REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 445 OF 2018

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD.....APPELLANT

= VERSUS =

MUTUA MBOYA & NZISSI ADVOCATES.....RESPONDENT

(An Appeal from the Judgement and Decree of Honourable M. Mbeja (Mr.)

Senior Resident Magistrate delivered on 31/08/2018

in Milimani CMCC No. 5144 of 2010)

JUDGMENT

This is an appeal by National Hospital Insurance Fund Management Board against the ruling and orders of the Honourable M. Mbeja (Mr.) Senior Resident Magistrate in Milimani CMCC No. 5144 of 2010 delivered on 31st August, 2018. The appellant was the defendant while the respondent was the plaintiff before the trial court. The firm of Cherono & Co. Advocates are on record for the appellant while the respondent is representing himself.

The respondent instituted a suit via an amended plaint filed on 6th May, 2013 against the appellant herein seeking a refund of money wrongly overpaid as rent on account of misrepresentation and an order for injuction against the appellant restraining it, its agents and/or servants from harassing, evicting, demanding excessive rents or in any way interfering with the plaintiff's possession of the rented premises.

The respondent's case before the trial court was that it entered into a Lease Agreement with the appellant for an office space on the 7th Floor of Construst House measuring 866 square feet at a monthly rent of Kshs. 50,2888 inclusive of service charge at Kshs. 15/= per square feet and VAT payable quarterly. That however, a dispute on the actual office space occupied by the respondent arose and after measurements were taken, it was discovered that the actual office space was 637 square feet as opposed to 866 square feet agreed upon. The respondent also pleaded that the appellant charged him a higher service charge of Kshs. 15 per square feet as opposed to the standard charge of Kshs. 10.

The appellant filed its Further Amended Defence dated 10th March, 2014 refuting the respondent's claim together with its own counterclaim for Kshs. 580,921.46 on account of unpaid rent, service charge and excess charge for the period up to and including 30th September, 2013 plus interest thereof at the rate of 20% per annum plus 5% as per the lease terms from 1st October, 2013 until payment in full. The respondent called two witness to support its case while the appellant called three witnesses.

The trial court after hearing both parties in its judgment delivered and dated on 31st August, 2018 entered judgment for Kshs. 817, 530 in favour of the respondent and dismissed the appellant's counter claim. The court stated:-

> **"The court finds it just to entitle the Plaintiff to payment of damages of a sum of Kshs. 817,530/= being rent paid by the Plaintiff to the Defendant between 1st October, 2007 and 30th September, 2013 for extra space not occupied by the Plaintiff, as assessed in the foregoing, which will attract interest at court rates from the date of the judgment until payment in full. The other two claims by the Plaintiff do not suffice, as the same was exclusively and specifically provided for in Clause 6.3.1 as read with clause 6.4.1 and 6.4.2 of the Lease Agreement. From the written submissions by both the Plaintiff and Defendant dated 9th April 2018 and 6th June 2018 respectively, both parties assert that each of their claims be adopted and the opposing parties' claims be dismissed with costs. From the foregoing, I find it right equitable that each party should bear its own costs of the suit.**

... In the result the counter claim is hereby dismissed with no order as to costs and judgment is entered in favour of the plaintiff against the defendant as sought in the plaint limited to the sum of Kshs. 817,530 plus costs and interests at court rates from the date of filing suit all circumstances considered."

Being dissatisfied with the said judgment and order of the subordinate court the appellant has preferred this appeal by way of a Memorandum of Appeal dated 26th September, 2018 and filed in court on the same date on the grounds that: -

1. The Learned Magistrate erred in law and fact by dismissing the Defendant's counter-claim without offering reason(s) for his decision.

2. The Learned Magistrate contradicted himself in that while holding that the basis for the counter-claim has been laid went ahead and dismissed the same.

3. The Learned Magistrate completely ignored the evidence of the Appellant's in determining the billable area of the suit premises.

4. The Learned Magistrate erred in law and fact by arriving at his decision on the basis of speculation rather than evidence.

5. The Learned Magistrate contradicted himself in arriving at different findings on Rent and that of the service charge, yet the two claims were founded on the same material particulars.

6. The Learned Magistrate erred in ignoring the express provisions of the Lease Agreement regarding liability of the Respondent towards the costs of services to the Common Areas.

7. The Learned Magistrate erred in law and fact by re-writing the Agreement between the parties.

8. The Learned Magistrate erred in law and fact by ignoring the Plaintiff's own witness evidence when assessing the Area on which the Rent ought to have been paid.

9. The Learned Magistrate erred in law by making an award of Kshs. 817,530 in favour of the Respondent without any factual basis.

10. The Learned Magistrate erred in law by completely ignoring the evidence of DW1 and DW3 on the common area concept and the actual measurement of the said common area.

11. The Learned Magistrate erred in law by arriving at a decision that is contrary to the weight of evidence.

12. The Learned Magistrate erred in law and fact by ignoring the appellant submissions.

On 30th June, 2020, the appellant filed a Record of Appeal. Additionally, the appellant filed a Supplementary Record of Appeal dated 1st March, 2021 and a 2nd Supplementary Record of Appeal dated 16th June, 2021 which included additional certified proceedings from the trial court. The respondent on the other hand filed a 3rd Supplementary Record of Appeal dated 24th June 2021 that included his List of Documents produced before the trial court. The appeal was admitted for hearing on 13th July, 2020 and the appellant filed its submission dated 5th March, 2021 while the respondent's submissions are dated 24th June, 2021.

Appellant's Submissions*:*

On grounds No. 1 and 2 the appellant submits that its counter claim was proved and the same was never contested by the respondent hence the dismissal of the same by the trial court was erroneous. According to Counsel, the lower court failed to address the issue of the counter claim in its judgment and more importantly the reasons for dismissing it. The appellant submits that DW 3(Rachel Wanjiku Njoroge) during her testimony in court confirmed that the appellant's claim of Kshs. 580,921.46 being the amount owing to it on account of Rent and Service Charge for the last quarter of the lease period plus the excess service charge for the year 2012 and VAT accrued. Counsel for the appellant pointed out that this amount was evidenced in the Rent/Bill Demand Note dated 31.08.2019, marked as Exhibit No.3 under the Defendant's List of Documents of 11th April, 2014. DW3 further testified that an Invoice dated 22.08.2013 was sent to the respondent with the breakdown of the outstanding amount owing to the appellants at the expiry of the lease.

On the Excess Service Charge of Kshs. 82,091, counsel submits that the same was highlighted by DW3 who testified that the excess charge was for the year 2012 and that the respondent was notified of the same via a letter dated 16.05.2013 by the Agent. It is the appellant's further submissions that the VAT as stated is statutory while the service charge report appears as document No. 4 in the Defendant's Supplementary List of Documents and that Appendix 1 of the 2021 Audited Accounts shows the allocation of the excess service charge on the respondent.

The appellant collapsed grounds 3 to 12 and submitted that at the core of the appeal is what constitutes the leased area and hence the billable area which Counsel submits should have been addressed first by the trial court. The appellant disagrees with the respondent's narrative that his office space is 637 square feet, constituting of the four corners of his office and nothing more. It however maintains that the leased area is the actual office space of 637 square feet plus the respondent's portion of the prorated common area measuring 299 square feet totaling to 866 square feet referred to at Preamble C of the Lease Agreement signed on 16.10.2007. Preamble C states as follows;

"The Landlord has agreed with the Tenant to grant to the Tenant a Lease of office premises on the Seventh floor of the

Building together with the use of the Common Area altogether measuring approximately 866.00 square feet as is detailed in the First Schedule hereto (hereinafter called 'the Premises') for the term and at the rent and with and subject to the covenants agreements conditions restrictions stipulations and provisions hereinafter contained:"

Further, the appellant has made reference to Clause 1.4 of the Lease Agreement which defines the Common Parts in the following terms;

"'the Common Parts' mean the pedestrian ways, forecourts, landscaped areas, entrance halls, landings, lift shafts, staircases, passages and other areas which are from time to time during the Term provided by the Landlord for common use and enjoyment by the tenants and occupiers of the Building and all persons expressly or by implication authorised by them."

Counsel submits that the Lease Agreement is not ambiguous on the office space leased out and that the respondent misapprehended the terms of the Lease Agreement by claiming that he did not lease out his prorated space in the common area measuring 299 square feet. According to the appellant, DW1 (Bonface Kibii Terer) in his testimony before court stated that the tenants benefit directly or indirectly from the common areas and that tenants are billed according to the prorated portion of the spaces they occupy. Additionally, the appellant submits that DW2 (Hellen Njoroge) a Registered Valuer and Estate Agent measurement of the respondent's actual office space and the prorated common area was in compliance with the terms of the lease as opposed to the measurement of the actual office space only by PW2 (Festus Khaula) a quantity surveyor instructed by the respondent.

The appellant maintains that the trial magistrate erred and contradicted himself in allowing the respondent's prayer for Kshs. 817,530 which was billed on the basis of 637 square feet office space as opposed to the measurements by PW2 of 661.98 square feet and the dismissal of the prayer for alleged overpayment of the service charge. Counsel for the respondent refutes the allegation of misrepresentation raised by the respondent at the trial court and submits that the respondent simply misunderstood the contract. The appellant states that the trial court erred in its judgment as it sought to rewrite the parties contract.

Respondent's submissions;

In opposition to the appeal, the respondent has submitted that there is no proper appeal before the court for failure by the appellant to include a copy of the Decree or Order being appealed against as provided for under Order 42 Rule 2 of the Civil Procedure Rules, 2010. Order 42 Rule 2 provides that;

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 time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

Further, the respondent has made reference to Order 42 Rule 13 (4) (f) which provides;

(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—

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

The respondent has submitted that failure to include the decree or order being appealed from in the Record of Appeal restrains an appellate court from considering an appeal on merit. To buttress this position, the respondent has cited the case of **BWANA MOHAMED BWANA V SILVANO BUKO BONAYA & 2 OTHERS [2015]eKLR** where the Supreme Court addressed itself on the failure by an appellant to include a certified copy of a decree and stated;

[41] Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:

"A court is competent, that is to say, it has jurisdiction when–

(1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

(2) the subject matter of the case is within its jurisdiction, and no feature in the case …… prevents the court from exercising its jurisdiction; and

(3) the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction" (emphasis supplied).

The respondent submits that the above decision is binding to this court and made reference to the case of **RUTH ANYOLO V AGNETTA OIYELA MUYESHI [2019]eKLR** where Justice H.A Omondi who although of a different mind held that she was bound by the doctrine of stare decisis established by the Supreme Court in the **BWANA MOHAMED BWANA** case as the correct position.

Counsel for the respondent further submits that the appellant has come to court with unclean hands after failing to include the Respondent's List of Documents dated 6th May, 2013 which included the appellant's letters dated 20.09.2007, 03.07.2009 and 04.09.2009 confirming that the lease office space was only 630 square feet. Consequently, the respondent states that it filed a 3rd Supplementary List of Documents dated 24th June, 2021 with all the documents that the appellant had deliberately failed to include despite the court order of 13th May, 2021.

It is the respondent's submissions that the trial court rightly dismissed the appellant's counter claim on the basis that it was already factored in the respondent's claim which factored in the entire lease period. The respondents maintain that the appellant's assertion that the billable areas include entrances, basement, parking, staircases and lift area is absurd. Further, the respondent submits that by failing to ensure that what was offered in the lease (866 sq. ft.) was available and instead offer 637 sq. ft. the appellant is guilty of fraud. The respondent urged the court to dismiss the appeal with costs.

Analysis and Determination;

The respondent has raised the issue of whether the present appeal is incompetent due to failure to include the decree or order being appealed against in the record of appeal. Order 42, Rule 13(4)(f) of the Civil Procedure Rules provides;

> **(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—**
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> **(a) the memorandum of appeal;**
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> **(b) the pleadings;**
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> **(c) the notes of the trial magistrate made at the hearing;**
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> **(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
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> **(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: (emphasis added)**

A perusal of Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 reveals that it is a specific requirement that before allowing an appeal to go for hearing, a Judge must be satisfied that the Judgment, order **or** decree appealed from are on the court record. In the present appeal, a perusal of the record of appeal shows that the appellant attached a copy of the judgment together with the certified copy of the lower court's proceedings however, there is no certified copy of the decree attached as is mandatorily required. The appellant did not respond to this issue either orally or in their written submissions meaning it remained uncontroverted.

The courts have pronounced themselves on the issue of incomplete record of appeal and the Court of Appeal in the case of **FLORIS PIERRO & ANOTHER V GIANCARLO FALASCONI (AS THE ADMINISTRATOR OF THE ESTATE OF SANTUZZA BILLIOTI ALIAS MEI SANTUZZA) [2014] eKLR** held that:

> **"An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling.**"

Vide a letter dated 11th January, 2019, the appellant through its counsel requested for certified proceedings and judgment but did not request for certified order or decree. The importance and purpose for extracting the decree was stated in the case of **PENINAH WAMBUI MUGO VS. MOSES NJARAMBA KAMAU NAKURU HCCS NO. 238 OF 2004** where **Koome, J** (as she then was) stated that the purpose of the decree or order to be reviewed being annexed is to enable the court appreciate the order or decree that the applicant is unhappy with. Additionally, Order 42 Rule 2 of the Civil Procedure Rules provides a recourse where an appellant has failed to file a certified copy of the decree or order. The Rule states 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."**

From the above discourse, although in my view such an omission should not lead to the draconian striking out of the appeal as the same ought to be cured by the provisions of Article 159 (2) (d) and the overriding principles under Section 1A and 1B of the Civil Procedure Act. I am in agreement with the Court of Appeal holding in the case of **DEEPAK CHAMANLAL KAMANI & ANOTHER VS. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS CIVIL APPEAL (APPLICATION) NO. 152 OF 2009** where the court held that:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to**

striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."

The Supreme Court in the Case of **BWANA MOHAMED BWANA** cited by the respondent affirmed that the omission of mandatory documents from the record had the effect of rendering the appeal defective and incompetent and that a court could not exercise its adjudicatory powers where an appeal is incompetent hence such an omission goes to the jurisdiction of the court. Deviations from and lapses in form and procedures that touches on the jurisdiction of the Court cannot be cured by Article 159 as was the holding in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013] eKLR** where the Court of Appeal held that;

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical."

Consequently, I am bound by the doctrine of stare decisis and must defer to the Supreme Court position as the correct position and hold therefore that this appeal is incompetent for lack of a copy of the decree. I need not consider the merits of the appeal as there is no valid appeal before the court. The appeal is hereby struck out; parties shall meet their own costs.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE