



**Mosi v Azenga & 6 others (Civil Appeal E011 (41) of 2020)
[2023] KEHC 23341 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E011 (41) OF 2020
AC MRIMA, J
OCTOBER 12, 2023**

BETWEEN

NAHASHON KIGONDI MOSI APPELLANT

AND

HILLARY AZENGA & 6 OTHERS RESPONDENT

*(Being an appeal from the Ruling by Hon. V. Karanja, Senior Resident Magistrate in Kitale
Chief Magistrate's Court Civil Suit No. 173 of 2020 delivered on 11 th November, 2020)*

JUDGMENT

1. The parties herein participated in Kitale Chief Magistrate's Court Civil Suit No. 173 of 2020 Nahashon Kigondi Mosi vs. Hillary Azenga & 6 Others (hereinafter referred to as 'the suit').
2. The suit was determined by a ruling rendered on 11th November, 2020. In the ruling, the suit was struck out.
3. Dissatisfied with the ruling, the Appellant lodged the appeal subject of this judgment.
4. The appeal was heard by way of written submissions which parties duly complied.
5. This Court has carefully perused and understood the record before it.
6. In the course of the Court satisfying itself on the propriety of the appeal, it downed that there was a glaring anomaly on the record. Although the issue was not taken up by the parties this Court will still deal with it as it goes to the substance and competency of the appeal thereby impugning the jurisdiction of this Court.
7. The issue is the non-filing of the Record of Appeal.



8. This Court has, despite diligence, not come across the filed Record of Appeal and there is no evidence of payment for such a Record of Appeal. The Court is, hence, satisfied that the Record of Appeal was not filed, but only the written submissions.
9. That being the position, this Court will now deal with the effect of non-filing of the Record of Appeal in this matter.
10. Appeals to the High Court from judgments and decrees are provided for in Section 65 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.
11. Order 42 Rule 1 of the Civil Procedure Rules provide that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
12. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in Order 42 Rule 13(4) of the Rules as follows: -

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).

13. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of lack of and/or incompleteness of such Records of Appeal.
14. The Supreme Court of Kenya in Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR referred to its earlier finding in Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013 where it held as follows: -
 - (16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:



An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- a. a petition of appeal;
- b. a record of appeal; and
- c. the prescribed fee.

(17)

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

(37)

(38) 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.

15. The Court further held, at paragraph 39, that:

(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.

16. Ngaah, J in Nyeri High Court Civil Appeal No. 51 of 2013 *Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo* (2016) eKLR dealt with how the Court of Appeal in *Kyuma vs Kyema* (1988) KLR 185 dealt with the interpretation of Section 79G of the *Civil Procedure Act*.

17. The Court of Appeal held as follows: -

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay” Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore, a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment.

18. Sitati, J in Kakamega Election Petition Appeal No. 3 of 2018 *Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others* (2016) eKLR dealt with the same issue in an election petition appeal from the subordinate Court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

32. What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I



am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.

19. This Court will also add its voice on the subject. First, under Order 42 Rule 13(4) of the Civil Procedure Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Second, the saving grace under Article 159(2)(d) of *the Constitution* is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Third, despite the mandatory provisions on the filing of the Record of Appeal, the Appellant did not explain any difficulty in doing so.
20. From the foregoing, a complete Record of Appeal is, therefore, mandatory to invoke the jurisdiction of a Court. In the words of the Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others case* (supra) even in cases where the Record of Appeal is incomplete ‘such an appeal would be incomplete and hence incompetent’.
21. Having said so, the upshot is that there is no competent appeal for consideration. The appeal is, hence, struck out with costs.
22. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for **Mr. Wanyonyi**, Counsel for the Appellant.

Miss Mukamo, Counsel for the Respondents.

Regina/Chemutai – Court Assistants

