



**Mungai & another v Osore (Civil Appeal E443 of 2021)
[2024] KEHC 9309 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E443 OF 2021**

**AB MWAMUYE, J
JULY 18, 2024**

BETWEEN

ELIUD NJUGUNA MUNGAI 1ST APPELLANT

JOSEPH KIHU MBURU 2ND APPELLANT

AND

EVALINE ADHIAMBO OSORE RESPONDENT

JUDGMENT

1. The Record of Appeal in this matter is dated 15th March, 2023; with the Memorandum of Appeal being dated 23rd July, 2021. The Record of Appeal does not contain the impugned decision of the lower court, nor does it contain the proceedings.
2. The Appellants have been notified variously by this Court's Registry since the year 2023 that the Record of Appeal filed does not contain those two critical documents, but there has been no action by the Appellants. The issue has also been brought up during mentions of this matter, but the Appellants have taken no action to regularize the position.
3. On 6th June, 2024 the matter came up for mention, and Ms. Mumbi holding brief for Mr. Waiganjo for the Respondent observed they had not been served with a Record of Appeal, not to mention Appellants' Written Submissions. This Court granted the Appellants fourteen days to regularize the position and file and serve written submissions, with the Respondent having fourteen days from the date of service to file and serve their submissions in reply. This Court stated that at the lapse of that combined period of time the matter would be reserved for judgment, and judgment would be delivered on 18th July, 2024 at 10:30am EAT.
4. The Respondent was directed to serve a Judgment Notice on the Appellants and file an Affidavit of Service within three working days of 6th June, 2024. The Respondent complied and filed an Affidavit of Service dated 7th June, 2024 sworn by Antony Muli Ndolo. Annexed to the affidavit is a Judgment



Notice dated 6th June, 2024 which was served on the law firm of Kimondo Gachoka & Company Advocates and stamped received by them on 7th June, 2024.

5. To date, the Appellants have taken no remedial action to save their appeal from the only fate that can await an appeal where there is no copy of the impugned judgment, the decree appealed against, or the proceedings of the lower court.
6. 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.
7. 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.”
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 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.
10. The Respondent engaged representation and they have appeared variously before court in this appeal; in addition to filing affidavits of service and participating at the interlocutory stage. The Respondent is, therefore, deserving of costs.
11. Consequently, the Appeal is struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Njuguna h/b Mrs. Wanjira Counsel for the Appellant

Mr. Kiptanui h/b for Mr. Wachira Counsel for the Respondent

Mr Guyo, Court Assistant

