



**Kamau & another v Robert (Civil Appeal E823 of 2022)
[2024] KEHC 8868 (KLR) (Civ) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E823 OF 2022

AB MWAMUYE, J

JUNE 20, 2024

BETWEEN

ROBERT MWANGI KAMAU 1ST APPELLANT

KENNEDY KARIMI WANJOHI 2ND APPELLANT

AND

MUTHII ROBERT RESPONDENT

*(Being an Appeal against the Judgment and Decree of the Hon. M.S. Muchungi (SPM)
delivered on 16th September, 2022 in Milimani CM Civil Suit No. 9620 of 2021)*

JUDGMENT

1. The Appellants herein have approached this Court aggrieved at the Judgment of the Trial Court delivered on 16th September, 2022 in Milimani CM Civil Suit No 9620 of 2021. The Memorandum of Appeal dated 14th October, 2022 is contained within a Record of Appeal whose Certificate and Index are both dated 22nd December, 2023.
2. The Memorandum of Appeal dated 14th October, 2022 raises the following grounds, which I reproduce verbatim:
 - a. The learned trial magistrate erred in law and misdirected herself when she failed to consider the Appellants' submissions on both points of law and facts.
 - b. The learned trial magistrate erred in law and in fact in awarding general damages of Kshs 210,000/- plus costs and interests which amount is/was excessive, unjust in the circumstances considering the nature of the claim, and the conventional awards in relation to such claim.



- c. The Learned Magistrate erred in law and in fact in finding the amount awarded by assessing the same against the height of evidence on record.
 - d. The trial magistrate erred in fact and in law in failing to consider the Appellant's/Defendant's Submissions on quantum.
 - e. The Learned Magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellants and by instead relying on the authorities cited by the Respondents which were unrelated to the actual claim by the Respondent.
 - f. The Learned Trial Magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Kshs 210,000/- which is a very high award for the injuries suffered.
 - g. The Learned Trial Magistrate erred and misdirected herself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages which are soft tissue in nature.
 - h. The Learned Magistrate erred in law and in fact in unduly the evidence adduced in trial.
3. The Respondent has opposed the Appeal by way of the Respondent's Written Submissions dated 18th March, 2024. The Appellants failed to file written submissions despite being directed numerously to do so.
 4. At Paragraph 4 of the Respondent's Submissions, the Respondent observes that the Appellants herein did not include the impugned Judgment of the Trial Court, or a copy of the Decree and/or the Order being, in their Record of Appeal. It was the Respondent's submission that as per Section 66 of the [Civil Procedure Act](#) an appeal to this Court can only lie against a Decree or an Order and no competent appeal can be brought to this Court unless such a Decree or Order is extracted and included in the Record of Appeal. The Respondent relied on the case of [Chege v Sulciman](#), [1988] eKLR in support of its contention that the present Appeal is fatally defective due to the absence of the Decree.
 5. Noting that the impugned Judgment of the Trial Court is also absent, in the same paragraph the Respondent also cited the case of [South Nyanza Sugar Company Limited v Bitengo](#), [2022] KEHC 11440 (KLR), and in particular Paragraphs 34 and 35 of the Judgment of Wendoh J in which the Court held that:
 - “ 34. There is no other step that this court can take since, in the absence of a complete and proper record of appeal, it is devoid of jurisdiction.
 35. I therefore strike out the appeal with costs to the respondent.”
 6. It is beyond contention that the Appellants did not include the impugned Judgment, Decree, or Proceedings in their Record of Appeal. This Court's Record shows that the Appellants appeared before the Court a number of times and they were directed variously to file a Supplementary Record of Appeal containing those documents but they failed to do so. Of particular note is the court attendance of 8th April, 2024; during which the Counsel for the Appellants noted the irregular position and applied for and received leave of thirty days to regularize the position. The Appellants failed to do so.
 7. In addition to those various directions, the Court File also exhibits the communication between the Court and the Counsel for the Appellants on this issue. On the 24th of January, 2024 the



Deputy Registrar emailed Counsel through their stated email address indicated in their filed pleadings, info@kglaw.co.ke . I reproduce that email in its entirety and verbatim below. The email read:

“ Good afternoon,

The registry notes that you have filed the record of appeal online, however it does not contain a certified copy of the proceedings, judgment and decree appealed against.

Kindly file a supplementary record of appeal containing the same and avail a bound physical copy of the same to the registry for record to enable the registry prepare the appeal for admission.

Joseph M. Kairu for Deputy Registrar.”

8. The impugned Judgment and the Proceedings of the Trial Court are mandatory documents that an appellant must lay before the appellate court to enable the appellate court reach a decision; and without which the appeal before the appellate court must be struck out for being fatally incompetent.
9. This is a settled position that has been set forth in a plethora of Supreme Court, Court of Appeal, and High Court cases. The analysis of the caselaw by Mrima J in the case of *Trans Mara Sugar Co. Ltd v James Omondi Obudho*, [Migori HCCA No 80 of 2018] concluded with the following words:

“ 23. I will also add my voice on the subject. First, from the reading of Section 65(1) of the Act it is the decree or part thereof that is appealed from the subordinate court to the High Court. Second, under Order 42 Rule 13(4) of the Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving grace under Article 159(2)(d) of the *Constitution* is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time the Appellant never sought for any extension of time to file the decree neither did it explain any difficulty in obtaining the decree. The appeal was filed around 60 days post the delivery of the judgment appeal against. That was clearly out of the stipulated time.

24. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No 20 of 2014 Bwana Mohamed Bwana (supra) ‘such an appeal would be incomplete and hence incompetent’.

25. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.”

10. The Appellants having not taken advantage of the numerous opportunities to rectify the irregular position, and with the matter having progressed beyond the hearing stage and into the judgment writing stage without the necessary action by the Appellants; there is no further step that this Court can take in the absence of a complete and proper Record of Appeal as it lacks jurisdiction.
11. Consequently, I strike out this Appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF JUNE, 2024.

BAHATI MWAMUYE



JUDGE

In the presence of:

Ms. Kalaine Counsel for the Appellants

Mr. Mwiha Counsel for the Respondent

Mr. Guyo, Court Assistant

