



Inter Security Services Limited v H Young & Company (EA) Limited (Civil Appeal E296 of 2023) [2025] KEHC 225 (KLR) (Commercial and Tax) (16 January 2025) (Judgment)

Neutral citation: [2025] KEHC 225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E296 OF 2023
AA VISRAM, J
JANUARY 16, 2025**

BETWEEN

INTER SECURITY SERVICES LIMITED APPELLANT

AND

H YOUNG & COMPANY (EA) LIMITED RESPONDENT

(Being an appeal from the judgment of Honourable Edgar Kagoni (P.M) issued in Nairobi Chief Magistrate’s Court in MCCC NO.767 of 2020 on 22/3/2022)

JUDGMENT

1. The Appellant instituted a suit against the Respondent in Nairobi Chief Magistrate’s Court MCCC NO.767 of 2020 seeking the sum of Kshs.733,633.97/= for security guard services rendered to the Respondent.
2. Upon consideration of the suit, the Honourable Magistrate seized of the matter, delivered a judgment on 22nd March, 2022, whereby he dismissed the Appellant’s case against the Respondent.
3. The Appellant, being dissatisfied with the entire judgment rendered by the lower court, appealed against it to this court on the following grounds as set out in its Memorandum of Appeal dated 7th August, 2023:-
 - “ a. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant’s suit.
 - b. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate and or disregard the fact that the Appellant provided security services to the Respondent.



- c. That the Learned Trial Magistrate erred in Law and in fact by failing to appreciate and or disregard the fact that the Respondent owed the Appellant a sum of Kshs. 733,633.97/= being an outstanding amount due to the Appellant for security guard services offered to the Respondent.
 - d. That the Learned Trial Magistrate erred in law and in fact in failing to take into account that the Appellant and the Respondent entered into a contract for provision of security guard services and that though the Appellant was insured against theft, the Respondent failed to provide a list of alleged stolen goods and police abstract.
 - e. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate and or disregard the fact that the Respondent had made previous payments to the Appellant for services rendered.
 - f. That the Learned Trial Magistrate erred in law and in fact in deciding the case against the weight of evidence on record.
 - g. That the dismissal of the suit with costs is an injustice to the Appellant.”
4. In support of its case, the Appellant filed its Record of Appeal dated 7th August, 2023, together with written submissions dated 8th March, 2024.
 5. On the other hand, the Respondent opposed the appeal through its written submissions dated 8th April, 2024.
 6. Having considered the rival submissions of the parties, I take note from the outset, that the Respondent submitted, and the Appellant did not deny that the Appellant failed to file its appeal within the 14-days time period granted by the Court in Miscellaneous Application No. E877 of 2022.
 7. Accordingly, the appeal was filed three months out of time, namely, on 9th November, 2023, without leave, or an order granting extension of time. The appeal was therefore filed in violation of the orders of the court, and in breach of the statutory timelines.
 8. Further, the Respondent pointed out that the Record is missing certain crucial documentation, including a certified copy of the decree; judgment; and typed proceedings from the lower court. In the absence of the same, it could not respond effectively to the appeal and was prejudiced.
 9. In the Respondent’s view, the trial court had correctly determined the matter and the present appeal was incurably defective for the above reasons.
 10. Having examined the record, I find that the said documents are indeed missing. To add to the confusion, the Appellant filed a different Record of Appeal in the Case Tracking System from the hard copy provided to the court. The only record available in the CTS relates to case no: Commercial Misc. No. E877 of 2022, which needless to say, is a different matter from the present one.
 11. Order 42, rule 13(4) of the Civil Procedure Rules states:-
Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - (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:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs *para_11 subpara_a (a)*, *para_11 subpara_b (b)* and *para_11 subpara_f (f)*.

12. The Court of Appeal in Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] KECA 353 (KLR) held:-

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the Civil Procedure Rules which provides inter alia:

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.”

However, the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

“The word “Decree” has been defined by the *Civil Procedure Act*, Cap 21 to include judgment. In fact, the *Civil Procedure Act* has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.

This is the essence of the provision to the definition of the term “decree.”

According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect.”(Emphasis mine)

13. Looking at the physical record dated 7th August, 2023, I see that a copy of the judgment delivered on 22nd March, 2022, has been availed, however, the same is not a certified copy. I note further that a certified copy of the decree, nor the proceedings of the lower court, have not been included in the record.



14. Guided by the decision of the Court of Appeal in Emmanuel Ngade Nyoka (supra), and given the omission on the part of the Appellant to include the following documents in the Record of Appeal, namely:- certified copies of the decree; a certified copy of the judgment; and the typed proceedings arising from the lower court, this court is unable to carry out a proper assessment or evaluation of the merits of the Appeal.
15. Accordingly, I find and hold that the various omissions as stated above are fatal. The appeal is defective and the same is hereby struck out with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 16TH DAY OF JANUARY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant

For the Appellant

For the Respondent

