



REPUBLIC OF KENYA



KENYA LAW
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**Ismail v Nyandieka (Civil Appeal E073 of 2023)
[2025] KEHC 1620 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E073 OF 2023
SM MOHOCHI, J
FEBRUARY 11, 2025**

BETWEEN

ABDIRAHIM ISMAIL APPELLANT

AND

JOEL NYANDIEKA RESPONDENT

(Being an Appeal from the judgement of Hon D. Macharia (RM) delivered on 30th March, 2023)

JUDGMENT

1. This is an Appeal emanating from the small claim where Respondent was the Claimant in Nakuru SCCC No. E035 of 2023 of 2019. In his Statement of Claim dated 23rd January 2023 the Respondent sought damages for the sum of Kshs 470,000 he claimed he paid to the Appellant as an agent after his son secured placement in Mohawk International School, Canada.
2. The Appellant on the other hand in his response dated 1st March, 2023 stated that he owed a portion of the claimed amount amounting to Kshs. 150,000 which was as result of a loan advanced given.

The Trial

3. CW1, Joel Nyamuni Nyandieka adopted his Witness Statement dated 20th January 2023 and produced Demand letter (Exh-1), Letter from Mohawk College (Exh-2), Bank Slips (Exh-3a and 3b). He testified that the agreement dated 27th September, 2022 (R.MFI-1) was about money he lent the Appellant and was handed over in cash.
4. In cross-examination he stated that, the Kshs. 470,000/- deposited in the Appellant's account was meant for school. The agreement was that, once he paid Kshs. 470,000/- the Respondent's child would be facilitated in Canada and the money would cater for everything.



5. He added that, the money was all inclusive with no breakdown. He stated the agreement was loan in addition to the money deposited in the bank and the Appellant paid Kshs. 40,000/- in regard to the loan a matter that was not before Court. they had a case at the DCI offices.
6. He visited the Respondent's office who told him he had paid the money by flywire. The fee was to be paid by June of 2022. That he trusted the Appellant and loaned him Kshs. 210,000/- extra.
7. RW1, Adbdirahman Ismail, stated that, he was an agent that helps people secure schools overseas. It was his testimony that, the Respondent visited his office and was advised of three faces; first to secure the school at Kshs. 220,000 processing fees nonrefundable, secondly, to pay school fees once there was an admission letter and the third payment of visa. That, the admission letter came and he was not able to pay the fees due to unavoidable circumstances. That he negotiated with the Respondent that instead of the September intake they have the January intake which the Respondent was not agreeable to hence they agreed to refund the money.
8. He stated further that, before the agreement he had paid the Respondent Kshs 40,000. He also paid Kshs. 70,000 therefore and what is owed is Kshs. 140,000. He produced the settlement agreement dated 27th September, 2022 (Ehx-2). and account statements (Ehx-2). That the Respondent had taken him to DCI offices for Kshs. 250,000 and the Respondent could not have lent him money because he owed him 140, 000.
9. In cross-examination he stated that, he ought to be paid processing fees because he secured a school for the child.
10. The judgement of 30th March, 2023 was entered in favour of the Respondent as against the Appellant and the Respondent was awarded the sum of Kshs. 440,000, costs of the suit together with interests from the date of judgment.
11. The Appellant dissatisfied with the decision, preferred this appeal vide Memorandum of Appeal dated 20th April, 2023 on the following grounds: -
 - i. That, the Adjudicator erred in law and in fact, in shifting the burden of proof from the Respondent to the Appellant;
 - ii. That, the Adjudicator erred in law and in fact, in raising the Appellant's burden of proof than that of the Claimant/Respondent
 - iii. That, the Adjudicator erred in law and in fact, in lowering the Respondent's burden of proof;
 - iv. That, the Adjudicator erred in law and in fact, in failing to take into consideration the oral Testimony of the Appellant/Respondent and evidentiary documents supplied by him;
 - v. That, the Adjudicator erred in law and in fact, in failing to properly interrogate Claimant/ Respondent's evidentiary document;
 - vi. That, the Adjudicator erred in law and in fact, by refusing to assess all the evidence advanced by each party and decide which case is more probable;
 - vii. That the Adjudicator erred in law and in fact, in failing to apply the well-established principles of evidence;
 - viii. That the Adjudicator's decision is against the weight of the evidence adduced.
12. The Appellant seeks from this Court that the appeal be allowed reversing and setting aside the order delivered on 30th March, 2023 together with costs of the Appeal.



13. The Appeal was disposed by way of written submissions.

Appellant's Submissions.

14. As regards the Preliminary Objection, the Appellant submitted that the record of appeal is competent and proper. According to the Appellant Order 42 Rule (13) (4) of the Civil Procedure Rules uses the word 'or' indicative of a disjunctive intent. That inclusion of the judgment or order or decree is sufficient for purposes of Appeal.
15. Reliance was placed in Ponda vs Mweu [2023] KEHC 24132 (KLR) wherein the Court cited Emmanuel Ngade Nyoka v Kitheka Mutisya Ngala [2017] eKLR.

“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”.

16. The Appellant also argued that Section 65(1)(b) of the *Civil Procedure Act* provides that an appeal or part of an appeal shall lie to the High Court and that Section 2 of the *Civil Procedure Act* defines a decree to include a judgment. It was argued further that the Court should be concerned with substantive justice as opposed to technicalities.
17. It was further the Appellants submission that, the failure not to include the decree was not intentional and that, the Respondent has not demonstrated the prejudice he stands to suffer.
18. On the second issue of whether a reasonable tribunal; properly directing its mind on law and facts would have arrived at the decision of the Learned Magistrate. It was submitted that the Court failed to consider the evidence falling short of legitimate expectation pertaining rules of procedure. That the Court erred in assuming that the Appellant's services were free yet there was part performance in the contract.
19. The Appellant argued that the Agreement dated 27th September, 2022 was in relation to the refund of the tuition fees and no evidence was adduced by the Respondent on attempts of recovery of a loan. That it was erroneous of the Court to recognize recovery of part of the money despite the Respondent admitting to receiving the monies.

Respondent's Submissions

20. The Respondent submitted that under Order 42 Rule (13) (4) (f) a decree appealed from is a mandatory document. Reliance was placed in Boy Juma Boy & 2 Others v Mwamloe Tchappu Mbwana & Another [2014] eKLR, where the Court found that:-

“The respondent's situation has been further aggravated by the failure to include a certified copy of the decree or order sought to be appealed against. This is a primary document the omission of which as was held in Municipal Council of Kitale vs Fedha (1983) KLR 307 is a substantive defect which renders the appeal incompetent.”

21. Reliance was also placed in Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others [2015] eKLR and Njiiri David Mugo Maina t/a Jomka Transporters [2024] KEHC 7232 to submit that the failure of filing a decree renders the Appeal incompetent.



22. The Respondent further submitted on the Grounds of Appeal and why they should fail. On the issue of burden of proof as raised in Grounds 1,2, 3 and 8, the Respondent relied on the case of Ahmed Mohamed Noor v Abdi Aziz Osman [2019] eKLR to submit that the evidential burden shifted to the Appellant and the burden of proof was always on the Respondent.
23. Pertaining to Grounds 4,5 and 6 the Respondent submitted that the Court did indeed consider the pleadings and evidence on record as evidenced in the judgement at paragraphs 3, 12, 24 and 25.
24. In respect to ground 7 the Respondent submitted that the Memorandum of Appeal does not specifically state the principles of evidence that were not considered and therefore should fail.

Analysis and Determination

25. I have considered the Record of Appeal, the evidence as well as the rival submissions. This is a first Appeal and this Court therefore is not bound to follow the decision of the Trial Court but it is duty bound to re-evaluate and re-analyse the evidence on record and reach its own independent conclusions bearing in mind it did not have the advantage of seeing the witnesses testify.
26. This Court has formulated two issues for consideration namely;
 - I. Whether the absence of a decree renders the Appeal incompetent?
 - II. Whether the Appeal as filed is incompetent?
27. In *Paramount Bank Limited vs First National Bank Limited & 2 others* [2023] KECA 1424 (KLR) it was held inter alia that: -

“...A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the [Civil Procedure Act](#), a first Appellate Court can appreciate the entire evidence and come to a different conclusion...”

Whether the absence of a decree renders the Appeal incompetent?

28. The Respondent raised the issue on whether the Appeal was competent and proper bearing in mind the Appellant had not attached a decree.
29. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that: -
 - “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”
30. Section 65(1)(b) of the [Civil procedure Act](#) cited by the Respondent provides:
- “Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
- (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact”.
31. The provision provides that, an appeal from a decree of part of a decree of a subordinate court shall lie to the High Court.
32. Section 2 of the Act defines a decree as:
- “decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—
- a. any adjudication from which an appeal lies as an appeal from an order; or
 - b. any order of dismissal for default:
 - c. Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
33. It is quite evident from the proviso to definition of decree that it includes a judgment. The proviso goes on to provide that a judgment shall be appealable regardless of whether a decree has been drawn up, or is capable of being drawn up or not.
34. Order 42 Rule 13 stipulates the documents that must be on record before an appeal is admitted to hearing. Rule (13) (f) provides:
- “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—
- (f) the judgment, order OR decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:(emphasis).”
35. An Appellant is required to include in the record of appeal, the judgment, order or decree appealed from. The use of the word “or” is indicative of a disjunctive intent of the requirement. Accordingly, for purposes of an appeal, the filing of the judgment or order or decree is sufficient.



36. Further where an Appellant may not have filed a decree or order appealed against with the memorandum of appeal, the law gives such an Appellant the leeway to do so as soon as possible or within the time allowed by the Court. Order 42 Rule (2) provides:

“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.”

37. Failure to file a certified order or decree appealed against is not a fatal technicality and can be cured pursuant to Order 42 Rule (2) of the Civil Procedure Rules. The provision accords with the Constitutional imperative in Article 159(2)(d) of *the Constitution*, that justice shall be administered without undue regard to procedural technicalities. Prescriptions of procedure and form should therefore not trump over the primary object of dispensing substantive justice. This also goes to protecting the right to a fair trial as guaranteed under Article 50 of *the Constitution*.

Whether the Appeal as filed is incompetent?

38. This is an appeal from a Small Claims Court. Ordinarily first appeals from the Subordinate Courts, the Appellant is called upon to re-valuate and re-analyze the Trial Court’s evidence and the facts of the case and arrive at its own independent conclusion. This however is an appeal from the Small Claims Court whereby Section 38 of the *Small Claims Court Act* provides that: -

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law
2. An appeal from any decision or order referred to in subsection (1) shall be final

39. An appeal from the Small Claims Court can only be a matter of point of law. Meoli J. in the case of *Outsourced Professional Services v International Planned Parenthood* [2024] KEHC 5273 (KLR) cited the Court of Appeal decision in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, where the Court distinguished between matters of law and matters of fact by stating that: -

“I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed afresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

40. While the Appellant has over eight grounds in his memorandum of appeal, this Court observes that the question of shifting, lowering, and raising of burden of proof, failing to take into consideration of evidence, refusing to assess evidence are points of fact.



41. In his filed written submissions dated 11th October 2024, the Appellant significantly argues a generic issue for determination on his substantive Appeal as to whether a reasonable tribunal, properly directing its mind on law and fact would have arrived at the decision of the learned adjudicator.
42. The Appellant submits by rearguing and regurgitating the Small Claim as argued before the Trial Court, on factual matters and is basically inviting this Court to re-evaluate the facts of the case. This Court lacks jurisdiction by virtues of Section 38 of the *Small Claims Court Act*.
43. In the circumstances the Appeal is accordingly found to be lacking merit and is hereby dismissed with costs to the Respondent.

It is so Ordered

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 11TH DAY OF FEBRUARY, 2025.

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MOHOCHI S.M

(JUDGE)

