



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT IN NAIROBI

ELCA/E081/2021

FLAMINGO TOWERS LIMITED.....1ST APPELLANT/APPLICANT

CITISCAPES VALUERS & ESTATE

AGENTS LIMITED.....2ND APPELLANT/APPLICANT

=VERSUS=

HOMELAND MEDIA GROUP LTDRESPONDENT

RULING

1. The instant ruling is in regard to a Notice of motion dated 12/10/21 duly filed in court on the even dated and commenced under Section 1A, 1B,3A of Civil Procedure Act Cap 21, Order 51 Rule 1, of the Civil Procedure Rules 2010, (The motion herein). The two (2) appellants are seeking orders infra; -

a. Spent

b. Spent

c. THAT Honourable court be pleased to order the Respondent herein to pay its rent of Kshs. 25,956,424.50 and service charge of Kshs. 535,624/= and continue doing so as provided in the Lease Agreement dated 15/05/2018 between the 1st Appellant and the Respondent pending the hearing and determination of the Appeal filed herein.

d. THAT in the alternative and without prejudice with prayer 3 above, the Respondent be ordered to deposit the entire balance of the purchase price in the interest bearing escrow account of both counsel for the Applicants and Respondent pending the hearing and determination of the Appeal.

e. THAT the Honorable Court do grant the Applicants any other reliefs as it deems fit and just in the circumstances.

f. THAT cost of this application be provided for.

2. The motion is premised on the Supporting Affidavit of one of the Directors of the 1st appellant/applicant, Samuel Warugu Kimotho and grounds 1 to 21 set out on its face. There is however no copy of a draft memorandum of appeal annexed thereto.

3. So, on 15/10/2021, the court ordered and directed that the appellants/applicants serve the respondent with the motion. Indeed, by an affidavit of service sworn on the even date and filed in court on 26/10/2021, respondents were duly served.

4. The Respondent has filed a defence and opposition to the Notice of Motion.

Applicant's Case

5. The applicant's motion is anchored on the fact the 1st Appellant is the owner and proprietor of Flamingo Towers, a commercial building in Upper Hill and the 2nd Appellant is the property manager of Flamingo Towers.

6. The Respondent is a tenant in the 1st Appellant's property vide a lease agreement dated 9/01/2019. That although the Respondent was initially a tenant they made an offer to purchase the premises it occupied at a consideration of Kshs. 89,546,670/- and a letter of offer "subject to contract" was executed between the 1st Appellant and the Respondent on 27/09/2019.

7. That due to breach the letter of offer was terminated and withdrawn through a letter dated 30/06/2020 and then the 1st Appellant exercised its right pursuant to clause 14 and treated the already paid monies of Kshs. 4,500,000 as rent and service charge.

8. The respondent filed a suit in the subordinate court for injunctive orders CMCC No. 4077 of 2020 which were granted *ex parte* and confirmed after *inter partes* hearing on 25/11/2020.

9. That the subordinate court acted *ultra vires* when it entertained both the suit and the application because the Respondent had asserted to being the purchaser of the suit property whose contractual value was Kshs. 89,564,760/= and so the lower court should have dismissed the matter summarily due to the lack of pecuniary jurisdiction for the Magistrate's court which is limited.

10. The Appellant had through an application dated 9/12/2020 sought to have the suit filed dismissed but this was dismissed on 24/09/2021.

11. The Appellant further avers that the Respondent has continued to default on its obligation to pay rent hiding behind the injunctive order of 25/11/2020 where the Appellants were restrained from evicting the Respondents.

12. The Appellant contends that it is in the interest of justice and fairness that the application should be heard on priority and the orders granted.

Respondent's Case

13. The Respondent filed a replying affidavit sworn by one Joe Musyimi Mutambu who is a director of the Respondent and does not deny that they are in occupancy of the suit property.

14. They contend that the application is baseless and a mere abuse of the Court's process.

15. That the applicants do not have any judgment against the respondents for them to demand payment of monies indicated.

16. That the Respondent cannot lodge an appeal and pray of what was not pleaded in the lower court to be awarded before the draft appeal is admitted.

17. That the Applicants never filed a defence or counter claim against the Respondent. Further that the Applicants only responded to the Respondent Application in the lower court and then filed an application to set aside the orders of the court dated 25/11/2020 and the application was dismissed vide a ruling dated 24/09/2021.

18. They reiterate that the Applicants never raised the matter of jurisdiction. They further aver that the application herein directly and indirectly prejudices their defence and that the appeal is yet to be heard, further that they have valid orders from the lower court restraining the Appellant from harassing or blocking the Respondents from accessing the office and business.

19. That there is no valid lease agreement therefore the Application has no merit.

Analysis and determination

20. Having considered the motion, supporting affidavit, annexures, grounds of opposition and written submissions, this court is of the considered view that the only issue falling for determination is whether the applicant's motion is merited. I will proceed to analyze the legal and jurisprudential framework on the issue.

21. At the outset, it is important to point out that, appeals to a superior from the lower court do not require a notice of appeal. **Sections 78 and 79 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules** have an elaborate framework on how such appeals are to be lodged which are distinct from the procedures envisaged under the **Court of Appeal Rules**.

22. **Order 42 rule 2 of the Civil Procedure Rules; provides as follows: -**

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed”.

23. This rule envisages a situation where the appellant is set to lodge his memorandum of appeal but the order or the decree appealed against has not, in the words of **section 79G** of the Act, been “prepared and delivered”; in that case, the memorandum of appeal may be filed but the filing of the order or the decree must follow at the earliest opportunity possible or within such a time that the court may direct. The logical conclusion that one can make from these provisions is that without the order or the decree appealed against, the appeal is incomplete.

24. Again, **Order 42 Rule 13(4)** of the **Rules** is also clear that the record of appeal will not be complete without the decree or order appealed against; it provides:-

“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 during the hearing;*
- d.

25. Is the motion merited? On the face of the applicant’s motion and supporting affidavit are bereft of material facts on which court’s decision the applicant was heard and aggrieved against. In the Appellant’s supporting affidavit, the court gets a slight glimpse of the decision they are aggrieved against when they narrate that the application to set aside the decision of 25/11/2020 was dismissed on 24/09/2021. It is not clear whether this is the essence of the Appeal.

26. The appellant/applicant is urging this court to carry out a fishing expedition in discerning the decision they intend to appeal against. It is unfortunate that the applicant did not avail a draft memorandum of appeal to assist this court. From the applicant’s supporting affidavit and the respondent’s submissions, it is not clear what the appeal is about. It is the finding of this court that the motion is devoid of material facts on the decision the applicant is aggrieved against.

27. In Appellant’s motion, the appellant/applicant failed to proffer to this court a draft copy of the memorandum of appeal which is a mandatory requirement. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** held as follows;

“Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time”

28. In the instant case the Appellant’s failure to follow procedure cannot be saved by Article 159(2)(d) of the Constitution. The court in **Lalji Bhimji Shangani Builders & Contractors vs. City Council of Nairobi [2012] eKLR** Odunga J. held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

29. And in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** Kiage, JA held as follows:

“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

30. The law is that appeals to the High Court are instituted by way of filing a memorandum of appeal and it is not mandatory for an appellant to file a memorandum of appeal together with the record of appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under *Order 42 Rule 13* of the *Civil Procedure Rules*.

31. In the case of **Haron E Ogechi Nyaberi vs British American Insurance Co. Ltd [2012] eKLR**, the High Court held that: -

“It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rules 11 and 13 thereof. Appellant’s compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:

- a) *Serving the Memorandum of appeal; and*
- b) *Filing and serving the Record of Appeal.”*

32. On the face of pleadings, the applicant has failed to meet a mandatory ingredient in a motion of filing for an appeal against a decision of the subordinate court. Indeed, the case number for this matter is even listed at ELCA E081 OF 2021. It is clear that this is an appeal but the pleadings fall short of the crucial standard laid down by *Order 42* of the *Civil Procedure Rules*.

33. In determining whether the application before the court in the circumstances of this case is warranted, and what to do with the gap in procedure, I find myself drawn to the overriding objective of the CPA and the CPRs there under. The overriding objective of the CPA and the rules made thereunder is *‘to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.’* That is what section 1A of the Act states and to further this objective, the Court is bound by the provisions of section 1B inter alia in that *“it shall handle all matters presented before it for the purpose of attaining the following aims—*

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

34. Rules of procedure have been described as handmaidens rather than mistresses of justice. I find the exposition of the Oxygen Rule by the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** apt in the circumstances of this case in addressing both the application before me and the gap in the rules as to what happens where appellant fails to comply with the rules.

35. Had the appellant/ applicant disclosed the substance of the suit against which he is aggrieved and filed a draft memorandum of appeal which he has not, this court would have exercised its discretion in deciding whether or not to grant the motion based on the well-established principles in the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat (ibid)**.

36. Consequently, it is the finding of this court that the motion is not merited.

37. Ultimately, the upshot is that I find no merit in the applicant's application dated 12/10/21 and the same is ordered dismissed with costs to the Appellant/applicant.

Orders Accordingly

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021

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MOGENI J

JUDGE

In the Presence of

Mr. Manyara for the Appellant/Applicant

Mr. Katunga for the Respondent

Mr. Vincent Owuor.....Court Assistant