Njiriri v David Mugo Maina t/a Jomka Transporters (Civil Appeal E176 of 2021) [2024] KEHC 7232 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7232 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E176 OF 2021

JM OMIDO, J

JUNE 20, 2024

BETWEEN

STEPHEN KARANJA NJIRIRI ..... APPELLANT

AND

DAVID MUGO MAINA T/A JOMKA TRANSPORTERS ..... RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. E. Olwande, Chief Magistrate delivered on 26th August, 2021 in Limuru CMCC No. E176 of 2021)

JUDGMENT

1. This appeal emanates from the judgement ruling and orders of Hon. E. Olwande, Chief Magistrate delivered on 26th August, 2021 in Limuru CMCC No. E176 of 2021. In which the Appellant's application for review of the Judgement of the court dated 18th February, 2021 was dismissed with costs.

2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 24th September, 2021 upon which he seeks to upset the ruling and order of the lower court are as follows:

    i. The Learned Magistrate misdirected herself in both law and fact, and arrived at an erroneous decision in failing to acknowledge that an assessor's report is sufficient proof for material damage claim to warrant the Honourable Court's review of the judgement and award Appellant's claim agaist the Respondent.

    ii. The Learned Magistrate erred in both law and fact by failing to find that there was an error on the face of the record to warrant review of the judgement that was delivered on 18th February, 2021 as the Honourable Court failed to appreciate that material damage claims do not need to be specifically proved for them to be awarded more so where the amount claimed was specifically pleaded.

iii. The Learned Magistrate misdirected herself in both law and fact by placing a heavy evidentiary burden on the Appellant who had sufficiently proved his material damage claim to the required standard of the law, thus a review was highly merited.

iv. The Learned Magistrate erred in both law and fact in failing to appreciate that there were sufficient reasons for the court to review its judgement and has thus caused the Appellant a grave miscarriage of justice in that while she held that the Respondents were 100% liable for the loss that was suffered by the Respondent (sic) the Court failed to award any damages and/or at all.

3. On 20th March, 2024, directions were taken that the appeal proceeds by way of written submissions. The parties filed their respective submissions.

4. In precis, the issue for determination as discernible from the record is whether the Learned Trial Magistrate erred in law and in fact by holding that the Appellant's application for review dated 25th March, 2021 was not merited, thereby dismissing it with costs.

5. I have perused the record of appeal, the submissions by the two sides and the record in its entirety.

6. The application for review dated 25th March, 2021 sought for the review of the judgement of the lower court entered on 18th February, 2021. In the said Judgement, the trial court did not award the Appellant special damages for costs of repairs. The trial court held that the Appellant failed to produce receipts to show the extent of damage and actual cost of repairs.

7. The position that the Appellant took in the application was that the law on material damage claims is that special damages need not be shown to have been incurred and the Appellant was only required to show the extent of the damage and what it would cost to restore the damaged chattel to as near as possible the condition in which it was before it was damaged.

8. In the Appellant's view, as a report prepared by an assessor had given details of the damaged parts and assigned assigned a value with some certainty, the court ought to have allowed the claim for cost of repairs.

9. The Appellant's case was thus that failure by the trial court to award the claim for cost of repairs amounted to an error apparent on the face of the record.

10. The application was opposed by the Respondent who resisted the same on the grounds that the same did not meet the threshold for review; that there were no new and important matters of evidence that the Appellant had discovered; that there was no mistake or error apparent on the face of the record; that there had been unreasonable delay in presenting the application; and that the application amounted to an appeal against the trial court's judgement.

11. In determining the application, the Learned Trial Magistrate rendered herself as follows:

> "I have looked at the grounds upon which the Plaintiff wishes to have this court review the judgement that it passed herein on 18th February, 2021. In my view, the long and short of the Plaintiff's argument is that this court misapprehended the law on special damages and arrived at an erroneous decision. That in my respectful view would be a subject of appeal in an appellate court. I do not think that it would be proper for me to purport to reevaluate the law and evidence herein afresh with a view to arriving at a different decision. That would be tantamount to sitting on appeal over my own decision which is not tenable in law."

12. With that, the lower court proceeded to dismiss the application for review with costs.

13. The instant appeal therefore urges that the Learned Trial Magistrate erred in both law and fact by failing to find that there was an error on the face of the record to warrant review of the judgement that was delivered on 18th February, 2021.

14. The issue for determination as discernible from the material before me is firstly, whether the Appellant, vide the Application before the trial court demonstrated that there was an error apparent on the face of the record and consequently, if there was such an error, whether the Learned Trial Magistrate erred in declining to allow the application for review and secondly, if there was any other sufficient reason for the court to review its judgement.

15. The Court of Appeal in the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243: observed as follows:

> "In Nyamogo & Nyamogo -vs- Kogo [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (Emphasis mine).

16. In the case of National Bank of Kenya Limited V Ndungu Njau [1997] eKLR, the Court of Appeal distinguished between an error apparent on the face of the record that can be subject of review and errors of law which can only be corrected on appeal. The court stated as follows:

> "A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis mine).

17. From the Memorandum of Appeal and the submissions filed herein by the Appellant, I hear the Appellant to be saying that the Learned Trial Magistrate failed to properly apply the appropriate principles in assessing the Appellant's material damage claim thereby arriving at a wrong decision.

18. The question that then calls for an answer is, if indeed the decision was arrived at following the failure by the trial court to properly apply the appropriate principles in assessing the Appellant's material damage claim, would that amount to an error apparent on the face of the record? I do not think so. That is because, as we have seen in the authorities above, the grounds that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law does not amount to an error on the face of the record and cannot be a ground for review. Rather, a party aggrieved from such an outcome ought to challenge the same through an appeal.

19. With regard to the question as to whether there was any other sufficient reason for the lower court to review its judgement, it is urged by the Appellant that he is elderly and in his 80's and that he relied on the premises (the subject matter of the suit in the lower court) as a source of income and therefore stands to suffer immense prejudice if the instant appeal is not allowed.

20. It is to be noted, as rightfully proferred by both parties, that where the ground upon which review is sought is that of other sufficient reason, it is for the court entertaining the application for review to exercise its discretion. That then means that a party that is aggrieved by the outcome of the court's decision must demonstrate on appeal that the court that issued the order appealed from did not correctly or judiciously exercise its discretion.

21. In the impugned ruling, the Learned Magistrate expressed herself as follows, while addressing the "any other sufficient ground":

> " Another issue which this court ought to determine is whether there are any other sufficient reasons to review the judgement. Various authorities have indicated the wide-reaching discretion which the courts have in determining sufficient cause. However, none stretches to include a scenario where the court would seem to be sitting on appeal over its own decision.
>
> Counsel cited another case from (sic) in a bid to persuade the court to consider reviewing its judgement on the basis of sufficient cause. In the case of Registered Trustees of the Archdiocese Dar es Salaam v The Chairman Bunju Village Government & others, the court held:-
>
> > " ....it is difficult to attempt to define the meaning of the words sufficient cause; it is generally accepted in order to advance substantive justice when no negligence, or inaction or want of bona fides is imputed to the Appellant."
>
> He emphasized the last line which I would also emphasize. As indicated earlier, the Plaintiff failed to provide evidence which he said was available and he did not explain his failure. In my view, that is tantamount to inaction, negligence and want of bona fides."

22. In the Appellant's submissions, it has not been stated that the Learned Magistrate did not correctly or judiciously exercise her discretion. In my view, the lower court well explained the reasons as to why it declined to exercise such discretion. Particularly, the Learned Magistrate stated, in my understanding, that having reached a finding that there was no error apparent on the face of the record and that the matters presented under that ground were those to be addressed on appeal, she could not again go around and review the same matters (meant for appeal) on the other ground that there were other sufficient reasons, as that would amount to her sitting on appeal in the same issue that she had determined.

23. I therefore opine that the Learned Magistrate properly exercised her discretion in refusing to review the judgement on the "other sufficient grounds/reasons" basis.

24. But that is not all. I notice from the record of appeal that the Appellants have not included in it the extracted certified and signed copy of the order of the lower court from which the instant appeal emanates.

25. Order 42 Rule 13 of the Civil Procedure Rules makes provisions on the documents that must mandatorily form part of the record of appeal, which include the order or decree appealed from.

26. The questions that then call for answers are; how is an appeal that fails to include the order appealed from to be treated? Is there a valid appeal in such a situation?

27. The answers to these questions are to be found, happily, in a number of previous judicial pronouncements of superior courts.

28. In the case of Lucas Otieno Masaye v Lucia Olewe Kidi [2022] eKLR Ombwayo, J. stated thus:

> " It was the Respondent's submission that failure by the Appellant to attach a decree to the record of appeal was fatal to his case. A look at the record of appeal clearly shows that a decree has not been attached thereto.

Order 42 Rule 2 of the Civil Procedure Rules provides as follows:

> " Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."

Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides;

> "
>
> " (4) 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;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (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)."

The Supreme Court of Kenya, in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR held as follows at paragraph 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."

The Court of Appeal in Chege v Suleiman [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

> " But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of Section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal." (Note the emphasis)

29. In conclusion, Ombwayo, J. held that an appeal is rendered fatally defective where the decree or order appealed from is not part of the record of appeal. The Court proceeded to strike out the Appeal with costs to the Respondent.

30. In the case of Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR the Court of Appeal made the following observations:

> " It is common ground that the appellants filed their respective records of appeal on 10th April, 2012. It is also common ground that in the said records, the appellants failed or omitted to incorporate certified copies of the order appealed against as required by Rule 87(1)(h) of this Court's Rules. An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out."

31. While addressing the same issue, L. N. Mugambi, J in the case of *Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021)* [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) stated as follows:

> " 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 the legally specified documents is incompetent in law."

32. In the case of Chege v Suleiman [1988] eKLR the Court of Appeal stated that failure to attach the decree or order to a record of appeal is a jurisdictional one. It rendered itself thus:

> " But we concur positively in the submission of Mr. Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on proper interpretation of Section 66 of the *Civil Procedure Act*, which confers a right of appeal from the High Court to this court from "decrees or orders of the High Court". And the holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal

could be brought unless those decrees orders were formerly extracted as the basis of the appeal." (Emphasis).

33. Finally, in the case of Bwana Mohamed Bwana v Siluano Buko Bonaya & 2 others [2015] eKLR, the supreme Court of Kenya expressed itself as follows:

> " 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 it 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." (Emphasis).

34. The above decisions guide me in reaching the finding that where the decree or order appealed from does not form part of the record of appeal, the record of appeal filed is incomplete and fatally defective as such an appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

35. I have confirmed by perusing the record of appeal that the Appellant did not extract and attach the formal order against which the instant appeal has been preferred. The same does not form part of the record of appeal. Guided by the ratio in the authorities above, I can only reach the finding that the instant appeal is fatally defective.

36. For the reasons stated above, I find that the instant appeal is devoid of merit and I proceed to dismiss it with costs.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 20TH DAY OF JUNE, 2024.

JOE M. OMIDO.

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

For Appellant: Ms. Kimani holding brief for Mr. Njenga.

For Respondent: Mr. Were.

Court Assistant: Ms. Njoroge.