



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Abdalla v Ewins (Civil Appeal 87 of 2021) [2024] KEHC 133 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 133 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CIVIL APPEAL 87 OF 2021**  
**M THANDE, J**  
**JANUARY 19, 2024**

**BETWEEN**

**WANJIRU YUSUF ABDALLA ..... APPELLANT**

**AND**

**ELIZABETH MWENI EWINS ..... RESPONDENT**

*(An Appeal from the Judgment of Hon. W. Chebseba Chief Magistrate on 24.9.21 in Malindi CMCC NO. 298 of 2021)*

**RULING**

1. The Appeal herein arises from a judgment delivered on 24.9.21 in Malindi CMCC NO. 298 of 2021 by Hon. W. Chebseba Chief Magistrate 2021. By a plaint dated 18.9.18 and amended on 29.1.21 and again on 3.2.21, the Respondent (Elizabeth) instituted a suit in the trial court against the Appellant seeking the following:
  - a. United Kingdom Sterling Pounds 30,740 and interest thereon at the prevailing commercial rate of 14% from the date of advancement to the defendant until the date of full payment.
  - b(1) A declaration that the sale agreement dated 17<sup>th</sup> February 2015 is invalid and unenforceable for want of consideration and that the same be revoked and/or cancelled by this Honourable court.
  - b(2) An order that the defendant do render and account for all the profits and rent received from management, operation and use of the premises standing on Plot No. 49 Watamu popularly known as Sea Whispers Guest House Watamu from the 17<sup>th</sup> of February 2015 until the date of giving of vacant possession.
  - b(3) That the Defendant do give vacant possession of all those premises standing on Plot No. 49 Watamu popularly known as Sea Whispers Guest House Watamu from the Judgment of this



court failing which the defendant be evicted therefrom by the court bailiff of this court with the assistance of the officer commanding station (O.C.S.) Watamu.

- c) Costs of this suit together with interest thereon at such rate and for period of time as this Honourable Court may deem fit to grant.
  - d) Any such other or further relief as this Honourable Court may deem appropriate.
2. The Appellant denied the Respondent's claim.
  3. The matter proceeded to hearing and was concluded. In her judgment dated 24.9.21, the trial Magistrate found that the Respondent had proved her case against the Appellant and entered judgment against the Appellant as prayed in the amended plaint together with costs and interest from date of filing suit.
  4. It is this decision of the trial Magistrate that has provoked the Appeal herein. In the memorandum of appeal dated 6.10.21 the Appellant raised 7 grounds of appeal.
  5. Pursuant to directions given by the Court, parties filed their written submissions which I have duly considered.
  6. In her submissions, the Appellant contends that the Respondent's case was not proved to the required standard and that the learned Magistrate greatly lowered the bar on the standard of proof required to prove fraud, thereby occasioning a miscarriage of justice. She faults the learned Magistrate for finding that the agreement dated 17.2.15 was a fraud yet the Respondent had not supplied any evidence to support the allegation, as required by section 107 of the Evidence Act. The Appellant further contends that at the time the agreement dated 17.2.15 was executed, the Respondent was out of the country. Additionally, the said agreement was prepared and signed by an unqualified person, Mr. Kupalia, an advocate who had long retired and stopped renewing his status. For this reason, the agreement relied on by the trial court is void ab initio and cannot be enforced in law. Lastly, that the Appellant submitted that the learned Magistrate abused discretion by failing to subject the parties through the pretrial and case conferencing before the matter was laid down for hearing.
  7. For the Respondent, it was submitted that the Appeal is incompetent as the record of appeal is incomplete. The annexures attached to the witness statement in the court below were not attached. Similarly, the Respondents' list of documents which were used in evidence were not all included in the record of appeal. Additionally, the Appellant's list of documents dated 3.3.2020 and filed in the trial court are not in the record of appeal. Also missing from the record of appeal are proceedings relating to applications that were heard and determined by the trial court. As such, the record of appeal is incompetent and fatally defective and should be struck out.
  8. Being a first appeal, this Court is called upon to re-assess and analyse the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123).
  9. 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).
10. 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, some of the notes of the trial magistrate made at the hearing as well as documents put in evidence before the trial court are missing from the record. This Court has not dispensed with the production of the same. In the premises, the record of appeal is incomplete.
  11. Our courts have time and again Courts pronounced themselves on incompleteness of records of appeal.
  12. 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.
  13. 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.



14. Although the Appellant filed a supplementary record of appeal dated 9.5.23, the same did not contain the omitted documents. All it has, is the certificate of delay and judgment of the Court in Civil Appeal No. E070 of 2021. It is not clear why the documents were omitted yet they were available in the lower court file. They include annexures to the Respondent's amended witness statement and additional documents in her further list of documents. Similarly, the Appellant's own list of documents filed on 3.3.2020 was also omitted. Also omitted are relating to applications that were heard and determined by the trial court. There is on record a certificate of delay dated 27.4.23, indicating that certified proceedings were issued to the Appellant on 2.11.22. In light of this, it is not clear why the record of appeal does not contain the complete proceedings, and no explanation for the omission has been proffered.
15. The documents omitted from the record of appeal are not few. It does therefore appear to the Court that this is not a case of inadvertent omission. Were it so, the Appellant would have surely applied to file a supplementary record with a view to incorporating the said documents. Where there is an omission of required documents in the record of appeal and no sufficient explanation for the omission is proffered, the Court will be justified in striking out that record of appeal. (see Hamida Yaroi Shek Nuri case, (supra)). The Appellant has neither acknowledged nor explained the omission and failure to comply with the express provisions of order 42 rule 13 of the Civil Procedure Rules.
16. 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.
17. Duly guided, I find that with an incomplete record, the appeal is incompetent and defective. The Court is thus divested of the jurisdiction to consider the issues placed before it, as the conditions set by law have not been met.
18. The upshot is that the Appeal herein being incompetent, is hereby struck out with costs to the Respondent.

**DATED AND DELIVERED IN MALINDI THIS 19<sup>TH</sup> DAY OF JANUARY 2024**

.....

**M. THANDE**

**JUDGE**

