

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 145 OF 1984

NDUNYU MUTUNGAAPPELLANT

VERSUS

JAMES NDEMWA ITULURESPONDENT

(Being an appeal from the Ruling of District Magistrate's Court at Kitui in DMCC No. L. 42 of 1977 delivered on 25th June, 1984 by Hon. J.K. Mbugua – DMII)

JUDGMENT

1. This is one of those vexing appeals. Vexing because it is an Appeal that was filed in 1984 and the original file mysteriously disappeared from the registry. At one point, the Respondent claimed that indeed the Appeal had been heard and determined. However, in its Ruling of 24th March, 2017, this court was unable to come across any record to confirm that indeed the Appeal was heard and determined as alleged by the Respondent.
2. The Appeal is against the Rulings of the District Magistrate II at Kitui in DMCC No. L. 42 of 1977. In the said Ruling, dated 22nd June, 1984, the court dismissed the Appellant's Application seeking to set aside the orders of the court granted on 24th August, 1981 which orders confirmed the Judgment of 18th May, 1981.
3. The Appeal is premised on four (4) grounds: that the learned Magistrate erred when he held that there was a full hearing before the Judgment was entered whereas on 22nd November, 1980, the case proceeded ex-parte; that the Magistrate erred by stating that in 1980, the Magistrates Amendment Act No. 14 of 1981 became operational and that the Magistrate erred when he held that Mr. Musyoka was and has always been the Applicant's advocate.
4. The Appeal proceeded by way of written submissions. The Appellant's counsel submitted that the Appellant was not served with a hearing notice and was not aware of the date the matter came up for hearing; that the court proceeded to hear witnesses of the Plaintiff in the absence of the Defendant and that it was the Plaintiff who should have filed an Affidavit of service showing that he served the Appellant with a hearing notice.
5. The Respondent's advocate submitted that the suit was fixed for hearing in the lower court on 21st November, 1978; that both parties and their advocates were present when the matter was adjourned to 18th and 19th November, 1980 and that the Appellant and his advocate were absent on 18th November, 1980.
6. Order 42 Rule 13(4) provides the documents that should be included in the Record of Appeal, for the court to be able to determine the same. The said documents include the Memorandum of Appeal, the pleadings, the notes of the trial Magistrate, all documents that were produced during the hearing and Judgment or order appealed from.
7. Although the Appellant was given leave to reconstruct the file after the original file was misplaced, he did not file all the copies of the pleadings that were before the lower court. Indeed considering that the matter in the lower court was heard and determined, it was imperative for the Appellant to file a copy of the Plaint to enable this court to understand the dispute that was before the lower court.
8. The failure by the Appellant to include in the Record of Appeal the Plaint that was filed in the lower and the Application that gave rise to the Ruling under challenge renders the Appeal incompetent and bad in law.
9. In the circumstances, I strike out the Appeal but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE