



**Ogutu v Opondo (Environment and Land Appeal 46 of 2021)
[2024] KEELC 4169 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 46 OF 2021**

AY KOROSS, J

MAY 23, 2024

BETWEEN

MATHEW OOKO OGUTU APPELLANT

AND

FRANCIS OTIENO OPONDO RESPONDENT

*(Being an appeal from the judgment of SRM Hon. Odhiambo
delivered on 2/7/2018 in Ukwala ELC Case No. 11 of 2018)*

RULING

1. The impugned judgment was rendered by the learned trial magistrate on 2/07/2018 which is close to 6 years ago. Being aggrieved by the decision, the appellant exercised his right to appeal as envisaged by Section 79 (G) of the *Civil Procedure Act* and lodged his appeal on 13/07/2018 which was barely 6 days after the impugned decision was rendered.
2. Bearing in mind the swiftness with which he filed his memorandum of appeal and with anxiety, he expected this court to promptly dispose of the appeal either way.
3. However, with no fault inputted on him or this court but squarely at the doorstep of the lower court, the appellant's quest for justice in seeking for this court to re-assess the lower court record including adduced evidence, and arrive at an independent decision hit a snag- the lower court record has been missing for over 6 years. This denied the appellant access to justice and hindered this court from admitting the appeal for hearing.
4. The appellant's situation in seeking justice for close to 6 years at no fault of his own but as a result of laxity by the court's administrative systems is quite appalling, interferes with the efficient administration of justice, and impairs public confidence in the judiciary as a public institution.



5. No doubt, instead of the lower court administering justice, it frustrated and abused its mandate and became an impediment to justice. Further, it failed to safeguard the interests of the very people it is called upon to serve.
6. This court and the appellant have consistently written to the lower court to avail the lower court record to no avail. It never bothered to write a single letter to explain the circumstances under which the lower court record could not be availed to this court. It is astounding and commendable that the appellant and his counsel Mrs. Margaret Opondo still had a glimmer of hope that eventually, justice would be nigh.
7. The conduct of the lower court should not be tolerated as judicial staff, may for malicious motives or ulterior motives hide, tamper or mutilate files to the detriment of the people the judiciary serves thus interfering with society's good order and impeding access to justice.
8. The Supreme Court of Kenya in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR in considering an appeal from the decision of the Court of Appeal of *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR expressed itself very strongly on the essence of court records in the following terms: -

“(48) The importance of the record of a Court, particularly for a Court of record, such as the High Court, cannot be gainsaid. We agree with learned counsel for respondent, Mr. Muite, that the record of a Court of record is a fundamental reference-point in the administration of justice. We have perused the Court of Appeal Ruling granting certification, and we find no fault with its observations and findings, as regards this vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave, indeed reinforced the public-interest element in this issue, that speaks to its nature, as a matter of general public importance, when it held thus:

“...we must also concede that upon hearing the forceful submissions made before us by Mr. Muite for the applicant, we cannot but conclude that the issue of the character of superior Courts as Courts of record and the consequences of absence or incompleteness of the record, where rights are determined with finality on the basis of what ought to be on that very record, is neither shallow nor idle. Rather, formulated in the precise manner in which it was before us, the issue appears to us to have far-reaching consequences and implications on the integrity of the adjudicative processes of the Courts...”

The Court of Appeal proceeded as follows:

“The Supreme Court’s final and authoritative pronouncement on the issue presented is what in our view, will finally put this long-drawn out dispute to rest.

“The matter before us brings to the fore the peril to justice that is daily presented to systematic weaknesses both in recording of Court proceedings and in the maintenance, security, and preservation of the same. A long-hand, manual recording of proceedings by the



concerned judicial officer as opposed to an independent automated system within built accuracy and integrity safeguards will continue to plague our Courts, yet they are, and must remain and be seen to be, Courts of record.

“The importance of the record is self-evident from the very definition of a Court of record. The learned Indian author P. Ramanatha Aiyar, in *The Major Law Lexicon*, 4th Ed. 2010, Vol. 2 at para. 1611 states that a Court of record is:-

‘a Court where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony... a Court that is bound to keep a record of its proceedings ... ‘Recordum’ is a memorial or remembrance in rolls of parchment, of the proceedings and acts of a Court of justice ... But legally records are restricted to the rolls of such only as are Courts of record, and not the rolls of inferior courts (Coke, Litt.260a)’

“The obligation to keep a record of its acts, proceedings and decisions would then appear to be of the very essence and character of a Court of record: ‘a Court of record necessarily requires some duly authorized person to record the proceedings’ as was stated in *Ex. Parte Cregg*, 6 Fed, Cas. No. 3. 380 2 curt. 98.”

(49) The question of missing records has been of concern to the Courts, time and again. Many are the occasions when the Court has ordered for the reconstruction of Court files (which form part of the Court record). In some cases, reconstruction has failed to yield the desired results; and this appears to be the case, in the instant matter.

[50] The centrality of the Court record, thus, goes to the principle of access to justice, in the terms of Article 47 of the Constitution. Indeed, this is a matter of general public importance. It is, however, a separate question as to whether the Appellate Court was right in granting leave to appeal to this Court³an issue to which we now advert.”

9. The court is privy that the appellant in a final attempt to have his day before this appellate court, filed an application for reconstruction of the lower court file which was dated 13/09/2023.
10. Upon hearing him, the lower court issued orders in his favour and a skeleton file was opened. This file was remitted to this court as the lower court record. Nonetheless, upon its perusal by this court, it emerges it only contains parties’ pleadings and in my honest view, it cannot meet the threshold to



warrant admission of the appeal for hearing as envisaged by Order 42 Rule 13 (4) of the Civil Procedure Rules which stipulates: -

- “(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—
- (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).”

11. Unquestionably, the reconstructed file that was remitted to this court by the lower court will not meet the intended results as it is bereft of recorded and typed proceedings, adduced evidence, judgment, and decree which are the pillars upon which, this court can re-assess the evidence as adduced before the lower court and consider whether based on law and evidence, it will interfere with the learned trial magistrate’s exercise of discretion.
12. As an appellate court, this court is constrained to only consider presentations made before the trial court unless leave is granted to adduce additional evidence on appeal. In other words, this court can only proceed to hear the appeal based on the trial court record.
13. However, this court finds it is not tenable in the circumstances of this case for it to proceed one step further without the complete lower court record. Thus, this court shall in the exercise of its inherent powers under Section 3A of the Civil Procedure Act and by powers bestowed upon it by Section 78 (1) (e) of the Civil Procedure Act, order a retrial. Ultimately, this court now issues the following disposal orders: -
 - a. A new trial is ordered at Ukwala Law Courts to be presided over by a magistrate who is seized of the requisite pecuniary jurisdiction other than Hon.Odhiambo, who heard the original suit.
 - b. The head of the station, Ukwala Law Courts, shall ensure that the new trial is conducted expeditiously and latest within one year from the date of this ruling.
 - c. This file is hereby effectively marked as closed.



It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

23/5/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mrs. Opondo for the appellant

Respondent - present

Court assistant: Ishmael Orwa

