



REPUBLIC OF KENYA



Olegesalie New Properties Limited v Lematasho (Environment and Land Appeal E003 of 2022) [2025] KEELC 1218 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

MD MWANGI, J

MARCH 6, 2025

BETWEEN

OLEGESALIE NEW PROPERTIES LIMITED APPELLANT

AND

JEREMIAH PARKIMINA OLE LEMATASHO RESPONDENT

(Being appeal from the judgment of the Honorable Chief Magistrate Hon. B.M Cheloti {SPM} delivered on 28th December, 2023 in the Chief Magistrates Court at Kajiado Case No.31 of 2021)

RULING

1. On 30th January, 2025, the court slated this matter for delivery of judgment on the appeal herein on 6th March, 2024. When the court retired to make its judgement, it noted that the following crucial documents were missing from the Appellants' record of appeal dated 24th February, 2022;
 1. Application dated 7/5/2020 alluded to in the trial court proceedings of 12/10/2020.
 2. Application dated 7/10/2020 mentioned in the proceedings of 15/12/2020.
 3. Preliminary Objection dated 15/1/2020 referenced in the proceedings of 9/2/2021 as well as the Defendant/Respondent Replying Affidavit. On the same date, the trial court indicated that it would issue its ruling on 2/3/2021. The status of the said ruling cannot be ascertained from the record of appeal.
 4. Plaintiff's further supplementary list of documents dated 24/9/2020 adopted by PW1, Stephen Karanja during his testimony on 21/10/2021. The document was further referred to by the trial court in paragraph 5 of its judgment delivered on 28th December, 2021.
 5. DW2, Stephen Malit's witness statement adopted when he gave his evidence on 21/10/2021. The statement was similarly mentioned by the trial court in paragraph 13 of its judgment.



6. Reply to amended statement of defence and counterclaim dated 12th October, 2021 mentioned in paragraph 7 of the trial court’s judgment.
 7. Amended statement of defence enumerated on page 68-70 of the record of appeal is incomplete. The same was mentioned in paragraph 5 of the trial court’s judgment. In addition, it formed the basis upon which the court made its determination as demonstrated in paragraph 17 of its judgment.
 8. Appellant/Plaintiff’s submissions dated 17th November, 2021 quoted in paragraph 6 of the memorandum of appeal dated 10th January, 2022.
2. The Appellant counsel through a certificate of record dated 24th February, 2022 affirmed the correctness of the record of appeal in conformity with the Civil Procedure Rules, 2010. These assertions are incorrect in view of the above missing documentation.
3. Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 provides that a record of Appeal must contain; {emphasis added}
 - (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”
 4. While dealing with the issue of omission of documents in an appeal, the Supreme court in *Bwana v Bonaya & 2 others* [2015] (Election Petition 15 of 2014{2015} KESC 8 (KLR) (19 February, 2015) (Ruling), quoting its decision in *Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others*, stated as follows;

“Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”
 5. The appeal before me is therefore strictly speaking incompetent. It is subject to striking out. However, Article 159(2)(d) of the *Constitution* obligates courts to ensure that justice is administered without undue regard to procedural technicalities. This principle is further restated in Section 18(c) of the *Environment and Land Court Act*.
 6. Superior Courts have extensively pronounced themselves on how justice ought to be delivered when faced with procedural technicalities. A case in point, is the Supreme Court decision in *Kidero & 4*



others v Waititu & 4 others (Petition 18 & 20 of 2014(Consolidated))[2014] KESC 11 (KLR) (29 August 2014) (Judgment) where at paragraph 218 of its judgment, it stated as follows;

“ And therefore a case such as the one before us, begs the question, are these misadventures and misapplications in our past - eradicated by our transformative Constitution, or are they still lurking menacingly, within the corridors of justice? If the latter is the case, then should a judicial officer down his or her tools mechanically, citing procedural technicality in the face of administrative unfairness? I respectfully think not. The entire judicial machinery including its administrative arm ought to respond to the impetus of judicial authority, which, aside from emanating from the people of Kenya, imposes certain guiding principles, under Article 159 (2): that justice shall be done to all, irrespective of status; justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities and the purpose and principles of the *Constitution* shall be protected and promoted. These principles manage the exercise of judicial authority and indeed call upon all Judges to exercise managerial judging to suit the demands of Kenya’s transforming charter. This duty is exercised in the discretionary powers of the Court to extend statutory timelines where a convincing case, geared towards the protection of fundamental rights and freedoms is made out.”

7. Guided by Article 159 of the *Constitution*, this court will rise to its higher calling to do justice by saving the appeal and allow the Appellant an opportunity to remedy the situation by filing a supplementary record of appeal containing all missing documents.
8. Consequently, the directions on delivery of judgment are hereby vacated. The matter will be mentioned in 30 days within which time the Appellant must file the supplementary record of appeal including all the missing documents outlined above. In addition, the Appellant is directed to ensure that the documents are filed in a chronological manner.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 6TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

N/A by the Parties

Court Assistant: Mpyoe

M.D. MWANGI

JUDGE

