



**Dorothea v Ojwang' (Civil Appeal E748 of 2023)  
[2024] KEHC 13161 (KLR) (Civ) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13161 (KLR)

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

**CIVIL  
CIVIL APPEAL E748 OF 2023**

**AM MUTETI, J  
OCTOBER 16, 2024**

**BETWEEN**

**REINE DOROTHEA ..... APPELLANT**

**AND**

**SYLVANUS OJWANG' ..... RESPONDENT**

*(Being an appeal from the judgement dated the 12th June 2023 delivered in  
Milimani CMCC NO. E8227 of 2021 by the learned Honourable Ruguru PM)*

**JUDGMENT**

**Introduction**

1. The appellant in this appeal was the defendant in the Lower Court. Judgement was entered against her in the sum of Kshs. 1,582,550 by the learned Honourable N.Ruguru on the 12<sup>th</sup> May 2023.
2. The appellant aggrieved by the said decision filed this appeal vide a memorandum of appeal dated 2<sup>nd</sup> August 2023.
3. The memorandum of appeal has two cases numbers mentioned in it as being the cases giving rise to the instant appeal. The effect of the inclusion of the two cases bearing different case numbers and arising from different jurisdictions shall become obvious as we progress in this judgment.

**Analysis**

4. On the face of the memorandum of appeal the appellant indicates that she intended to challenge the judgement of Hon. Ruguru Magistrate delivered on 12<sup>th</sup> June 2023 in Milimani CMCC NO. E8227 OF 2021.



5. However, in the first paragraph of the memorandum of appeal, the appellant has stated as follows:-

“The appellant being aggrieved by the judgement delivered by HM. J. Irura Senior Principal Magistrate, on the 29<sup>th</sup> June 2023 in Kigumo CMCC E187 of 2021 hereby appeals against the whole judgement to the Honourable Court and sets out herein below their grounds of appeal” :-

- i. The Learned Trial Magistrate erred in fact and in law by failing make a finding and/ or holding that the respondent did not contribute to the accident by his negligence as a road user;
- ii. The Learned Trial Magistrate erred in fact and in law by finding the defendant liable, vicariously or otherwise, in the absences of cogent evidence pointing to the actions and/or omissions on the part of the appellant herein;
- iii. The Learned Trial Magistrate thereby misdirected herself and based her findings on wrong considerations;
- iv. The Learned Trial Magistrate erred in Law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
- v. The Learned Trial Magistrate erred in fact and in law in failing to consider conventional awards and established precedent in cases of similar nature in awarding general damage and thereby proceeded to award manifestly excessive and undeserved general damages to the Respondent;
- vi. The Learned Trial Magistrate's judgment consequently occasioned a miscarriage of justice.
- vii. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the appellant's contentions, arguments and submissions;
- viii. The Learned Magistrate's judgment consequently occasioned a miscarriage of justice.

The confusion further goes on when one examines the index of documents. The judgement the appellant is indicated to be challenging on the face of the index is one dated 12<sup>th</sup> June 2023 by Hon. Ruguru P.M. The memorandum of appeal initiates the appeal thus an error such as the one highlighted here renders the appeal incurably defective.

6. The certificate appearing at page 1 of the record prepared by DIRO Advocates LLP indicates that this is a certificate for an appeal challenging a judgement dated 12<sup>th</sup> May 2023 in Milimani CMCC NO. E8227 of 2021 thus contradicting the body of the Memorandum.
7. The record does not also contain the decree or order appealed from. The issue has been taken up by the respondent as an important jurisdictional question for the court to address.
8. The respondent argues that the issue of the decree not being part of the record is a fatal omission which renders the entire appeal incompetent. The respondent's submission is premised on the provisions of Section 65(1)(b) of the Civil Procedure Rules,
9. In support of the position, the respondent maintains that the issue of the jurisdiction of the Court to determine the appeal it must be determined in limine since jurisdiction is everything and without it the court must down its tools.



10. The respondent relies on the decision in *Bwana Mohammed Bwana Vs. Silvanus Buku Bonaya & 20 others* [2015] eKLR at Pg. 41 where the Court held:

“Without a record of appeal the Court cannot determine the appeal cause before it. Thus if the requisite bundle of documents is committed, the appeal is incompetent and defective for failing the requirements of the law. An incompetent appeal divests the Court of the Jurisdiction to consider factual or legal controversies embodied in the relevant issues.”
11. The decision is important for it brings out the aspect of the record of appeal as a whole not just the absence of a decree.
12. I associate myself with the reasoning of the Court in the decision and add that where an appellant presents an appeal and presents a record that is incomplete or is replete with mistakes, errors or omissions, the appellant must be ready to suffer the consequence of his action.
13. The contents of a record of appeal are elaborately stated under Order 42 Rule 13 (4) of the Civil Procedure Rules and the documents set out under the rule must be placed before the Court before the court can proceed to hear the appeal. No doubt therefore, they are central to the determination of an appeal and the exclusion of any of them by the appellant from the record is a fatal omission.
14. The rule in its second proviso leaves no room for the exclusion of the memorandum of appeal, the pleadings and the judgment, order, or decree appealed from.
15. The record before me presents irreconcilable positions regarding the decision being appealed from.
16. The appellant alludes to two judgements by Honourable Ruguru one of 12<sup>th</sup> May 2023 and another of 12<sup>th</sup> June 2023.
17. The appellant in the body of the memorandum of appeal makes reference to yet another judgement delivered by Hon. J. Irua ,SPM in Kigumo CMCC NO. E187 of 2021 and indicates that to be the judgement that the appellant is challenging.
18. Interestingly, the record of appeal contains only one judgement by Hon. Ruguru dated 12<sup>th</sup> May 2023 appearing at pages 58,59 and 60 of the record of appeal.
19. It is the only judgement that the Court has before it and there is no memorandum of appeal challenging it. It therefore follows that without a memorandum raising grounds in respect of the judgment, the court cannot act on the same.
20. The inclusion of the decision of the Honourable J. Irura SPM in Kigumo CMCC NO. 187 of 2021 the body of the Memorandum of appeal renders the memorandum fatally defective.
21. The litany of errors in this appeal leaves the court without clarity as to what is the matter the appellant has moved this court to interrogate on appeal.
22. The jurisdiction of the court has therefore not been properly invoked as per the law,
23. The cocktail of errors in the record of appeal renders the entire appeal incompetent and incurably defective.
24. The respondent picked on the aspect of the missing decree to lay a basis for his argument on jurisdiction. The appellant did not apparently realize that the record of appeal had multiple other issues rendering it incompetent.



25. The latent mistakes in the record of appeal leave this Court with no option but to decline jurisdiction since there is no memorandum of appeal challenging the only judgement included in the record being the judgment of the Learned Honourable N. Ruguru Senior Principal Magistrate.
26. The court in declining to exercise jurisdiction is guided by the decision of the court of appeal in the Owners of The Motor Vessel Lillian vs Caltex Oil (Kenya) Ltd {1989} EKLR
27. As stated above, the memorandum of appeal contains grounds of appeal in relation to a decision rendered in Kigumo on 29<sup>th</sup> June 2023 by the learned Honourable J.Irura in Kigumo Cmcc E187 of 2021
28. It must be remembered that even though Article 159 (2) (d) of *the Constitution* requires Courts not to pay undue regards to technicalities in deciding matters, the situation obtaining in this appeal goes beyond what would pass for a technicality.
29. In fact, the errors are so fundamental and go to the root of the matter.
30. The appellant in his submissions addresses herself to the judgement of 12<sup>th</sup> June 2023. I have said there is no such judgement in the record of appeal.
31. The appellant's submissions do not make mention of the Kigumo CMCC E187 of 2021. It is clear therefore that in preparing the record of appeal, counsel was not meticulous enough to ensure that he put in the proper documents.
32. I must say that the mistakes apparent on the face of this appeal are nearly traumatizing because the appellant has lost his cause before this Court due to the fatal defects in the record of appeal. A decree must be included in a record of appeal otherwise the record would be incompetent. See Bwana Mohamed Bwana Vs Silvano Buko Bonaya \$ 2 Others (2015) where the the Supreme court held that an incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.
33. The mistakes are costly but must be borne by the appellant for he who seeks equity must do equity.
34. The respondent has been confronted with an appeal record which in all fairness was not designed to see the light of day.

#### **Determination**

35. Having made the observations I have made above, I hereby agree with the respondent's counsel that the record of appeal is fatally defective for omitting to include the decree.
36. I further hold that the entire appeal is incompetent since the memorandum of appeal deals with a matter that is not before this Court that being the judgement dated 12<sup>th</sup> June 2023 or even a judgement from the Kigumo Court.
37. The entire appeal is hereby struck out with costs to the respondent.
38. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

**A. M. MUTETI**

**JUDGE**



In the presence of:

Kiptoo: Court Assistant

Nyaata for the Appellant

Oguna Ongeru Advocates for the Respondent

Ombuna Advocate present

