



**Mungai v Giceru (Civil Appeal E034 of 2024)
[2025] KEHC 3243 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E034 OF 2024
SM MOHOCHI, J
FEBRUARY 11, 2025**

BETWEEN

WINNIE WAMBUI MUNGAI APPELLANT

AND

RUBEN GICERU RESPONDENT

*(Being an Appeal from the Judgement of the Hon. Macharia (RM)
delivered on 1st March, 2024 at Nakuru in SCCC No. E1395 of 2023)*

JUDGMENT

1. The appeal herein arises from the judgement of Honourable D.M Macharia (RM) delivered on 1st March, 2024 in Nakuru SCCCOM No. E1395 of 2023 wherein the Appellant sued the Respondent.
2. The Appellant claimed that she entered into an oral agreement with the Respondent to supply timber logs and payment was being made before delivery. The Respondent diligently supplied the logs in 2002 without default but in the year 2023 he did not deliver the goods despite receiving Kesh 281,000 from the Appellant sent to the Respondent's M-Pesa line.
3. The Respondent in his response dated 20th December, 2023 stated that he and the Appellant were business partners in timber supply and denied owing the sum of Kshs 281,000 but the sum of Kshs. 250,000. In his Counterclaim the Respondent claimed the sum of Kshs. 120,000 against the Appellants for the costs incurred to his damaged vehicle after it was towed and accused the Appellant for instigating the towing.
4. Before the hearing, the Respondent made an oral application for amendment by deleting the paragraph where he admitted to owing the Appellant any amount and stated it was entered in error. The Court allowed the Application and directed parties to argue their cases.



5. The Trial Court delivered its judgment finding that, the Appellant's claim and Respondent's counterclaim were wanting of merit and dismissed them with each party bearing their own costs of the claim.
6. Aggrieved by the decision of the Trial Court, the Appellant filed this appeal and raised twenty-five (25) grounds of Appeal in the Memorandum of Appeal dated 6th March, 2024 as follows: -
 - i. That the adjudicator erred in law and in fact by disregarding the Respondent's evidence on admission to owing the Claimant Kshs. 250,000;
 - ii. That the Adjudicator erred in law and in fact by failing to enter in favour of the Claimant on the admitted sum;
 - iii. That the Adjudicator erred in law and fact by allowing an oral application for amendment by deletion of some paragraphs in the respondent to statement of Claim immediately before the testimony of the Claimant was taken;
 - iv. That the Adjudicator erred in law and fact by failing to afford the Claimant an opportunity to evaluate and respond further to the said amendments. The failure occasioned a miscarriage of justice;
 - v. That the Adjudicator erred in law and fact by failing to uphold the basic tenets of rules of procedure and fairness. The failure occasioned a miscarriage of justice;
 - vi. That the adjudicator erred in law and in fact by concluding that it was hard to rationalize the amount sought in disregard to the evidence before the Court that no supplies were made to 9 monies paid in the year 2023;
 - vii. That the Adjudicator erred in law by disregarding the legal principle that a mere proof of supply and acceptance of delivery of goods in the absence of any memorandum or contract in writing constitutes a valid contract;
 - viii. That the adjudicator erred in law and in fact in failing to apply the well-established principles of evidence;
 - ix. That the adjudicator erred in law and in fact by directing a phone call made to a driver who was not called as a witness neither was his statement on record for purposes of questioning by the Court at the hearing;
 - x. That the Adjudicator erred in law and fact by failing to afford the Claimant an opportunity to cross examine the alleged Respondent's driver;
 - xi. That the Adjudicator erred in law and in fact by failing to take into account that the set-off signified the existence of money owed to the Claimant;
 - xii. That the Adjudicator erred in law and fact by disregarding the inconsistencies that marred the testimonies of the Respondent's witness;
 - xiii. That the Adjudicator erred in law and in fact by failing to properly interrogate the Appellants evidentiary documents;
 - xiv. That the Adjudicator erred in law and fact by refusing to assess all the evidence advanced by each party and decided which case is more probable;



- xv. That the Adjudicator erred in law and fact by raising the Claimant's standard of proof above the balance of probabilities
 - xvi. That the Adjudicator erred in law and fact by disregarding that the Claimant had proven her case on a balance of probabilities;
 - xvii. That the Adjudicator erred in law and fact by failing to take into account that there already existed negotiations on the mode of repayment;
 - xviii. That the Adjudicator's decision is against the weight of the evidence adduced;
 - xix. That the Adjudicator erred in law and in fact when he considered extraneous matters in arriving at its impugned decision;
 - xx. That the Adjudicator erred in fact and in law by failing to consider all the material that was placed before him and therefore arrived at a wrong decision;
 - xxi. That the Adjudicator erred in law and fact by dealing with issues not before him hence arrived at a wrong decision;
 - xxii. That the Adjudicator erred in fact and in law by disregarding Respondent's admissions in receiving money sent to him in 2023 by the Claimant;
 - xxiii. That the Adjudicator erred in law and fact by disregarding the evidence of the Claimant's witness;
 - xxiv. That the Adjudicator erred in law and fact by arriving at a wrong decision by siding with the Respondent who was clearly not acting in good faith;
 - xxv. That the Trial Court demonstrated bias against the Appellant in the matter
7. The Appeal thus seeks from this Court the reversal of and setting aside the Judgement/Order of the Adjudicator delivered on 1st of March, 2024, with costs being awarded to the Appellant.
8. Pursuant to the directions of 26th September, 2024, the Appeal would be heard and disposed by way of written submissions. Both parties complied.

Appellant's Submissions

- 9. The Appellant in her submission dated 3rd October, 2024 submitted that the Trial Court failed short of its legitimate expectation. That parties are bound to their pleadings as was held in *Ogando v Watu Credit & Another* [2024] KEHC 3074 (KLR) as well as *Electoral and Boundaries Commission & another vs Stephen Mutinda Muie & 3 Others* [2014] eKLR.
- 10. The Appellant argued that the Court ought to have entered judgment on the admitted sum first. That a mere proof of delivery of good in the absence of any memorandum or contract in writing constitutes a valid contract.
- 11. Allowing a phone call to be made to the Respondent's son without allowing the Appellant to cross examine him and without there being a witness statement was a miscarriage of justice.
- 12. In the supplementary submission dated 28th October, 2024 the Appellant submitted that the Appeal was proper since according to Order 42 Rule 13 (4) (f) of the Civil Procedure Rules inclusion of the judgment order or decree was sufficient for purposes of Appeal. Reliance was placed in *Ponda vs Mweu* [2023] KEHC 24132 KLR.



13. Counsel also submitted that Section 2 of the *Civil Procedure Act* States that the decree means a formal expression of an adjudication and that the omission was not intentional and the Court ought to be concerned with substantive justice as opposed to technicalities.

Respondent's Submissions

14. The Respondent submitted on two issues. The first one was on the competence of the Appeal in the absence of attaching a decree. The Respondent insisted that the *Bwana Mohamed Bwana v Silvano Buko & 2 Others* [2015] eKLR and *Chege v Suleiman* [1988] eKLR to submit that the instant appeal could only lie from a decree and the same ought to be struck out with costs
15. The Respondent argued that the law allows for oral applications for amendments of pleadings and the Appellant was at liberty to respond to the amendments if she wished to.
16. That no evidence was tendered to decipher or substantiate the transaction equivalent to Kshs 281,000 claimed neither was the evidence of the alleged phone call that was recorded and if any, nothing stopped the Appellant from cross examining.

Analysis and Determination

17. I have considered the record of appeal and the arguments fronted by either party in their respective submissions. The issues for determination are therefore:-
- i. Whether failure to include the decree appealed from, in the Record of Appeal renders this Appeal defective,
 - ii. Whether this Appeal has merit?
 - iii. Who bears the costs of this Appeal.
18. The Respondent has relied on decisions of the Court of Appeal and the Supreme Court. Nonetheless the principle is the same that when rules prescribe procedure then the same has to be followed and litigants should not be allowed to flout procedure.
19. Article 159(2)(d) of *the Constitution* gives Courts the discretion to dispense justice without procedural technicalities. Be that as it may the procedural technicalities should not go to the substance of the appeal and the procedural technicality ought to be evaluated on a case-to-case basis.
20. Going by this case an Appeal from the Subordinate Court to the High Court, the Applicable law would be Order 42 Rule 13 (4) of the Civil Procedure Rules which 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-
- ...
- ...
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal”
21. The Respondent has argued in favour of striking out the appeal as the failure to attach a decree is fatal to the Appeal. The Appellant has vehemently disagreed and argued in her reply that the omission is



not fatal and that according to Section 2 of the Civil Procedure Act, a decree is formal expression of an adjudication. That the Court can grant leave to file a supplementary record of Appeal.

22. In addressing failure to include a decree in the Record of Appeal, the Court in the case of *Nyota Tissue Products v Charles Wanga & 4 Others* [2020] eKLR, stated thus: -

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in *Silver Bullet Bus* case on the point, that it would be too draconian to strike out the appeal in these circumstances.”

23. Further, in the case of *Elizanya Investments Limited v Lean Energy Solutions* [2021] KEHC 8495 (KLR) the Court stated thus: -

“30. I am of the view that the use of the conjunction “or” means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the Judgment appealed from. A decree is defined under Section 2 of the Civil Procedure Act, Cap 21, Laws of Kenya as follows:

31. In the present appeal, the appellant filed Kilifi Senior Principal Magistrate’s Court Civil Case No. 326 of 2018. After hearing the parties, Judgment was delivered dismissing the appellant’s suit, with costs to the respondent. In this court’s view, the failure to include a certified copy of the decree in the Record of Appeal should not invalidate the present appeal for reasons of non-compliance as this court has had the benefit of reading Judgment which was rendered by the Trial Court.”

24. Similarly in the case of *Dragon Fire Protection Limited v African Highlands Produce Co Ltd* [2023] KEHC 1735 (KLR) the Court declined to strike out an appeal due to failure to attach a decree. The Court held that:-

“The Record of Appeal herein attached the judgment of the trial court according to the requirements of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules and in my respectful view, I would be too draconian to strike out the appeal in these circumstances.”

25. The record of appeal herein has with it, the Trial Court’s certified copy of judgement which dismissed the Appellant’s claim as well as the Respondent’s counterclaim. The Judgement itself has enough material for consideration. The omission does not go in the substance of the appeal.

26. Furthermore, my interpretation of Order 42 Rule 13(4) (f) of the Civil Procedure Rules is that it does not make it mandatory to attach a decree and judgement and therefore not fatal.

27. Going to the second issue on the merit of the Appeal, the Appellant put forward 25 grounds of appeal for this Court’s determination.

28. 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
29. 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 a fresh, - 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.”

30. The Court further stated that: -

“Black’s Law Dictionary, 9th Ed. Pg. 1067 defines; -“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law as: A matter involving a judicial inquiry into the applicable law.”

31. The Appellant has argued her entire appeal in her grounds of appeal. The only points of Law raised in my opinion are whether the Court was right to dismiss the Appellant’s claim. The Appellant was bound by the Provisions of Section 107 of the *Evidence Act* to prove that the Respondent owed her money.
32. The Appellant produced bank and M-Pesa statements of transactions amounting to more than the claimed amount. She did not specify which payments were not honored and her witnesses only came to corroborate the existence of a contract. The specific breach of contract was not clearly spelt out and the Trial Court was bound to dismiss her claim.
33. Rule 17 of the Small Claims Court provides for the amendment of pleadings. The timelines of the Small Claims Court are quite restrictive and Courts ordinarily weigh on the matters based on facts. The Court in this regard allowed the application for amendment and gave the parties an opportunity to argue their respective cases as regards the amendments. The Appellant did not. The Appellant never made an application to Court for judgment on admission to be entered prior to the amendment. The Appellant only has herself to blame.
34. The Appellant further has argued that the Court failed to recognize the existence of an oral contract or that there were negotiations undergoing. This also fell short of the burden of proof and the Trial



Court, after evaluating the evidence and arguments of either party found that neither party had proved their case to the required standards

35. The Appellant in the rest of the grounds has argued on points of facts 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](#).
36. 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)

