



**Reliance Bank Limited v Suam Trading Company Limited (Civil Appeal
43 of 2018) [2023] KEHC 1281 (KLR) (Civ) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1281 (KLR)

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

CIVIL

CIVIL APPEAL 43 OF 2018

DO CHEPKWONY, J

FEBRUARY 16, 2023

BETWEEN

RELIANCE BANK LIMITED APPELLANT

AND

SUAM TRADING COMPANY LIMITED RESPONDENT

*(Being an appeal from the Ruling and order of Hon. E. Nyaloti
(CM) delivered on the 30th May 2017 in CMCC No. 13313 of 2004)*

JUDGMENT

Background

1. The background of this appeal is that the Appellant filed an application dated 15th July, 2016 seeking to review the ruling and orders of the court made on 1st March, 2013 and 13th May, 2014 by Hon. S. Atambo (PM) in CMCC No.13313 of 2004.
2. The Appellant also sought for an order that a decree and certificate of stated costs be extracted and issued to the Plaintiff based on the certified copy of the court register where terms of Judgment were recorded.
3. Upon consideration of the application, the trial court delivered its ruling on 30th May, 2017 to the effect that parties were directed to comply with the ruling and order of Honourable S. Atambo (MS) PM issued on 1st March, 2013 and have the file reconstructed and the case to start De novo.



4. Being dissatisfied by the ruling and orders issued, the Appellant preferred this appeal vide a Memorandum of Appeal dated 31st January, 2018 raising the following grounds of appeal(verbatim);
- a) That the learned Magistrate erred in law and fact by wrongly exercising his discretion in disallowing the application dated 15th July, 2016 and upholding the ex-parte ruling and orders of Hon. S. Atambo (PM) that directed the matter to be heard de novo without sufficient grounds.
 - b) That the learned Magistrate failed to consider the issues raised in the submissions placed before him by the Appellant.
 - c) That the learned Magistrate erred in law and in fact by failing to appreciate that it is not possible to hear the matter de novo as it is the court file with all the evidence and proceedings that has been lost by the court.
 - d) That the learned Magistrate erred in law and in fact by failing to appreciate that the matter had already been heard and concluded and Judgment had already been delivered.
 - e) That the learned Magistrate erred in law and in fact by shifting the burden of producing and or explaining the fate of the subordinate court file and the Judgment of the court on appeal.
 - f) That learned Magistrate erred in law by failing to apply the overriding objective as provided in Section 1A and 1B of the Civil Procedure Act, to meet the ends of justice.

It is proposed to ask the for orders that;

- a) This appeal be allowed and the ruling and order of the subordinate court be set aside and the prayers sought in the application dated 15th July, 2016 be granted.
 - b) Costs of this appeal and the application in the subordinate court be granted to the Appellant.
 - c) Any such orders as may be deemed appropriate.
5. The appeal was admitted for hearing on 13th May, 2022 and this court directed that the appeal be disposed by way of written submissions.
6. The Appellant filed its written submissions dated 26th April, 2022 but I note that there are no submissions on record for the Respondent.

Analysis and Determination

7. I have considered the grounds as set out in the Memorandum of Appeal alongside the record of proceedings and Judgment of the trial court, the Appellant's submissions in support of the appeal and the cited authorities thereto. The Appellant has raised a total of six (6) grounds of appeal in its Memorandum of Appeal. However, I find the sole issue arising for determination before this Honourable Court is whether this appeal is merited.
8. The Appellant has faulted the trial court on law and fact by wrongly exercising her discretion in disallowing the application dated 15th July, 2016 and upholding the ex-parte ruling and orders of Hon. S. Atambo (PM) that directed the matter to be heard de novo without sufficient grounds.



9. The record shows that the first application for reconstruction of the file was filed on 28th October, 2009 whereby the same was heard and determined. The court then ordered for reconstruction of the file. Being dissatisfied with the order of the court delivered on 1st March, 2013, the Appellant filed an application for review in which the court issued orders of reconstruction of the file.
10. I have had the opportunity to carefully peruse the record and the only evidence available relating to delivery of the Judgment before the trial court is a copy of the register. There is nothing like a copy of the Judgment as evidence to confirm that the matter was infact heard and Judgment delivered.
11. There is no doubt that if there was a copy of the Judgment for perusal by this court, it would have arrived at a different finding. But in the absence of such, this court is not in a position to confirm that indeed a Judgment was delivered before the trial court.
12. It is clear that an order for reconstruction of a missing court file is consistent with the provisions of Article 48 of *the Constitution* on the right to access justice. To decline a party from reconstructing a missing file amounts to denying a party the opportunity to ventilate his or her/its case which in my view is an affront to the aforementioned provision of *the Constitution* and more particularly, where it has not been shown that the original file went missing as a result of a mistake on the part of the party making such request.
13. It should be noted that reconstruction of a file is necessary in order to meet the ends of justice and, in the absence of any particular provision of the law, the court is entitled to invoke its inherent powers under Section 3A of the *Civil Procedure Act* and order for reconstruction of a file so as to meet the ends of justice.
14. Section 3A of the *Civil Procedure Act* provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.
15. I am satisfied that in the absence of a copy of Judgment with regard to the finding by the trial court to have the court file reconstructed, it is necessary to make out justice for the parties by according them a right to be heard and heard fairly on equal footing. I therefore order the trial court file to be reconstructed and the matter to start de novo.
16. In the ultimate, the Appellant’s appeal dated 25th January, 2018 is found to be without merit and is hereby dismissed. I further make the following orders
 - a) The Appellant be and is hereby granted leave to reconstruct the trial court’s file.
 - b) The parties to avail all the pleadings and documents filed in the matter for the said reconstruction to the Court Administrator at Milimani Commercial Court within 14 days from the date hereof.
 - c) The reconstructed file to be kept under lock and key.
 - d) Mention on 7th March, 2023 before the Chief Magistrate, Milimani Commercial Court for further directions.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2023.



D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ochieng counsel holding brief for Mr.Oyatta counsel for Respondent

Mr. Gathuri holding brief for Mr. Gitonga counsel for the Appellant

Court Assistant - Simon

