



REPUBLIC OF KENYA



KENYA LAW
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**Kings Pride Properties Limited v Mukora (Commercial Case E048 of 2022)
[2025] KEHC 383 (KLR) (Commercial and Tax) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E048 OF 2022
A MABEYA, J
JANUARY 27, 2025**

BETWEEN

KINGS PRIDE PROPERTIES LIMITED APPELLANT

AND

PATRICIA NYAMBURA MUKORA RESPONDENT

*(Being an appeal from the ruling and orders of the Hon. Mr. D. M Kivuti (PM)
delivered on 5th April 2022 at Nairobi in Milimani CMCC 7367 of 2019)*

JUDGMENT

1. This is an appeal against the ruling and order of Hon. D. M. Kivuti dated 5/4/2022. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

2. The background to the appeal is that, the respondent filed a suit in the lower Court against the appellant seeking orders for general damages for breach of the terms of the Letter of Offer and loss of investment opportunities, an order directing the appellant to pay the respondent Kshs. 2,100,000/



- =, costs of the suit and interest on costs and damages at Court rate from date of ascertainment until payment in full.
3. The respondent claimed that the appellant, a real estate agent, promoted the Golden Palm Apartments project in 2015, as a lucrative investment with high returns. The appellant represented that investors would own apartments upon completion of the construction and payment of the purchase price. Enticed by this, the respondent consulted the appellant and was offered a two-bedroom serviced apartment (Unit A4) on the 4th floor for Kshs. 17,500,000/=. The respondent accepted the offer by signing a letter of offer on 5/5/2015, which was also signed by the appellant.
 4. The respondent stated that the letter of offer outlined a payment plan for the purchase price thus: a 20% deposit (Kshs. 3,500,000) upon signing, followed by a sale agreement; 60% (Kshs. 10,500,000) in monthly installments after construction began; and the remaining 20% (Kshs. 3,500,000) upon completion of construction.
 5. The respondent contended that that upon signing the letter of offer, she made several payments to the appellant amounting to Kshs. 2,100,000/=: a fact which is not disputed. However, the appellant failed to provide the sale agreement or update the respondent on the construction progress after the last payment on 21/2/2017. The respondent claimed that the appellant halted and abandoned the construction of the Golden Palms Apartments without notifying her, despite her payments. In the premises, she contended that the appellant breached the terms of the Letter of Offer, thus causing her to suffer loss of Kshs. 2,100,000/=:
 6. On 2/12/2019, the respondent filed a Request for Judgment after the appellant failed to respond to the Summons within the requisite timeframe. Subsequently, an interlocutory judgment was entered in favor of the respondent and the matter proceeded to formal proof hearing on 3/2/2021. In a judgment delivered by the lower Court on 12/3/2021, the Court entered judgment in favour of the respondent against the appellant, directing the appellant to pay the respondent Kshs. 2,100,000/= plus interest from the date of judgment until full payment, along with costs of the suit.
 7. Consequent thereto, the appellant filed a Notice of Motion dated 8/9/2021, seeking orders inter alia that the Court sets aside the judgment dated 12/3/2021 and the consequent decree and grants leave to the appellant to file its defence and defend the claim. The appellant contended that the ex-parte judgment was irregularly obtained due to improper service of court documents. That it was unaware of the suit until served with a Proclamation Notice by auctioneers on 26/8/2021.
 8. The appellant denied receiving the Summons to Enter Appearance or the plaint, alleging that they were served on a casual laborer, Marven Jumba, at a construction site, instead of an authorized officer of the appellant or its front office. The appellant maintained that the lower Court judgment and decree were irregular and contended that it had a defense on merit.
 9. In response, the respondent filed a replying affidavit sworn on 4/2/2022 by herself. She averred that service of Summons to Enter Appearance and the plaint upon the appellant was proper and in compliance with the provisions of Order 5 Rule 3 of the Civil Procedure Rules 2010 as can be seen from the affidavit of service of Oscar Mutie Kilonzo, a Licensed Court Process Server. She contended that the appellant has not demonstrated that the recipient of the summons and the pleadings was a casual labourer.
 10. In a ruling delivered on 5/4/2022, the trial court found no merit in the application and dismissed the same. Aggrieved by the said ruling, the appellant lodged the instant appeal vide a Memorandum of Appeal dated 14/4/2022. The appeal is premised on the grounds which may be summarized as hereunder: -



- i. That the trial court erred in dismissing the appellant's application dated 8/9/2021 by failing to apply the correct legal principles governing such applications;
 - ii. The trial court erred in failing to recognize that the service of the Summons to Enter Appearance and plaint on a casual worker at a construction site did not constitute proper service on a Corporation;
 - iii. The trial court erred by ignoring the draft defense, which raised several triable issues; and
 - iv. The trial court erred in dismissing the said application despite acknowledging that the respondent failed to meet the threshold for a regular judgment.
11. In the end, the appellant sought that the appeal be allowed, the ruling of 5/4/2022 be set aside and substituted with an order allowing its application dated 8/9/2021.
 12. The appeal was canvassed by way of written submissions. The appellant's submissions dated 16/7/2023 were filed on 29/6/2023, while those of the respondent were dated 12/7/2023.
 13. The appellant argued, citing Order 5 Rule 3 of the Civil Procedure Rules 2010, that the service of summons in the primary suit was defective as it was left with a casual laborer at a construction site, contrary to legal requirements. Referring to the Supreme Court case of Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR, the appellant submitted that such service does not constitute proper service on a corporation.
 14. The appellant also cited the Court of Appeal case of Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR, asserting that its defense raised triable issues, including the denial of a contract with the respondent, the appellant's role as an agent or vendor, the party to whom payments were made, and whether any payments were made under the agreement. These issues, the appellant argued, require evidence at trial.
 15. On the other hand, the respondent submitted that the appellant's appeal was incompetent for failing to attach a certified copy of the trial court's ruling and orders, as required by Order 42 Rules 2 & 13(4) (f) of the Civil Procedure Rules 2010 and Rule 14 of the Practice Directions on Standardization of Practice in the High Court 2021.
 16. Citing the Supreme Court case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR, the respondent submitted that this omission undermines the appeal's substance, as the court cannot understand the appellant's complaints. The respondent further argued that this was not a mere technicality that can be remedied under Article 159(2) (d) of *the Constitution* and urged the court to dismiss the appeal.
 17. It was further submitted that the appellant's appeal was defective as it challenged the trial court's ruling of 17/9/2021, which dismissed the appellant's application for non-attendance. The appellant did not appeal that ruling within the timeframe set by Section 79G of the *Civil Procedure Act* but instead filed a second application to reinstate the dismissed application, which application was also dismissed in the ruling delivered on 5/4/2022. In the circumstances, the present appeal could not address the ruling of 17/9/2021.
 18. Citing the case of Mbogo & another v Shah [1968] EA 98, the respondent submitted that service of summons on the appellant was valid, making the trial Court's judgment regular. She relied on the case of Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR, for the proposition that the appellant had failed to show that its defense raised triable issues to justify setting aside the said judgment.



19. It was further submitted that the Letter of Offer was on the appellant's letterhead, signed by its director, and that the appellant admitted receiving Kshs. 2,100,000/= as a deposit. Furthermore, the appellant offered an alternative property when a refund was demanded.
20. I have considered the record of appeal, the rival submissions by Learned Counsel for parties and the authorities relied on. The issues that arise for determination are whether the appeal is fatally defective and whether the appeal is merited.
21. The respondent contended that the appeal was fatally defective for failure to attach a copy of the ruling and/or order appealed against. Appeals are provided for under Order 42 of the Civil Procedure Rules. However, the applicable law to this case is Order 42 rule 2 of the Civil Procedure Rules which provides that:-
- “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 a time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of Act until a copy is filed.”
22. In this case, the appellant's Record of Appeal is dated 31/10/2022. A perusal of the same shows that there is no copy of the ruling and/or order being appealed against. The Supreme Court in the case of *Law Society of Kenya V Centre for Human Rights & Democracy & 12 others* [2014] eKLR in addressing the issue of what constitutes a complete Record of Appeal held that –
- “The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it. If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent.”
23. In the premise, the court finds that the appellant's failure to include a copy of the ruling and/or order appealed against in the Record of Appeal is fatal since the Court has nothing to adjudicate upon. It is worth noting that in an appeal, the Court is required to look at the ruling and/or judgment appealed against alongside the pleadings and evidence adduced before the trial Court, in order to determine inter alia whether the trial Court exercised its discretion within the confines of the law, and whether it applied and/or interpreted the law properly. Therefore, failure to include a copy of the ruling and/or order appealed against makes the appeal incompetent.
24. The Supreme Court in the case of *Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 Others* (supra), when faced with an appeal where the appellant had failed to file a Record of Appeal held that -
- “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.”



25. Bound by the aforementioned Supreme Court decisions, this Court finds that the appeal herein is incompetent. As it were, without the ruling being appealed against, the merits or otherwise of the appeal cannot be gauged.

26. Accordingly, the court finds the appeal to be fatally defective and strikes it out with costs to the respondent.

It is so decreed.

SIGNED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

