



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Revenue Authority & 2 others v Mount Kenya Bottlers Ltd & 4 others  
(Petition 41 of 2019) [2021] KESC 26 (KLR) (26 November 2021) (Ruling)**

Neutral citation: [2021] KESC 26 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 41 OF 2019  
PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & W OUKO, SCJJ  
NOVEMBER 26, 2021**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> PETITIONER**

**COMMISSIONER GENERAL OF KENYA REVENUE AUTHORITY .... 2<sup>ND</sup>  
PETITIONER**

**COMMISSIONER OF CUSTOMS & EXCISE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**MOUNT KENYA BOTTLERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY BOTTLERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI BOTTLERS LTD ..... 3<sup>RD</sup> RESPONDENT**

**KISII BOTTLERS LTD ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal to the Supreme Court against the Judgment of the Court of Appeal in Nairobi  
(Karanja, Odek & Kantai, JJA) in Civil Appeal No. 164 of 2013 delivered on 19th July 2019)*

**An attempt by an advocate to conceal material facts in a matter was unethical and a breach of the duties of an advocate as an officer of the court.**

Reported by John Ribia

***Civil Practice and Procedure** – appeals – record of appeal – attachments necessary in a record of appeal – where attachments were not filed - whether a record of appeal that did not contain the required documents relating to the proceedings at the trial court was fatally defective – Supreme Court Rules, 2012 (repealed), rules 33(3) and (4).*

***Advocates** – professional ethics – duty to disclose all material facts that are necessary to arrive at a fair and just conclusion - where an advocate attempted to conceal material facts - whether an attempt by an advocate to conceal*



*material facts of a matter was unethical and a breach of the duties an advocate owed to the court as an officer of the court.*

### **Brief facts**

The Court of Appeal had overturned the judgment and orders of the High Court in Petition No. 72 of 2011. In dismissing the 1<sup>st</sup> to 4<sup>th</sup> respondent's petition, the High Court had held that the petitioners had acted within the law in demanding payment of excise duty on returnable containers and that there was no breach of any constitutional rights of the 1<sup>st</sup> to 4<sup>th</sup> respondents.

Aggrieved by the decision of the Court of Appeal, the petitioners filed the instant petition of appeal and the matter was eventually set for hearing. However, before the hearing and upon perusing the filed pleadings and record of appeal, the Supreme Court noted some serious anomalies: that the petition of appeal omitted any prayer for relief, and that the petition filed in the High Court as well as a substantial part of the affidavit supporting it, was missing from the record of appeal. As such, the court found that it was necessary to ascertain the status of these documents before proceeding to hear the matter.

Counsel for the petitioners indicated that their petition of appeal contained the reliefs sought. It was their submission that the court ought to make pronouncements on the principles of taxation in terms of that paragraph. Counsel further urged the court to allow them to ventilate the matter and not strike out the appeal, arguing that such a move was too draconian and that if necessary, the petitioners should then be allowed to amend the petition. On the other hand, counsel representing the respondents submitted that the petition did not contain any reliefs sought. In that regard, he submitted that the petition could not now be amended and urged that the omission was fatal because the arguments to be advanced by the parties had to result in reliefs that the court could properly grant. It was further contended that there being no reliefs sought, proceeding to hear the matter would be undertaking an academic exercise as a court determined issues pleaded and granted reliefs sought by the parties.

### **Issues**

- i. Whether a record of appeal that did not contain the required documents relating to the proceedings at the trial court was fatally defective.
- ii. Whether an attempt by an advocate of the High Court of Kenya to conceal material facts of a matter was unethical and a breach of the duties an advocate owed to the court as an officer of the court.

### **Held**

1. There were no actual legally recognized reliefs pleaded by the petitioners for the court to grant, the petition of appeal before the court was fatally defective for lack of reliefs sought and ought to be struck out.
2. The record indicated that the instant matter was severally mentioned before the Deputy Registrar for the petitioners to file a supplementary record of appeal. The mentions culminated into a consent dated October 5, 2020 adopted as a court order on October 8, 2020 where the court directed and ordered that the supplementary record of appeal be filed and served within 14 days from the date of recording the consent. The petitioners filed a supplementary record but it only contained the order and proceedings of the Court of Appeal. Therefore, the defect was not cured as the High Court petition and part of the affidavit were still missing.
3. Rule 33(4) of the Supreme Court Rules, 2012 (repealed) which rules were applicable at the time of filing stated that for the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal had to contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub rule (3) and had to further contain the following documents relating to the appeal in the first appellate court being the certificate, if any, certifying that the matter was of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. The petitioners were obligated by law to include all the pleadings and documents relied upon during the hearing in the two superior courts. Failure to comply with section



33(4) of the Supreme Court Rules, 2012 (repealed) was fatal as the window for such compliance was closed. The petition was fatally defective and incurable

4. The Supreme Court was concerned with the demeanour of counsel appearing for the petitioners. Even when he was aware that essential documents were missing from the record of appeal, he intended to proceed with the matter without duly informing the court or the other parties in the matter. That apparent attempt by counsel to mislead the court, fell short of professional etiquette and conduct that was expected from an advocate and officer of the court. It was improper, dishonest, and discourteous for an advocate to deliberately conceal material facts that were important to arriving at a just and fair decision. The Supreme Court frowned greatly upon such behaviour.

*The petition was struck out.*

#### **Orders**

*The 1<sup>st</sup> to 4<sup>th</sup> respondent were to have the costs of the appeal. The 5<sup>th</sup> respondent did not participate in the proceedings in any meaningful way, and therefore was not entitled to any.*

#### **Citations**

##### **Cases**

None referred to

##### **Statutes**

##### ***East Africa;***

Supreme Court Rules, 2020 (Act No 7 Sub Leg) rules 9 (1)(d); 33(4) — (Interpreted)

##### **Advocates**

None mentioned

## **RULING**

- [1] The petition before this court is dated 30<sup>th</sup> October 2019 and filed on 1<sup>st</sup> November 2019, arising out of Judgment of the Court of Appeal (Karanja, Odek & Kantai, JJA) dated 19th July 2019 in Civil Appeal No 164 of 2013. The Court of Appeal overturned the Judgment and Orders of the High Court (Lenaola J, as he then was), in Constitutional & Human Rights Petition No 72 of 2011 delivered on 26th October 2012. In dismissing the 1<sup>st</sup> to 4<sup>th</sup> respondent's petition, the High Court held that the petitioners herein had acted within the law in demanding payment of excise duty on returnable containers and that there was no breach of any Constitutional rights of the 1<sup>st</sup> to 4<sup>th</sup> respondents.
- [2] Aggrieved by the decision of the Court of Appeal, the petitioners filed the instant petition dated 30th October 2019, and the matter was eventually set for hearing before this court on the 22<sup>nd</sup> September 2021.
- [3] However, before the hearing and upon perusing the filed pleadings and record of appeal, this court noted some serious anomalies: that the petition of appeal omitted any prayer for relief, and that the petition filed in the High Court as well as a substantial part of the affidavit supporting it, was missing from the record of appeal. As such, the court found that it necessary to ascertain the status of these documentations before proceeding to hear the matter.
- [4] On 22<sup>nd</sup> September 2021, in open court, the court directed all parties present to address it on two issues:
- (i) whether the petition of appeal contained reliefs or prayers sought; and (ii) whether the record of appeal was incomplete?

#### **i. Did the petition of appeal contain reliefs sought?**



[5] Counsels for the petitioners led by Mr Nyaga indicated that paragraph 14 of their petition of appeal contained the reliefs sought. It was their submission that the court ought to make pronouncements on the principles of taxation in terms of that paragraph. Counsel further urged the court to allow them to ventilate the matter and not strike out the appeal arguing that such a move is too draconian, and that if necessary, the petitioners should then be allowed to amend the petition.

[6] On the other hand, counsel representing the respondents led by Mr Ohaga,SC submitted that it was indeed true that the petition did not contain any reliefs sought. In this regard, he submitted that the petition could not now be amended and urged that the omission was fatal because the arguments to be advanced by the parties must result in reliefs that the court can properly grant. It was further contended that there being no reliefs sought, proceeding to hear the matter would be undertaking an academic exercise as a court determines issues pleaded and grants reliefs sought by the parties.

[7] The impugned paragraph 14 of the petition of appeal, states as follows:

“14. The appellant herein further wishes to have the Supreme Court make pronouncements on the following principles of taxation with a view to build the jurisprudence in taxation:

(a) Article 201 on Principles of Public Finance:

(1) public finance system shall promote an equitable society, and in particular:-

i. The burden of taxation shall be shared fairly”

(b) Article 210 on Imposition of tax:

(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(2) If legislation permits the waiver of any tax or licensing fee-

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and each waiver, and the reason for it, shall be reported to the Auditor”

[8] The guiding rule in this regard is rule 9(1)(d) of the *Supreme Court Rules* of 2012, which states that:

“9(1) A petition filed in the court shall be in Form D set out in the First Schedule and shall contain—

.....(d) the relief sought in the petition and any directions sought pursuant to these Rules.” [Emphasis added]

[9] It is clear to us, from the above excerpt of the appellant’s petition, that there were no actual legally recognized reliefs pleaded by the petitioners for the court to grant, and taking the relevant rules into consideration, we do find that the petition of appeal before us is fatally defective for lack of reliefs sought and ought to be struck out.

#### **ii. Was the record of appeal incomplete?**

[11] As to whether the record of appeal was incomplete, Mr Nyaga agreed that some of the pleadings and other documents were missing from the record of appeal. It was their case that they only realized the documents were missing a day before the hearing. It was submitted that the documents were omitted



during photocopying and while preparing the bundle of documents. Additionally, Counsel urged the court to give them one day to allow them to furnish the missing documents.

- [12] On his part, Mr Ohaga, SC states that the petition as filed at the High Court was not included in the record of appeal, therefore, the Petition as filed before this court is incomplete. He submitted that the court gave petitioners several opportunities to rectify the omission and that the petitioners have known that some documents were missing since October 2019.
- [13] The court notes that the record indicates that this matter was severally mentioned before the Deputy Registrar for the petitioners to file a supplementary record of appeal. The mentions culminated into a consent dated 5<sup>th</sup> October 2020 adopted as a court order before Ibrahim SCJ on 8<sup>th</sup> October 2020 where the court directed and ordered that the supplementary record of appeal be filed and served within 14 days from the date of recording the consent. It is further noted that the petitioners filed a supplementary record on 19<sup>th</sup> October 2020 but it only contained the Order and proceedings of the Court of Appeal. Therefore, the defect was not cured as the High Court Petition and part of the affidavit were still missing.
- [14] Rule 33 (4) of the Supreme Court Rules, 2012 (which rules were applicable at the time of filing) states that:
- “33(4) For the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under subrule (3) and shall further contain the following documents relating to the appeal in the first appellate court –
- (a) the certificate, if any, certifying that the matter is of general public importance;
  - (b) the memorandum of appeal;
  - (c) the record of proceedings; and
  - (d) the certified decree or order.”
- [15] We find that the petitioners were obligated by law to include all the pleadings and documents relied upon during the hearing in the two superior courts. Failure to comply with section 33(4) of the then Supreme Court Rules, 2012 is fatal as the window for such compliance is now closed.
- [16] Before we conclude, it is to be noted that we are concerned with the demeanor of Counsel appearing for the petitioners. Even when he was aware that essential documents were missing from the record of appeal, he still intended to proceed with the matter without duly informing the Court or the other parties in the matter. This apparent attempt by Counsel to mislead the court, in our considered view falls short of professional etiquette and conduct, that is expected from an Advocate and officer of the court. It is improper, dishonest, and discourteous for an advocate to deliberately conceal material facts that are important to arriving at a just and fair decision. We shall say no more, but only to state that this Court frowns greatly upon such behavior.
- [17] From the foregoing, it is clear to us that the petition before the court is fatally defective and incurable. Accordingly, the final orders of this court are as follows:
- (i) The petition herein is hereby struck out.
  - (ii) As costs follow the event, the 1st to 4<sup>th</sup> respondent shall have the costs of the appeal. The 5<sup>th</sup> respondent did not participate in the proceedings in any meaningful way, and therefore is not entitled to any.



[18] It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF NOVEMBER 2021.**

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**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M.K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S.C. WAJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**

**SUPREME COURT OF KENYA**

