



REPUBLIC OF KENYA



KENYA LAW
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**Shitanda v West Kenya Sugar (Civil Appeal E025 of 2022)
[2024] KEHC 8164 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E025 OF 2022**

AC MRIMA, J

JULY 5, 2024

BETWEEN

DAMARY NASIMIYU SHITANDA APPELLANT

AND

WEST KENYA SUGAR RESPONDENT

*(Being an appeal from Judgment of the Hon. Kassim Akida (RM) delivered
on 15th August 2022 in Kitale Chief Magistrate Civil Case No. 433 of 2021)*

JUDGMENT

1. Through the Plaintiff dated 12th November 2021, Damary Nasimiyu Shitanda, the Appellant herein, instituted suit against West Kenya Sugar before the trial Court in Kitale Chief Magistrate Civil Case No. 433 of 2021 (hereinafter ‘the civil suit).
2. The Plaintiff sought among other reliefs, general and special damages for loss occasioned to her commercial buildings that were rendered inhabitable after being knocked by the tractor driven by the Defendant’s employee.
3. Upon hearing the case, the trial Court was of the finding that the Appellant had not established liability against the Respondent for failing to call any eye witness.
4. The Appellant was dissatisfied with the trial Court’s findings. She preferred the instant Appeal based on grounds in the Memorandum of Appeal dated 29th August 2022, as set out hereunder;
 1. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant’s submissions and evidence.
 2. The learned trial magistrate erred in law and fact in failing to consider that the plaintiff had proved its case to the required standard.



3. That the trial learned magistrate erred in law and in fact in failing to assess and award damages to the plaintiff.
 4. The learned trial magistrate erred in law and fact in proceeding under wrong principle in assessing liability.
5. Before delving far into the substance of the dispute, it is notable that the Appellant's Record of Appeal was not filed despite the orders of this Court of 13th June 2023 directing the Appellant to file and ensure that it is on record.
6. I will therefore look briefly into the parameters that define a competent Appeal.
7. Order 42 Rule 1 and 2 of the [Civil Procedure Rules](#) provides as follows;
- Form of appeal [Order 42, rule 1]
- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
8. Order 42 Rule 13(4) guides the process that ensures competence of an appeal. It provides as follows;
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;
 - 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).
9. As a matter of law, the documents that cannot be dispensed with are the Memorandum of Appeal, the Pleadings and the Judgment, Order or Decree appealed from.
10. The significance of the foregoing documents was aptly captured by the Supreme Court in Petition 14 of 2013, [Law Society of Kenya v Centre for Human Rights & Democracy & 12 others](#) [2014] eKLR



where the Judges, discussed the Petition of Appeal and Record of Appeal, the equivalent of the Memorandum of Appeal and Record of Appeal in appeal proceedings before the High Court. The Learned Judges observed as follows;

(38) It is not in dispute that the applicant has filed a Notice of Appeal and a Petition of Appeal. The Notice as its title indicates, is a signification of intent by the potential appellant, to challenge by way of appeal, the decision of a lower Court. The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

(39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

11. The Appellant herein, despite having been directed by this Court to ensure that it files the Record of Appeal failed to do so. From the record, one Chaluo from the Appellant’s firm of Advocates being Messrs. Arusei, Chepchumba & Company collected the certified copy of the proceedings from Court on 16th March 2023. However, as said, the Record of Appeal was not filed as ordered.
12. The implication of that lacuna is that, save for the Memorandum of Appeal, the rest of the mandatory documents anticipated by Order 42 Rule 13(ii) are not part of the appeal.
13. As captured by the Supreme Court in Law Society of Kenya v Centre for Human Rights & Democracy & 12 others case [supra], such a scenario strips this Court its core appellate mandate.
14. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
15. On the basis of the foregoing, the upshot is that the Appeal is incompetent and suffers a false start. It is hereby struck out with costs.

It is so ordered.

DELIVERED, DATED and SIGNED at KITALE this 5th day of July, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

No appearance for Mr. Gemenet, Counsel for the Appellant.

Miss Mtunda for Mr. Masinde, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

