



**Atemba & another v Ndula (Civil Appeal E716 of 2023)  
[2024] KEHC 9312 (KLR) (Civ) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9312 (KLR)

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

**CIVIL**

**CIVIL APPEAL E716 OF 2023**

**AB MWAMUYE, J**

**JULY 11, 2024**

**BETWEEN**

**EDWIN ATEMBA ..... 1<sup>ST</sup> APPELLANT**

**MOSE WYCLIFF ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DENIS ISMAEL NDULA ..... RESPONDENT**

*(Being an Appeal against the Judgment and Decree of the Hon. S.A. Opande  
(PM) delivered 2nd March, 2023 in Milimani CM Civil Suit No. 6840 of 2018)*

**JUDGMENT**

1. The Appellants have filed a Record of Appeal dated 14<sup>th</sup> August, 2023 which contained a Memorandum of Appeal dated 28<sup>th</sup> July, 2023. Whereas the Memorandum of Appeal states that the Appellants are “highly aggrieved by the judgment delivered on the 2<sup>nd</sup> March, 2023 by the Honourable S.A. Opande (PM) in Milimani CMCC No. 6840 of 2018” they have not included the impugned judgment in their Record of Appeal, nor have they included the Decree appealed against or the proceedings of the lower court.
2. At the mention of this Appeal on 20<sup>th</sup> June, 2024 Counsel Machira for the Respondent informed the Court that whereas the Respondent had filed and served written submissions dated 6<sup>th</sup> June, 2024 the Appellants had not filed and served any Supplementary Record of Appeal or written submissions. The Court noted that neither the Supplementary Record of Appeal nor any written submissions by the Appellants were part of the Court’s Record, and the matter was reserved for judgment.
3. 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 case of *Chege V Suleiman*, [1988] eKLR makes clear than an appeal is fatally defective due to the absence of the Decree.

4. Noting that the impugned Judgment of the Trial Court is also absent, the present Appeal is similar to the situation in *South Nyanza Sugar Company Limited V Bitengo*, [2022] KEHC 11440 (KLR), where at Paragraphs 34 and 35 of the Judgment of Wendoh J 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.”

5. 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.
5. 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.”

7. 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.
8. Consequently, I strike out this Appeal with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2024.**

**BAHATI MWAMUYE**

**JUDGE**



In the presence of:

Ms. Kalaine h/b Mr. Kavita Counsel for the Appellants

Ms. Kasi Counsel for the Respondent

Mr. Guyo Court Assistant

