Piki Piki Limited v Tsuma & another (Suing as Administrator and Legal Representative of the Estate of Mwangale Roch Hinzano) (Civil Appeal E014 of 2024) [2025] KEHC 5126 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E014 OF 2024

M THANDE, J

APRIL 25, 2025

BETWEEN

PIKI PIKI LIMITED ..... APPELLANT

AND

RAMA MTUNDO TSUMA ..... 1ST RESPONDENT

ASHA CHIZI MWERO ..... 2ND RESPONDENT

SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF MWANGALE ROCH HINZANO

(An Appeal against the Ruling of Hon R. M. Amwayi- PM delivered on 14.2.24 in Kaloleni PMCC No. E001 of 2021 Asha Chizi Mwero and Ano. Vs. Jenerics Cargo Forwarders Ltd, Auto Industries Ltd & Piki Piki Limited)

JUDGMENT

1. The Appellant herein is aggrieved by the ruling dated 14.2.24 of the subordinate court in Kaloleni PMCC No. E001 of 2021. In its memorandum of appeal dated 20.2.24, the Appellant raised the following grounds of appeal:

    1. That the Learned Principal Magistrate erred both in law and in fact by dismissing the Applicant's application dated 21st November, 2023.

    2. That the Learned Honourable Principal Magistrate erred both in law and in fact in failing to properly consider the fact that no pre-trial was conducted before the main trial hence the Applicant could not be denied a chance to participate in the main trial.

3. That the learned magistrate erred in law and fact by failing to allow the Appellant to rely on the List of Documents filed and other pre-trial documents filed in compliance with Order 11 of the Civil Procedure Code.

4. That the Principal Magistrate failed to appreciate the principle that guides the court to re-open a case and receive additional evidence in a civil trial.

5. That the learned magistrate erred in law and fact by misdirecting herself that the court could not issue orders sought.

2. On the mention date for compliance on filing submissions, the Appellant's counsel informed the Court that the date of the impugned ruling was erroneously indicated in the memorandum of appeal as 14.2.24, which was the date for judgment. Counsel sought to have the date amended under Section 100 of the *Civil Procedure Act*. This was opposed by the Respondent's counsel who contended that the issue had been raised in their submissions and the same should be addressed in the judgment. The Court directed that it would consider the issue and make an appropriate determination in the judgment.

3. Section 100 of the *Civil procedure Act* confers upon this Court the general power to amend as follows:

> The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

4. Under the above provision, the Court has power to allow amendment of any defect or error in any proceedings. This must be done for the purpose of determining the real question or issue raised by, or depending on the proceeding. The ultimate objective of such amendment is to ensure that the interests of substantive justice are served. This provision resonates with Article 159(2)(d) of *the Constitution* which enjoins the Court to administer justice without undue regard to procedural technicalities.

5. The memorandum of appeal erroneously indicates that the appeal is in respect of the ruling delivered on 14.2.24. This however is the date of the judgment and not of the ruling. From the grounds, it is clear that the ruling referred to is the one that dismissed the Appellant's application dated 21.11.23. Indeed, this is acknowledged by the Respondents who in their submissions indicated that the Appellant seeks to set aside the ruling of 31.1.24 which dismissed its application dated 21.11.23. The Court thus finds that this a fit case to allow the amendment sought, and the same is allowed, for the purpose of determining the real question as raised by the Appellant.

6. Having allowed the amendment, I now turn to the substantive Appeal.

7. I have scoured through the entire record of appeal and I do not see the ruling appealed against. What is contained in the record is the judgment dated 14.2.24. Order 42 of the Civil Procedure Rules lists the documents that must be on the court record. Rule 13(4) provides as follows:

   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 (a), (b) and (f).

8. As can be seen from the above provision, the record of appeal is required to contain the listed documents. The Court may however dispense with the production of any document it deems irrelevant. Notably, the production of the memorandum of appeal, the pleadings and the decision appealed against may not be dispensed with. In the instant case, the decision appealed from is missing from the record. This a critical document which for obvious reasons, is not one the production of which the Court can dispense with. The record of appeal is thus incomplete.

9. Our courts have time and again pronounced themselves on incompleteness of records of appeal.

10. In the case of Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR, the Supreme Court considered an application for striking out the record of appeal which did not contain the record of proceedings before the Court of Appeal and stated:

(22) Under Rule 33(4), the contents of a Record of Appeal (from a court or tribunal in its appellate jurisdiction) contains the following documents from the first appellate court: the certificate, if any, certifying that the matter is of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. This Court has timely reiterated that under Rule 33(6) a document omitted may be filed in a Supplementary Record without leave of the Court with fifteen days of filing of the Record of Appeal; and subsequently with leave of the Court, the same document may be filed.

(23) It therefore emerges that failure to include the 'record of proceedings of the court of Appeal" in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.

11. What I understand the Supreme Court to be saying is that any omitted document may be filed in a supplementary record. However, where this is not done and no sufficient explanation for the omission has been provided, such record of appeal may be struck out. In the present case, the Respondent's counsel did point out that the decree was not in the record of appeal. In spite of this, the Appellant did not file a supplementary record of appeal containing the impugned ruling but only sought to amend the date of the ruling. The record thus remained incomplete.

12. In the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR the Supreme Court considering the incompleteness of a record of appeal stated:

(41) 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.

13. Duly guided, I find that with an incomplete record, the appeal is incompetent and defective. The Court is thus divested of the jurisdiction to adjudicate over the issues placed before it, as the conditions set by law have not been met.

14. The upshot is that the Appeal herein being incompetent, is hereby struck out with costs to the Respondent.

DATED SIGNED AND DELIVERED IN MALINDI THIS 25TH DAY OF APRIL 2025

M. THANDE

JUDGE