



**Aloo v Achiego (Land Case Appeal E018 of 2023)
[2024] KEELC 6847 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND CASE APPEAL E018 OF 2023
AY KOROSS, J
OCTOBER 17, 2024**

BETWEEN

FREDRICK ONYANGO ALOO APPELLANT

AND

WILKISTER ATIENO ACHIEGO RESPONDENT

*(Being an appeal from the judgment of the PM Hon. Mr. J.P.Nandi
delivered on 9/11/2023 in Bondo ELC Case No. 18 of 2018)*

RULING

Background of the appeal

1. This matter was scheduled for judgment today however, I have to render a ruling instead of a judgment as shall be demonstrated later in this ruling.
2. This is the 2nd time the appellant is appealing to this court against the decision of the honourable learned trial magistrate.
3. In considering the appeal that was filed for the 1st time by the appellant against the respondent in Siaya ELCA No. 21 of 2021, this court in its judgment rendered on 27/10/2022 set aside in entirety the judgment of the learned trial magistrate rendered on 18/12/2020.
4. Accordingly, in its judgment, this court ordered the land registrar and government surveyor (government officers) to visit North Sakwa/Nyawita/5823 (suit property) that was registered in the respondent's name, a public road, and North Sakwa/Nyawita/7799 (appellant's land) that is registered in the appellant's name and fix and demarcate the boundary between these parcels of land and the public road. The two parties are relatives.

5. Additionally, this court ordered these government officers to file their reports before the trial court before the matter could be set down for hearing. It also issued an order maintaining the status quo pending the hearing and determination of the suit afresh.
6. In compliance with the orders of this court, the government officers conducted a site visit on the disputed parcels of land and public road on 13/12/2022 and implemented the orders of this court. They also filed a report before the trial court on 28/06/2023.
7. Having set down the background of the appeal and orders that needed to be complied with before the matter was heard afresh, it is paramount to juxtapose the nature of the parties' cases that were before the trial court.

Parties' cases and trial

8. In an amended plaint dated 24/04/2019, the respondent contended that the appellant in the year 2015, trespassed on the suit property which measured 0.51 hectares.
9. She averred that the respondent had put up structures on it and was even cultivating it. She averred that her plea for intervention from the local administration against the appellant from continuing to trespass on the suit property fell on deaf years. She averred that the appellant's actions had caused her loss and damage which she particularised.
10. She sought inter alia, (i) a declaration that she owned the suit property (ii) injunctive orders be issued restraining the appellant from trespassing on the suit property, and (iii) eviction, general damages, costs, and interests.
11. The appellant entered an appearance and filed an amended defence dated 22/03/2019 which was mostly composed of denials. He averred that the suit property originally emanated from land parcel no. North Sakwa/Nyawita/495 while his parcel of land no. North Sakwa/Nyawita/7799 originally emanated from North Sakwa/Nyawita/491.
12. The appellant further averred that the respondent was not the registered owner of the suit property and she lacked locus standi to institute the suit. He also asserted that the plaintiff's suit was unmerited, an abuse of the court process, and incompetent. Consequently, he prayed for the suit's dismissal with costs to him.
13. The matter was slated for hearing and both parties testified with the respondent testifying as PW1 and the appellant as DW1. As to the reports filed by the government officers, the counsels agreed for their physical attendance to be dispensed with and for them to canvass the issues raised therein by written submissions. Consequently, this consent was adopted as an order of the court on 19/09/2023.
14. During the hearing, the plaintiff produced several documents that were marked as Pex1- 3 and they were respectively composed of a title deed to the suit property, a map, and a survey report dated 9/11/2019 that was filed by Geoflex Consultant's Ltd (respondent's survey report).
15. The appellant correspondingly produced several documents which were marked and produced as Dex 1-12 and amongst others, they were composed of the survey report by Opiyo & Associates (appellant's survey report), confirmation of grant, documents in respect of various court proceedings, green cards over various parcels of lands, correspondence, and certificates of official searches.
16. Upon closing parties' cases and submissions being filed, the learned trial magistrate in his impugned judgment identified 3 issues as arising for determination; whether the respondent was the registered

owner of the suit property, whether the appellant had trespassed on the suit property, and whether the respondent was entitled to the reliefs sought.

17. Upon analysis, on the 1st issue, the learned trial magistrate found in the affirmative, a similar positive finding was made on the 2nd issue while on the 3rd issue, the learned trial magistrate granted several reliefs in the respondent's favour. In other words, the respondent's claim was successful.

Appeal to this court

18. The decision of the learned trial magistrate did not augur well with the appellant. Aggrieved by the impugned judgment, the appellant preferred an appeal to this court, and in his memorandum of appeal dated 6/12/2023, he whoopingly raised 20 grounds for appeal.
19. Examining these grounds demonstrates they fall far short of the requirements of Order 42 Rule 1 (2) of the Civil Procedure Rules as they are repetitive, narratively stated matters of evidence, unconcise, and argumentative.
20. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. The nature and form of a memorandum of appeal is set out in this Order 42 Rule 1 (2) in the following manner: -

“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.”

21. The appellant appreciated the shortcomings of his memorandum of appeal and in his submissions dated 11/03/2024 which were filed by the law firm on record for him M/s Liko & Anam Advocates, consolidated them into 8 grounds which have been rephrased by this court as follows;
 - a. The learned trial magistrate misapprehended the map and ground situation.
 - b. The learned trial magistrate erred in finding the governmental officials' reports were unchallenged.
 - c. The learned trial magistrate erred in not considering that the government officials' report did not comply with Sections 18(1), 18(3), and 19(3) of the Land Registration Act.
 - d. The learned trial magistrate erred in rendering judgment over non-existent parcels of land.
 - e. The learned trial magistrate failed to consider that the Registry Index Diagram (RID) had not been amended to reflect changes that affected the appellant's land.
 - f. The learned trial magistrate erred in issuing orders that were to be executed by extra-judicial means.
 - g. The learned trial magistrate erred in not awarding the appellant special damages of kshs. 44, 700/- that he paid to the government officials.
 - h. The learned trial magistrate erred in his assessment of general damages.
 - i. The learned trial magistrate erred in not considering the appellant's submissions.
22. Therefore, the appellant urged this court to set aside the impugned judgment and substitute it with an order dismissing the respondent's claim with costs. He also sought for the costs of this appeal.

Parties' submissions

23. As directed by the court, the appeal was canvassed written submissions. The appellant's submissions have earlier been highlighted in this judgment and I need not reiterate.
24. In response, the respondent's law firm on record Ms. Lawi Ogutu & Co. Advocates filed written submissions dated 3/05/2024. This set of submissions raised 8 issues for determination but argued on the condensed grounds of appeal and also raised the issue of whether in the absence of a decree, this appeal could be sustained.
25. Upon identifying and considering the issues for resolution, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and legal authorities they relied upon to advance their respective arguments.

Issues for determination

26. 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. 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: -

“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 myself 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 whether the appeal is incompetent, the condensed grounds of appeal, and what orders should this court including an order as to costs. This court shall address these issues in the following consecutive manner: -
 - i. Whether the appeal is incompetent.
 - ii. If (I) is in the negative, address grounds (a) (b) (e) (f) and (h) together and in doing so, will deal with the issue of the public road and thereafter deal with grounds (c) (d), (g) and (i) separately.
 - iii. What orders should this court issue including an order as to costs?

Analysis and determination

I. Whether the appeal is incompetent

28. I have carefully perused the records and I have not sighted a decree suffice to say, I must agree with the respondent's counsel that the record of appeal lacks a decree. The question that arises is whether this is fatal.
29. 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.”
30. 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.;
 - (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;
 - (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.”
31. In giving effect to these provisions of law amongst other Orders and Rules, 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.
32. In addition, Order 42 Rule 13 (4) of the Civil Procedure Rules outlines the contents of a record of appeal in the following manner: -
- “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.

33. 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.
34. 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.
35. 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.
36. In the Court of Appeal case of Gregory Kiema Kyuma v Marietta Syokau Kiema [1988] eKLR, Apaloo JA interpreted Section 65 (1) and 79 (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.

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”

37. 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:

“A court is competent, that is to say, it has jurisdiction when–

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).”

38. 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 these findings, a determination of issue (II) is unnecessary while on issue (III), I hereby strike out the record appeal, and since costs follow the event, I award costs to the respondent of kshs. 20,000/=.

39. 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 respondent of ksh.20,000/=.
- b. That the appellant shall file a complete record of appeal and pay the respondent’s costs within 14 days hereof and in default, the entire appeal shall stand dismissed with costs to the respondent.
- c. Mention for further directions on 4/11/2024.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

17/10/2024

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of:

Mr. Wesley Gichabe h/b for Mr. Liko for the appellant

Mr. Lawi Ogutu for the respondent

Court assistant: Ishmael Orwa