



**Hassan v Abdi & another (Environment and Land Appeal
E116 of 2022) [2024] KEELC 5658 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E116 OF 2022**

**LN MBUGUA, J
JULY 18, 2024**

BETWEEN

AL SAWAE MOHAMMED ABDULQDDER A HASSAN APPELLANT

AND

MOHAMED ABDULLAHI ABDI 1ST RESPONDENT

HALIMA MAALIM IBRAHIM 2ND RESPONDENT

RULING

1. The 1st Respondent's Notice of Motion dated 10.11.2023 is for determination. He seeks orders to expunge/strike off documents at page 177 to 242 and the typed proceedings and ruling at page 246-256 of the record of appeal. He also seeks orders that the record of appeal dated 8.8.2023 be struck off for being incomplete and for lacking primary documents.
2. The application is based on grounds on its face and on the 1st Respondent's supporting affidavit sworn on 10.11.2023. He avers that he is a tenant of the appellant at shops No. A010 and A011 on ground floor of the building known as Sawa Towers formerly Al-haqq Plaza on LR No.36/VII/451, Eastleigh.
3. That the Appellant filed the record of appeal on 8.8.2023, contrary to the orders issued by this court on 19.4.2023 which required the record to be filed within 45 days from the date of the ruling.
4. That the Appellant upon filing the record of appeal has introduced new documents which did not form part of the trial and that he has also introduced a new cause of action at the appeal stage by attempting to introduce a new party who was not part of the proceedings in the tribunal.
5. He avers that the documents produced from page 177 to 256 of the record of appeal were not part of the Tribunal proceedings.



6. He also avers that the ruling at page 249-256 of the record of appeal does not form part of the record of appeal as it relates to a completely different tenant, one Mohamed Nuur Abdullahi and relates to Nairobi BPRT Case No. 909 of 2020.
7. He contends that the certified ruling and order in the record of appeal which are primary documents to the appeal are not annexed.
8. The application is opposed by the Appellant vide his replying affidavit sworn on 24.11.2023. He points out that his advocates did inform this court of the difficulties they had in obtaining typed proceedings and ruling from the tribunal, of which they sought for more time and the court obliged; hence the late filing of the record of appeal.
9. That all documents included in the record of appeal are copies of all pleadings filed in the Business Premises and Rent Tribunal case, which were retrieved from the e-filing portal, their case file and the court file.
10. He avers that the prayers to expunge pages 177-256 of their record of appeal seeks to exclude and silence the 2nd Respondent who is the actual tenant of Shop A010 and A011 and who has always been a party to the proceedings herein, having been enjoined at the behest of the 1st Respondent vide a Notice of Motion dated 21.1.2021.
11. He contends that in acquiring the suit building from its previous proprietor, numerous tenants have filed various complaints at the Tribunal which raised similar issues and related to the subject matter herein thus the Chairperson of the Tribunal consolidated some of the matters which are; BPRT case No. 909 of 2020, 915 of 2010 and 859 of 2020 and 857 of 2020 of which the ruling in PBRT 909 of 2020 applied to all the 3 consolidated matters.
12. The 2nd Respondent did not file a response to the 1st Respondent's application.
13. The application was canvassed by way of written submissions. The 1st Respondent's submissions are dated 22.5.2024 where he argues that the omission of the ruling and order appealed against is fatal as the same are primary documents that cannot be lodged by way of a supplementary record. The case of *Commercial Bank of Africa Ltd v Ndirangu* [2000] 1 EA 29 is relied upon.
14. The case of *Mohammed Aden Abdi v Abdi Nuru Omar & 2 Others* [2007] eKLR is cited to submit that this court has inherent power to strike out an appeal where a record of appeal fails to contain one or more of the primary documents.
15. The Appellant did not file submissions.
16. This appeal was triggered by the ruling of the Business Premises Tribunal in Nairobi BPRT Case No. 857 of 2022 delivered on 23.9.2022. The 1st Respondent seeks to have the entire suit struck out on the basis that the record of appeal was filed out of time, that the documents at page 177 to 256 of the Appellant's record of Appeal are not competent, and that the primary documents are missing from the record of appeal.
17. This court has perused the entire record. I find that vide the ruling in this appeal dated 19.4.2023, where the appellant had sought for time to lodge on appeal, the court gave orders that the appeal was to be filed and served within 30 days, while the record of appeal thereof was to be filed 45 days after the filing of the appeal. The records indicate that the memorandum of appeal was filed in time on 5.5.2023. However, the record of appeal dated 8.8.2023 was filed out of time on 5.10.2023.



18. The appellant avers that they had difficulties in obtaining some documents from the tribunal, hence his counsel requested for more time from the court. Indeed the proceedings of this court of 18.7.2023 do indicate that the appellant was granted more time to lodge the appeal. The striking of the appeal on that ground fails.
19. On the documents at page 177-256 of the record of appeal, I find that by and large, most of those documents are irrelevant in the matter as they were lodged after the date of the impugned ruling and majorly concerns applications dated 7.11.2022, 28.11.2022 and 8.12.2022 along with the annexures. The fact that they are irrelevant is not fatal to the suit as they can simply be disregarded.
20. The document (a tribunal order) at page 208 relates to case no 909 of 2020 and it also applies to the case 857 of 2020, which means that documents filed in relation to that other case 909 of 2020 would be relevant. Thus the court declines to expunge the document in question.
21. The 1st Respondent also argues that the record of appeal is bereft of the ruling and order appealed against. The court has perused the record and indeed neither the decree nor the ruling appealed against have been attached. This is despite the fact that the documents in question are in the original file, having been typed and certified. The explanation given by the appellant in relation to the ruling at page 249 to 256 of the record of appeal is that several matters were consolidated including BPRT Case No. 909 of 2020 by the Chairperson of the Tribunal including Nairobi BPRT Case No. 915 of 2020, *Muna Abdifatab v Al-Sawae Mohamed Abdulqader A. Hassan*, and Nairobi BPRT Case No. 857 of 2020, *Mohamed Abdulabi Abdi v Al-Sawae Mohamed A. Hassan*.
22. At paragraph 28 of the replying affidavit of the appellant, he depones as follows on the issue.

“ Furthermore, my advocates have informed me, the same I believe to be true that in obtaining the Ruling that precipitated the instant appeal herein, they were informed by the Registry staff at the Business Premises and Rent Tribunal of the position stated in paragraph 27 above and were provided with the ruling of BPRT 909 /2020 which was to serve as the Ruling in BPRT 857/2020.” Emphasize added.
23. The appeal herein is clear, that it was lodged against the decision of the tribunal dated 23.9.2020 in the case BPRT 857/2020. The ruling availed at page 249 - 256 in the record of appeal is in relation to case No. 909 of 2020 in *Mohamed Nuur Abdullabi Tenant/Applicant v Al-Sawaw Mohamed Abdulqader A Hassan* Landlord/Respondent and relates to the land lord’s application dated 1.12.2021 in which orders were sought for review of the orders given on 1.11.2021. There is no order made to the effect that the said ruling was to apply to any other matter!
24. The following day of 23.9.2022, another ruling (the one relating to this appeal was delivered. The same was filed in the case BPRT 857/2020 and concerns the tenants application dated 26.10.2020, tenants application dated 21.1.2021 and land lords application dated 22.1.2021. It is clear beyond peradventure that the ruling at page 249-256 of the record of appeal is completely unrelated to the ruling appealed against in this appeal. Thus the primary document which is the impugned ruling of 23.9.2023 is missing from the record of appeal and that the one at page 249 to 256 of the record of appeal cannot be a substitute thereof.
25. The court has considered the provisions of Order 42 Rule 2 and rule 13 (4) (f) of the *Civil Procedure Rules* which outline the requisite documents that ought to be provided before an appeal is admitted to hearing.



26. Further, the court is guided by the decision of the Supreme Court of Kenya in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR where it was held that;

“....An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

27. An incomplete appeal is not a procedural issue that can be cured under Article 159 of the *Constitution*, it is a jurisdictional point. In the circumstances, this court has no jurisdiction to consider the Appellant’s incomplete appeal. The upshot of the findings of this court are that the application dated 10.11.2023 is found to be merited. The net effect is that this entire suit is hereby dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Madawo for Appellant

Court assistant: Eddel

