Bakari v Kioko & another (Environment and Land Appeal E012 of 2021) [2025] KEELC 620 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEELC 620 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E012 OF 2021

AY KOROSS, J

FEBRUARY 18, 2025

BETWEEN

IMU BAKARI ..... APPELLANT

AND

JANE MUNYIVA KIOKO ..... 1ST RESPONDENT

KATELEMBO ATHIANI MUVUTI CO-OPERATIVE SOCIETY LIMITED ..... 2ND RESPONDENT

(his is an appeal from the judgment of PM Hon. C.N. Ondieki, delivered on 25/03/2021 in Machakos CM ELC Case No. 869 of 2014)

RULING

Background of the appeal

1. This matter was scheduled for judgment today; however, as will be demonstrated later in this ruling, I have to render a ruling instead of a judgment.

2. To contextualise the appeal, before the trial court, the appellant was one of the defendants and the 2nd respondent was his co-defendant. The 1st respondent was the plaintiff.

3. At the heart of the dispute was land plot no. Kyumbi Trading Center/90 (suit property) whose ownership was allegedly derived from the 2nd respondent by both the appellant's wife Saida Mbinya Bakari (Saida) and the 1st respondent.

4. It is noteworthy that Saida was never made a party to the proceedings, whereas the 2nd respondent did not appear and file a defence.

5. Furthermore, a judgment entered against the appellant and 2nd respondent of 11/09/2015 (the previous judgment) was set aside on 24/10/2019 by a ruling of the trial court.

6. In a plaint dated 4/11/2014, the 1st respondent contended she had purchased the suit property, a subdivision of I.R. nos. 4379 and 4996 (mother parcels) from the 2nd respondent at a consideration of ksh.40,000/-, which she duly settled.

7. According to her, the 2nd respondent had been reluctant to issue her a certificate of lease and surprisingly on 2/11/2014, she found the appellant had trespassed on the suit property by illegally fencing it off and on inquiry, he stated he had purchased the suit property from undisclosed persons.

8. She stated that being the legal allottee, no one could claim the suit property and sought the following reliefs from the trial court: -

    a. A declaration that she was the suit property's legal owner.

    b. An order of permanent injunction restraining the appellant and 2nd respondent from entering, trespassing, alienating, transferring, subdividing or in any manner interfering with the suit property whether by themselves, agents, servants or any other persons claiming under them.

    c. Costs of this suit.

9. Upon judgment being set aside, the appellant by the law firm of M/s. Nzei & Co. Advocates filed a defence dated 4/11/2019. By it, he denied the assertions made in the plaint, stated he was a stranger to the assertions and that the suit property lawfully belonged to Saida.

10. He asserted Saida had purchased it from John Nyamai Ndua (John) at a consideration of ksh.700,000/-, a transfer was made and the 2nd respondent had affirmed Saida's ownership.

11. Moreover, he averred in the alleged execution of a court order, the 1st respondent in April 2019 illegally trespassed on the suit property and replaced the fence therein with her own.

12. Therefore, according to him, there was no cause of action against him, the suit was incompetent, and bad in law and urged the court to dismiss the suit.

13. The matter proceeded to a hearing and the appellant testified as DW1. His evidence was led by John (DW2), Saida (DW3) and Daniel Nthiyani Mutisya (DW4). Their evidence was composed of adopted witness statements, oral testimonies and documents produced as Dex.1-7.

14. The 1st respondent was the sole witness (PW1), and as earlier stated, the 2nd respondent did not participate in the proceedings. The 1st respondent's evidence was composed of her adopted witness statement, oral testimony, and documents she produced as Dex.1-8.

15. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed 2 issues for resolution; who is the rightful owner and/or lawful owner of the suit property and whether the costs of this suit should be awarded.

16. In his conclusions on these issues, the learned trial magistrate decided that effective 19/08/1997, the 2nd respondent held the suit property in trust for the 1st respondent and did not have powers to re-allocate it to John who in turn sold it to Saida.

17. Additionally, the learned trial magistrate declared the 2nd respondent's repossession of 2007 as illegal, null and void, a cause of action did not exist against the appellant, found the 1st respondent had proved her case and awarded costs to her.

18. Consequently, the learned trial magistrate issued the following final orders:

    a. A declaration the 1st respondent is the lawful owner of the suit property.

b. A declaration the 2nd respondent having held the suit property in trust for the 1st respondent, had no power to repossess or transfer it to a 3rd party.

c. A declaration the purported repossession of the suit property by the 2nd respondent was illegal, null and void.

d. An order of specific performance against the 2nd respondent directing it to within 90 days, take all appropriate steps towards facilitating the transfer of the suit property to the 2nd respondent.

e. An order of permanent injunction restraining the appellant and 2nd respondent from entering, trespassing, alienating, transferring, subdividing or in any manner interfering with the suit property whether by themselves, agents, servants or any other persons claiming under them.

f. Costs of the suit be borne by the 2nd respondent.

Appeal to this court

19. Dissatisfied by the impugned judgment, the appellant filed their memorandum of appeal dated 26/03/2023 which faulted the learned trial magistrate on 15 grounds.

20. Being aware of the shortcomings of the grounds as they were not concise and repetitive, in submissions dated 29/05/2024 filed by the law firm which represented them in the lower court, he abandoned some of the grounds and consolidated others.

21. The residual grounds faulted the learned trial magistrate for: -

a. Concluding there was a cause of action against the appellant.

b. Erring in law and fact by finding no title passed from the 2nd respondent to John.

c. Erring in law and fact by adjudicating on issues not pleaded or presented to the court by the parties.

d. Erring in law and fact in misapplying the doctrine of constructive trust and entering judgment in the 1st respondent's favour.

22. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment and enter judgment in the appellant's favour, award costs of the appeal and the lower court suit to him, and lastly, any other relief that may appear just to be granted.

Submissions.

23. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions were highlighted earlier herein and they argued the appeal on the summarised grounds.

24. In submissions filed by her law firm on record M/s. D.K. Muema & Associates Advocates, the 1st respondent filed written submissions dated 31/07/2024 and framed several issues for determination.

25. They were whether the suit property was rightfully registered in 1st respondent's name, whether the doctrine of constructive trust applies to the 1st respondent, whether the 1st respondent had a sufficient cause of action against the appellant, whether or not the appeal should be struck for being incomplete and who should bear the costs. The 2nd respondent did not participate in these proceedings.

26. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' arguments on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments

Issues for determination

27. This being the first court of appeal, this court is reminded that the task at hand is to reappraise, reassess, and reanalyse the evidence as asserted by the parties and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not.

27. This court has the power to frame issues it considers pertinent for the determination of a dispute between the parties. The Court of Appeal in the case of Ratilal Gova Sumaria & another v Allied Industries Limited [2007] eKLR expressed itself on the role of a 1st appellate court as follows:

> " This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see Peters Vs. Sunday Post Ltd [1958] E.a. 424. Selle & Another Vs. Associated Motor Boad Co. Ltd. & Others [1968] E.a. 123 And Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu [1982-88] 1 Kar 278. In The Last Case Hancox JA (as he then was) put it thus at p. 292 of the Report: -
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> "A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."".

27. Reminding itself of the role of an appellate court, I have carefully considered the records, parties' rival submissions, provisions of law and authorities relied upon, and the issues that arise for determination are:-

a. Whether the appeal is incompetent.

b. Having concluded there was no cause of action against the appellant what consequential orders should have ensued?

c. Whether the doctrine of audi alteram partem was contravened.

d. Whether the impugned judgment decided on matters not pleaded by the parties.

e. What orders should this court issue including an order as to costs?

30. This court shall address these issues in a consecutive manner.

Analysis and determination

I. Whether the appeal is incompetent

31. I have carefully perused the records and I have not sighted a decree suffice to say, I must agree with the 1st respondent's counsel that the record of appeal lacks a decree. Pointedly, the appellant's counsel did not address me on this issue. The question that arises is whether this is fatal.

32. The legal framework for lodging an appeal from the subordinate court to this court is provided for in Section 16A (1) of the *Environment and Land Court Act* (ELC Act) in the following terms: -

> " All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act* (Cap. 8D), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

33. A similar provision is also found in Section 79 (G) of the *Civil Procedure Act* while Section 65(1) of this same Act states as follows: -

> " Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
>
> (a) deleted by *Act No. 10 of 1969*, Sch.;
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> (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;
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> (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."

34. In giving effect to these provisions of law, Order 42 Rule 2 of the Civil Procedure Rules provides: -

> " 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.

35. In addition, Order 42 Rule 13 (4) of the Civil Procedure Rules outlines

> " 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—
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> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (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.

36. Although this Order 42 Rule 13 (4) of the Civil Procedure Rules seems to suggest either a decree, order or judgment could suffice, this provision of law cannot be read and interpreted in isolation but has to be read conjunctively with Section 16A (1) of the ELC Act, Sections 65 (1) and 79 (G) of the *Civil Procedure Act* and Order 42 Rule 1 (2) and Order 42 Rule 2 of the Civil Procedure Rules.

37. From these provisions of law, it emerges one of the backbones of an appeal is a decree since it is the date from which time is computed, it is the basis upon which an appeal lies and it is the crux from which the grounds of appeal are derived from.

38. In my humble view, the absence of this crucial document from the record of appeal is a jurisdictional issue. In addition, I wish to emphasize this issue is not novel and has been the subject of interpretation by other courts whose decisions are binding on this court and this court adopts their positions which shall shortly be highlighted.

39. In the Court of Appeal case of Gregory Kiema Kyuma v Marietta Syokau Kiema [1988] eKLR, Apaloo JA interpreted Section 65 (1) and79 (G) of the *Civil Procedure Act* and the then Order 41 Rule 1 A of the Civil Procedure Rules which is alike with the current Order 42 Rule 2 of the Civil Procedure Rules in the following words: -

> “ 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 section contemplates that the appeal is against a decree or order, the appellant is obliged to file 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.
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> Rule 1 A of Order 41 permits this latter document to be filed “as soon as possible and in any event within such time as the Court may order”

40. The Supreme Court of Kenya weighed in on this issue in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR where in paragraph 41 of its judgment, it found as follows: -

> “ Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:
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> “A court is competent, that is to say, it has jurisdiction when–
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> 1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

2. the subject matter of the case is within its jurisdiction, and no feature in the case ..... prevents the court from exercising its jurisdiction; and

3. the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction" (emphasis supplied)."

41. The 1st respondent's counsel has argued that this court should strike out not only the record of appeal but the entire appeal and has placed reliance on several persuasive decisions that are not binding on this court and the Court of Appeal decision of Chege v Suleiman [1988] KECA 131 (KLR)

42. Taking a contrarian position as that of the appellant's counsel, other persuasive decisions have held that for purposes of an appeal, a judgment is equated to a decree.

See Jeremiah and Brothers Contractors & Benson Wanjau Kahiu v Simon Njoroge Maina [2020] KEHC 1976 (KLR)

43. Significantly, the procedural rules of the Supreme Court and those of the Court of Appeal are distinct from those applicable to this court.

44. Drawing guidance from the persuasive decision of Loopa & another (Suing as the legal representative of the Estate of Stephen Ng'ulia (deceased) V Technoplast Ltd [2022] KEHC 13597 (KLR) and the overriding objectives provided for under Section 1A and 1B of the *Civil Procedure Act*, this court shall consider the wider interests of substantial justice as striking out of the appeal for want of a decree is draconian.

45. In conclusion and from the foregoing, it is my finding that the record of appeal has not fulfilled its prerequisites, it is incompetent and fatally defective. Because of this finding, a determination of the other issuesis unnecessary. I hereby strike out the record appeal, and since costs follow the event, I award costs to the 1st respondent of kshs. 20,000/=.

46. To this end, I hereby issue the following final disposal orders: -

a. That the record of appeal is hereby struck out with costs to the 1st respondent of ksh.20,000/=.

b. That the appellant shall file a complete record of appeal and pay the 1st respondent's costs within 14 days hereof and in default, the entire appeal shall stand dismissed with costs to the 1st respondent.

c. Mention for further directions on 8/04/2025

Orders accordingly.

DATED AT MACHAKOS THIS 18TH DAY OF **FEBRUARY, 2025**

HON A.Y. KOROSS

JUDGE

18/02/2025

Delivered virtually through Microsoft Teams Video Conferencing platform

In the presence of

Mr. Muema for 1st Respondent

Mr. Mundia holding brief for Mr. Nzei for appellant.

Ms Kanja – Court Assistant