



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J.]

CIVIL APPEAL NO. 70 OF 2018

JAMES ABICH ODERA.....APPELLANT

-VERSUS-

KEGULE ONGUKA.....RESPONDENT

(Being an appeal from the ruling and Order by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 154 of 2012 delivered on 17/05/2018)

JUDGMENT

1. The Appellant herein, **James Abich Odera**, filed *Rongo Senior Resident Magistrate's Civil Suit No. 154 of 2012* (hereinafter referred to as '**the suit**') against the Respondent herein, **Kegule Onguka**. The suit was filed on 16/08/2012. It was a claim for Kshs. 94,500/=.
2. The suit was dismissed on 18/02/2016 for want of prosecution. On 01/12/2017 the Appellant filed a Notice of Motion evenly dated. He sought to review and set aside the dismissal order. I will hereinafter refer to the Notice of Motion as '**the application**'.
3. The application was heard and a ruling rendered on 17/05/2018. The application was dismissed with costs.
4. Aggrieved by the ruling and order, the Appellant preferred the appeal subject of this judgement. A Memorandum of Appeal was filed on 11/06/2018. Six grounds of appeal were preferred.
5. Directions were taken and the appeal was disposed of by way of written submissions. All parties duly complied. The Appellant contended that the dismissal order was not in consonance with **Articles 50** and **159(2)(d)** of the **Constitution**. Relying on various decisions the Appellant prayed that the appeal be allowed.
6. The Respondent opposed the appeal. He submitted that every litigation must come to an end. He also submitted that the Appellant cannot hide under the guise of mistakes of his then Counsel, if any, to perpetually keep the suit in Court. He also relied on several decisions in calling for the dismissal of the appeal.
7. It is the duty of this Court satisfy itself whether the ruling appealed against ought to be impeached.
8. I have carefully perused and understood the contents of the pleadings, the proceedings, the ruling, the record of appeal, the grounds of appeal, the submissions and the decisions referred to by the parties.
9. I noted an anomaly on the record of appeal. Although the issue was not taken up by the parties I will still deal with it as it goes to the substance and competency of the appeal. It is about the absence of the order arising from the ruling appealed against from the Record of Appeal as well as the lower court record.
10. I will now deal with the effect of the absence of the order arising from the ruling appealed against in the Record of Appeal.
11. Appeals from orders are provided for in **Sections 75** and **76** of the **Act** and **Orders 42** and **43** of the **Civil Procedure Rules** (hereinafter referred to as '**the Rules**').
12. **Order 42 Rule 1(2)** and **Rule 2** of the **Rules** provides as follows: -

1(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or

order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

2. 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.

(emphasis added).

13. There is a clear emphasis of what is appealed against. It can either be a decree or an order. A decree arises from a judgment. An order arises from a ruling. An appeal can only be against a decree or an order. An appeal cannot therefore be solely against a judgment or a ruling. However, an appeal may be against a judgment and the resultant decree or a ruling and the resultant order.

14. The emphasis still goes on. 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).**

(emphasis added).

15. A Record of Appeal is essentially supposed to be complete with all necessary documents. A Court may dispense with some documents from being part of the Record of Appeal. However, no Court can dispense with *the memorandum of appeal, the pleadings or the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal* from being part of the Record of Appeal. Any Record of Appeal which is without the these essential documents is incomplete.

16. Courts have severally dealt with cases of incompleteness of Records of Appeal.

17. The Supreme Court 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* 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.*

18. 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.

19. **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 Act. Before looking at what the Court said I will first reproduce the said Section.

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

(emphasis added)

20. The Court of Appeal then 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”.

21. **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.

22. I will also add my voice on the subject. 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. Further, despite clear provisions on extension of time the Appellant never sought for any extension of time to file the order neither did he explain any difficulty in obtaining the extracted order.

23. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in *Civil Application No. 20 of 2014 Bwana Mohamed Bwana* (supra) ‘such an appeal would be incomplete and hence incompetent.’

24. The absence of the order from the impugned ruling and any certificate of delay renders the appeal incompetent.

25. As I come to the end of this judgment, I wish to briefly touch on two other issues. The first one being that even had I considered the appeal on its merit I would have disallowed it as well. That is because the conduct of the Appellant right from the magistracy goes contrary to the constitutional calling that matters be expeditiously disposed of. The suit was dismissed for want of prosecution after 4 years of inaction. The application was filed close to 2 years post the dismissal order. **Article 10(2)(b)** of the **Constitution** elevates ‘equity’ to the status of a national value and principle of governance. The maxim ‘*Equity aids the vigilant and not the indolent*’ comes to play.

26. The second issue is on the general status of the Record of Appeal. It is pathetic. It seems that it was prepared in such a hurry with little or no care. The record lacks very basic items including an Index. A lot of time is hence spent in trying to locate a document. There is every need to accord sufficient time in preparation of Records of Appeal. They are at the very heart of any appeal.

27. Having said so, the appeal is struck out with costs.

28. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Jura instructed by the firm of Nelson Jura & Co. Advocates for the Appellant.

Mr. Gembe Counsel instructed by the firm of Messrs. Gembe Capis Omolo & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant