



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 9 OF 2016**

**EDWARD KARIUKI GICHOHI.....APPELLANT**

**VERSUS**

**HENRY MULWA.....RESPONDENT**

**RULING**

1. Before me for consideration and determination is the Respondent's Notice of Motion dated 16<sup>th</sup> October 2017 brought under Order 42 Rule 7, 14 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act and seeks the following orders:-

**a. That pending the hearing and determination of the application dated 24<sup>th</sup> June 2016, and the appeal itself the Appellant be ordered to deposit in Court or a joint interest earning account the equivalent of rent.**

**b. That all the documents relating to ownership of the land on which the partnership house stands be expunged/struck off the appeal file and also the application dated 24<sup>th</sup> June 2016 and the supplementary list of documents dated 5<sup>th</sup> October 2016 be struck off.**

**c. That the Appellant's Record of Appeal dated 5<sup>th</sup> May 2016 be struck off for being incomplete and lacking primary documents.**

2. The application is premised on the grounds on the face of the application and further supported by the affidavit of Henry Mulwa. The Respondent stated that the Appellant has continued to run his business in the partnership house at the expense of the Respondent. That despite the lower Court judgment that awarded the Respondent with the damages and that the partnership property were to be sold and subdivided into two. The Respondent also stated that the Appellant has introduced a new cause of action at the appeal stage. That none of the documents in the annexure and supplementary list were part of the lower Court proceedings and should be expunged from the appeal. The Respondent further stated that the Record of Appeal, the certified Judgement and Decree which are primary documents to the appeal are not annexed. Henry Mulwa, the Respondent herein swore his affidavit in support of the application on 23<sup>rd</sup> October 2017 and reiterated the grounds of the application.

**PROCEEDINGS**

3. The matter herein is an appeal from the Judgment and Decree delivered in **Mombasa CMCC 2402 of 2009, Henry Mulwa V Edward Kariuki Gichohi** on 8<sup>th</sup> April 2016 by Hon Njagi. The Appellant filed a Record of Appeal dated 5<sup>th</sup> May 2016 and a supplementary list of documents on 5<sup>th</sup> October 2016.

4. On 24<sup>th</sup> October 2017, the Court directed the status quo to be maintained pending hearing and determination of the appeal.

5. On 14<sup>th</sup> March 2018, the Court directed that the appeal to be canvassed by way of written submissions.

6. On 16<sup>th</sup> May 2018, the Court granted the Appellant leave to file and serve a supplementary Record of Appeal.

7. On 10<sup>th</sup> July 2018, counsel for the appellant informed Court that he could not file the supplementary Record of Appeal because the lower Court file was missing. The Court directed the Deputy Registrar to call for the original file from the subordinate Court to this Court for purposes of the appeal.

8. On 17<sup>th</sup> October 2018, the Court issued summons to the Executive Officer to attend court to explain why the original file in the subordinate Court could not be availed.

9. On 2<sup>nd</sup> May 2019, the court made the same orders made on 17<sup>th</sup> October 2019 and directed the DR to serve.

10. On 10<sup>th</sup> July 2019, the Appellant was directed by the Court to follow up with the Executive Officer, on the availability of the lower Court file.

11. On 25<sup>th</sup> September 2019, the Court again granted the Appellant leave to file a supplementary Record of Appeal after counsel for the Appellant informed Court that the lower Court had been found and the proceedings were being typed.

12. On 20<sup>th</sup> November 2019, the Court directed the E.O to ensure the remaining proceedings are typed.

13. On 28<sup>th</sup> January 2020, the Court noted that there was no evidence that the Appellant had effected service of the orders made on 20<sup>th</sup> November 2020 and returned the file to the registry, prompting the Respondent to now revive this application and on 1<sup>st</sup> March 2021, the Court directed the Respondent to file and serve the submissions to this application.

14. On 16<sup>th</sup> March 2021, the Court directed the Appellant to file and serve a response to this application together with submissions within 21 days.

15. On 28<sup>th</sup> June 2021 when the matter came up for mention to confirm compliance, counsel for the Appellant informed Court that the Appellant had not filed a response and submissions since the previous advocate on record as well as the Appellant were indisposed, and requested for 30 days to comply. The Court ruled that the Appellant has sought for more time in the past to comply and had been indulged by the Court. However to date, the Appellant has not complied and the reason that the Appellant and the previous advocate were unwell was not supported by any evidence. The Court then proceeded to grant three more days for the Appellant to file and serve their response and submissions and a ruling to be delivered with the documents that will be on Court record as of 1<sup>st</sup> July 2021.

#### **SUBMISSIONS**

16. The Respondent filed his submissions in support of his application on 10<sup>th</sup> March 2021. Counsel for the Respondent submitted that the Appellant obtained an injunction pending hearing and determination of the application dated 24<sup>th</sup> June 2016 and the subsequent appeal on 27<sup>th</sup> June 2016. That this injunction pending appeal was granted ex parte and the Appellant on 24<sup>th</sup> October 2017 abandoned the application in favour of filing submissions to the main appeal. Counsel submitted that the Appellant has been reluctant to prosecute the appeal because he still enjoying the injunction granted by Court.

17. Counsel further submitted that the Appellant never filed the supplementary Record of Appeal 3 years and 4 months after he sought to do so, yet he still occupies the suit premises without paying rent as ordered by the trial Court. Counsel also submitted that though there is no stay of execution, to instigate one would be to defy the status quo orders granted by this Court pending determination of the appeal. Counsel relied on Order 40, Rule 6 to submit that the injunction should lapse or Court to order for a joint account for rent payments.

18. Counsel further submitted that the Record of Appeal upsets Order 42, Rule 27 since the Appellant has introduced completely new documents which were never produced in the trial Court. Counsel urged the Court to expunge the new documents that introduce new evidence without leave of Court. Counsel further submitted that the Record of Appeal should be struck out for being incomplete and lacking primary documents as required by Order 42 Rule 13 (4) of the Civil Procedure Rules. Counsel submitted that the Appellant has failed to file a supplementary Record of Appeal as directed by Court and as such the Court should strike out the Record of Appeal.

#### **DETERMINATION**

19. I have considered the application and submissions. I take note of the directions that I gave to the parties on 28<sup>th</sup> June 2021 in respect to filing and serving of documents. I proceed to rule on the application without a response or submissions from the Appellant.

20. **Order 42 Rule 13 (4) of the Civil Procedure Rules** provide the documents to be included in the Record of Appeal; Memorandum of Appeal, pleadings from the trial court, certified copies of the trial court proceedings, all the evidence produced before the trial court, the Judgement and Decree appealed from. In this instant suit, the Appellant's Record of Appeal filed on 5<sup>th</sup> May 2016 consisted of; a Memorandum of appeal, pleadings of the trial court and the evidence produced before the lower court. The record however did not include certified copies of typed proceedings nor the certified copy of the judgement and certified copy of the decree of the trial court.

21. **Order 42 Rule 13 (4)(f)(ii) of the Civil Procedure Rules**, states that the court may dispense with the production of any documents save for the Memorandum of Appeal, the Pleadings, the Judgement and Decree being appealed from. Where the Appellant is unable to file these documents with the Record of Appeal he may seek leave of the Court to file as supplementary Record of Appeal. **Order 42, Rule 2 of the Civil Procedure Rules** directs the appellant where Memorandum of Appeal is filed without a copy of the Decree being appealed from to file such certified copy of the Decree as soon as possible, and in any event within such time as the court may order.

22. The appellant herein filed the Memorandum of Appeal on 5<sup>th</sup> May 2016 without the certified copy of the judgement and decree. The court granted leave to the appellant to file supplementary record of appeal on 16<sup>th</sup> May 2018 with directions to file and serve a supplementary record of appeal within seven days. Once again, the court granted leave to the appellant to file a supplementary record of appeal on 25<sup>th</sup> September 2019. The appellant has certainly not extracted the decree nor has he filed a supplementary record of appeal.

23. In my view, the Appellant has the onus to ensure that the judgment of the trial court is typed and certified as well as to extract the Decree in order to make his record complete. From the material on record, the Appellant has not demonstrated to Court the steps he took to follow up on the lower Court file since he filed the Record of Appeal on 5<sup>th</sup> May 2016. The Appellant did not extract the orders this Court made on 17<sup>th</sup> October 2018, summoning the Executive Officer to attend Court to explain why the lower Court file cannot be traced. This Court had extended the summons severally but the appellant did not adduce evidence showing that he had served the Executive Officer with the summons. The Appellant has also not demonstrated to the Court that he followed up with the Deputy Registrar on the status of the lower court file as directed by the court.

24. The Appellant filed a supplementary List of Documents on 5<sup>th</sup> October 2016. However the documents filed did not form part of the evidence that was produced before the trial Court. Order 42 Rule 27 of the Civil Procedure Rules provides that a party to an appeal is not entitled to produce additional evidence unless the appellate court allows. In this case, the appellant did not seek leave of court to file the Supplementary list of documents and as such the documents ought to be expunged from the court records.

25. The incomplete Record of Appeal contravenes the provisions of **Order 42 Rule 13 (4) (ii) of the Civil Procedures Rules** which requires the judgment and Decree being appealed from to be included in the Record of Appeal. The supplementary Record of Appeal was filed without leave of the Court in contravention of **Order 42 Rule 27 of the Civil Procedure** which requires evidence that was not in trial Court to be introduced with leave of Court and is hereby expunged from the court records.

26. Despite the numerous chances the Appellant was given by the court to prepare a complete record of appeal, the appellant failed to comply. Indeed, the application herein has not been opposed by the appellant. It is quite clear that the appellant, upon obtaining orders of injunction pending appeal has been reluctant to take action on the appeal. This leaves this court with no option than to strike out the record of appeal. The injunction orders granted herein which have no doubt lapsed are hereby discharged. Costs are awarded to the respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY, 2021**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**C.K. YANO**

**JUDGE**