



Guardian Bus Limited & another v Odongo & another (Suing as the Legal Administrators of the Estate of the Late Samwel Otieno Okello - Deceased) (Cause E016 of 2024) [2025] KEHC 6039 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CAUSE E016 OF 2024
AM MUTETI, J
MAY 6, 2025**

BETWEEN

GUARDIAN BUS LIMITED 1ST APPELLANT

NYAMIRA LUXURY EXPRESS CO.LTD 2ND APPELLANT

AND

MARY AKOTH ODONGO 1ST RESPONDENT

JACKLINE ATIENO OTIENO 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
SAMWEL OTIENO OKELLO - DECEASED**

JUDGMENT

Introduction

1. The appellants by way of a memorandum of appeal dated 2nd February 2024 have approached this court seeking to set aside the judgment delivered by the learned Honorable Robert M. Oanda (SPM) on the 25th January 2024 on the following grounds:-
2. The issues that arise in the appeal are whether the respondents were able to prove liability on the part of the appellants on a balance of probabilities and whether on the basis of the evidence adduced by the respondents the quantum of damages arrived at could be supported.
3. The parties elected to have the appeal disposed by way of written submissions. The court has duly considered each of the parties submissions.



Analysis and Determination

Duty of the First Appellate Court

4. The duty of this court as a first appellate court is to re-evaluate the evidence tendered by the parties before the Lower Court and determine whether or not the decision of the Lower Court could be supported by the evidence while remaining alive to the fact that unlike the lower court this court did not have benefit of seeing and hearing the witnesses. See *Selle Vs. Associated Motor Boat Company Ltd.* [1968] EA 123.
5. The first appellate court must ensure that there is compliance with the law in the manner in which the appeal is presented and argued by the parties.
6. The respondents by their submission dated 25th November 2024 have raised the question of the competence of the instant appeal.
7. The respondent contend that the record of Appeal is defective as it does not contain the decree appealed against.
8. The issue of the decree goes to the issue of jurisdiction which must be determined in limine.
9. The record of Appeal has an index of documents that are included in the record of Appeal. The list does not include the decree appealed against thus lending credence to the respondents submission that the appeal is defective.
10. Order 42 Rule 13 (4) (f) of the Civil Procedure Rules , 2010 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—
 - (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).
11. The rule is couched in mandatory terms thus where the appellant does not comply with the Rule of the Appeal is deemed to be incompetent and cannot proceed to full consideration on its merits.
12. An appellant under Order 42 Rule 2 has adequate opportunity available to him under the rules to file the decree. It follows therefore that his failure to comply with Rule 13 (4) (f) cannot be excused. The decree being a primary document must be included in the record of Appeal or filed subsequent to the filing of the memorandum of Appeal.



13. The finding of this court is therefore that the failure to file the decree be a fatal omission and the omission renders the appeal incurably defective.
14. Mugambi L.N J in Mburu & 6 Others Vs. Kirubi Civil Appeal No. E246 (2021[2023] KEHC 359 [KLR) (20 April 2023) stated:

“My appreciation of the said Order 42 Rule 13 (4) (f) of the Civil Procedure Rules and the cited decision of the Supreme Court is that an appeal that lacks legally specified documents is incompetent in law”
15. The Order 42 Rule 13 (4) (f) makes the inclusion of a decree a condition sine qua non to the hearing of an appeal.
16. It must be filed prior to the hearing of an appeal.
17. As stated elsewhere in this ruling the issue of the decree touches on the issue of the jurisdiction of the court to the hearing of the appeal. It follows therefore since jurisdiction is everything this court cannot consider the appeal any further since such action would amount to a nullity. See Owners of Motor Vessel Lillian S Vs. Caltex Oil (Kenya) Ltd [1989] eKLR.
18. As a result, this court finds that the appeal is incompetent and the same is hereby struck out with costs for non -inclusion of the decree.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Kwamboka for the Appellant

Owuor for the Respondent

