



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 89 OF 2017

JOHN KIPKEMBOI.....1ST APPELLANT

THELMAX CONTRACTORS.....2ND APPELLANT

VERSUS

BRAMWEL VUKINU.....RESPONDENT

(An appeal arising from the ruling and order of the Hon. Jacinta A. Owiti,

Senior Resident Magistrate (SRM), in Vihiga PMCCC No. 8 of 2016 of 18th July 2017)

RULING

1. What I am called upon to determine is the appeal herein, which was commenced by way of a memorandum of appeal, dated 14th August 2017, and filed herein on 15th August 2017. Directions were taken on 26th November 2018 that the appeal be canvassed by way of written submissions. The parties complied with those directions by filing their respective written submissions, whereupon I allocated them 18th October 2019 as the date for judgement.

2. I have perused through the appeal file for the purpose of writing the judgment, and I have unfortunately noted that the trial court file has not availed by the trial court. It would appear that it is not the trial court to blame for that, the blame lies squarely with the registry at the High Court civil appeals' section. There is in the appeal file a letter, in duplicate, that was written on 15th August 2018, the same day the memorandum of appeal herein was received at the registry. The letter was signed by the Deputy Registrar addressed to the PM's Court Vihiga calling for the original court record in Vihiga PMCCC No. 8 of 2016. Rather than that letter being sent to the trial court as intended, it was filed away. Both the original letter and its duplicate are in the appeal file.

3. For me to properly and effectually determine the matter before me, I should have sight of and peruse the trial record. The appeal before me is a first appeal from the determination of the trial court. As a first appellate court I have a duty to re-evaluate, re-assess and re-analyze the evidence afresh. and thereafter draw my own conclusions based on what is on record. The principle is stated in *Selle and another vs. Associated Motor Boat Company Ltd and others* [1968] EA 123, where the former Court of Appeal for Eastern Africa stated:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. in particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence generally (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 EACA 270).”

4. Of course, the court, in *Selle and another vs. Associated Motor Boat Company Ltd and others*, was handling an appeal from a trial by the High Court, but the High Court, and courts of equal status, has adopted the principles stated in that decision and applied them to appeals' that come before it from decisions made by the magistrates' courts as trial courts. See *Oserian Development Company Limited vs. Jackson Oteyo Sila* [2018] eKLR, *JAM vs. FOK* [2019] eKLR, *Patrick Sosio Lekakeny vs. Tomito Alex Tampushi & 3 others* [2018] eKLR, *Kapsiran Clan vs. Kasagur Clan* [2018] eKLR, *KIP Melamine Ltd & 2 others vs. Violent Waitiri Gichia* [2017] eKLR, among others.

5. For the appellate court to discharge its mandate as such it must have before it a complete record of the proceedings that were before the trial court. For the Court of Appeal, the record of appeal would be sufficient if it has the typed copies of the proceedings and the impugned ruling or judgement and the order or decree impugned, plus copies of relevant pleadings and other court processes, and copies of any

documents placed in the record as exhibits or evidence. For appeals to the High Court from the magistrates' court more is expected. In addition to the record of appeal, similar to that lodged at the Court of Appeal, the original record ought to be made available. That is the effect of Order 42 rule 15(1)(2) of the Civil Procedure Rules. Indeed, under Order 42 rule 15(1), the appellate court should notify the trial court of the filing of the appeal, whereupon the trial court ought, by virtue of rule 15(2), to release its original records. The trial court cannot be expected to comply with Order 42 rule 15(2) unless notice has been served on it. For avoidance of doubt, Order 15(1)(2) reads as follows:

“(1) When a memorandum of appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred.

(2) The court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.”

6. The principles referred to in paragraph 3 of this ruling, for the purpose of the High Court, sitting as an appellate court, should be read together with Article 165(6)(7) of the Constitution of Kenya, which confers upon the High Court a supervisory jurisdiction of subordinate courts, which include the magistrates' courts by virtue of Article 169 of the Constitution. Article 165(6)(7) states as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

7. The High Court exercises a supervisory jurisdiction over proceedings conducted by a magistrate's court. That jurisdiction is also subsumed in the appellate jurisdiction of the court, so that a High Court judge seized of an appeal from the magistrate's court, would, in that appeal, be exercising both appellate and supervisory jurisdiction, and in that respect, to properly and effectually discharge its mandate under those two jurisdictions, it must have before it the true original records of all the material that was before the trial court at the time it made the orders the subject of the appeal. It is that critical.

8. As stated above, the Deputy Registrar, in this matter, sought to comply with Order 42 rule 5 (1) of the Civil Procedure Rules, by calling, once he received the memorandum of appeal, for the original records of the trial court, so that the trial court could comply with Order 42 rule 15(2) by making available the records called for. Unfortunately, the Deputy Registrar was let down by the court staff working under him. Rather than dispatch the letter dated 15th February 2017, they just filed it away, hence Order 42 rule 15 was not complied with. The failure to comply with rule 15 means that I cannot determine the matter before me because the record before me is not complete. As I have had occasion to say in a similar case, it is unfortunate and disappointing that an appeal is delayed or cannot proceed because crucial records have not been availed from the magistrate's court. Justice has been delayed because of indolence, laxity and incompetence on the part of court staff, who should at all times be alive to the mantra that justice delayed amounts to justice denied. It is a terrible let down to the Kenyan public who have entrusted us, as Judiciary, with judicial authority.

9. Consequently, it is my order that the Deputy Registrar do, again, call for the original records from the trial court. The matter shall be allocated a date for mention at the delivery of this ruling, for compliance with the directions that I have given here above, and so that I can give further directions on the disposal of the appeal herein.

DATED, SIGNED and DELIVERED in OPEN COURT at KAKAMEGA THIS 18TH DAY OF OCTOBER 2019

W. MUSYOKA

JUDGE