



REPUBLIC OF KENYA



KENYA LAW
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**Kamiri v Onzere (Civil Appeal E964 of 2023)
[2025] KEHC 3901 (KLR) (Civ) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E964 OF 2023

TW OUYA, J

MARCH 27, 2025

BETWEEN

PETERSON MBATHA KAMIRI APPELLANT

AND

RUTH ISAVUKA ONZERE RESPONDENT

RULING

1. This appeal emanates from the judgement of Hon. M. Mutua RM 16th December 2022 in SCCC No.715 of 2021. The appellant filed an appeal challenging quantum awarded by the trial court vide memorandum of appeal dated 18th September 2023 on the grounds that:
 - i. That the Learned Magistrate erred in law and in fact in finding that the Appellant received goods from the Respondent amounting to USD \$28,107.12.
 - ii. That the Learned Trial Magistrate misdirected herself in relying on the statement of account tendered by the Respondent which did not reflect the advance payments that the appellant made before delivery.
 - iii. That the Learned Magistrate erred in law and in fact in finding that there was an admission of indebtedness by the appellant.
 - iv. That the Learned Magistrate erred in law and in fact in failing to find that there were inconsistencies in invoices and the corresponding airway bills as well as the packages delivered.
 - v. That the Learned Magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence on record thus reaching the wrong decision.
2. The appellant seeks for orders that:



- i. This appeal be allowed with costs.
 - ii. The Judgement in Milimani – SCCC NO. 715 OF 2021 delivered on 16th December 2022 by the Honourable Resident Magistrate B.J Ofisi, as follows: Liability 90:10%, General Damages – Kshs. 200,000/, Special 7,651/= with costs and interest, be stayed and/or set aside together with all other consequential orders be set aside.
 - iii. All proceedings in Milimani – SCCC NO. 715 OF 2021 be stayed pending determination of this appeal.
 - iv. Cost of this Appeal be borne by the Respondent.
 - v. Such further orders may be made by this Honourable Court may deem fit to grant.
3. This matter was mentioned before the Deputy Registrar on 22nd February 2024 and appellant given 30 days to file the record of appeal. On 9th May 2024 the appellant was granted a further 14 days to file the record of appeal. Upon mention on 30th July 2024 counsel for respondent informed court that they had been served with a complete record of the appeal upon which parties were directed to file submissions and matter placed before this court for hearing. On subsequent mention dates, 1st October 2024 and 21st November 2024 there was still non-compliance and no appearance by the parties. The DR directed that Notice to Show Cause to issue and matter to be heard by this court. The same was issued on the same date and served upon the parties.
4. On 5th December 2024 upon mention of the matter, there was no attendance by the appellant counsel and counsel for the respondent was in attendance. Court directed that parties do file written submissions. Only the counsel for the respondent complied. Counsel has submitted on two issues: That under order 42 rule 2 failure to attach a decree in the record of appeal is fatal to an appeal. That the appellant has not demonstrated which extraneous matters the trial court took into account to warrant challenging the award.
5. This court takes into account the fact that the impugned judgement entered 100% liability against the appellant, and awarded in favor of the respondent: kshs.200,000 in general damages, special damages of kshs.7,675 and costs of the suit. This being a matter emanating from the Small Claims Court this appellate court can only entertain matters of law. Section 38 of the Small Claims Act provides for appeals as:
1. A person aggrieved by the decision or an order of the court may be appeal against thar decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to in subsection (1) shall be final.
6. However, appeals to the High court can also be based on alleged errors in law or fact made by the Small Claims Court and in such cases, The high court reassess the evidence to arrive at a determination as was held in the case In *Mundia v Kigo (Civil Appeal 153 of 2023)*.
7. The court will therefore address the issue of non-filing of the decree as part of the record of appeal as raised by the respondent. Order 42 rule 2 failure to attach a decree in the record of appeal is fatal to an appeal. Order 42, rule 2 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 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.”

8. In *Lucas Otieno Masaye V Lucia Olewe Kidi* [2022] KEELC, Ombwayo J, stated;

“...from the foregoing, it is clear that an appeal can be rendered fatally defective in the absence of a decree. The appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the respondent.”

9. In *Salama Beach Hotel Limited and 3 others vs Kenyariri & Associates Advocates* [2017] eKLR the Court cited with approval an earlier decision of the Court in *Floris Pierro v Giancarlo Falasconi* (as Administrator of the Estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR that:

“...an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out” and that “as the order or decree appealed from is a primary document in terms of Rule 87(1)(h) of this Court’s Rules and must form part and parcel of the record of appeal.” In the latter case, the Court expressed that, “failure to include in the record of appeal a primary document or to formally apply to court for leave to file a supplementary record to include the same cannot be wished away as a procedural technicality. Otherwise, there will be no orderly conduct of business in this Court.’

10. A perusal of the record of appeal filed herein confirms that the appellant did not only fail to include the decree appealed against but also that the copy of judgement attached is illegible and therefore not helpful to the court for the purposes of this appeal. For lack of the primary document of appeal, this appeal fails the threshold test and cannot therefore proceed to the next level. The finding of the lower court is therefore upheld.

11. Over and above the foregoing, it is noteworthy that the appellant failed to take steps to prosecute the appeal and has failed to attend court on several occasions. Notice to show cause was issued on 21st November 2024 and same was served on the appellant for hearing on 5th December 2024 on which date he failed to attend court.

12. For the above reasons this appeal is dismissed with costs to the respondent.

13. At this juncture, this court points out that the carefree style with which counsel for the appellant handled this matter as indicated earlier above, is wanting and tantamount to an abuse of the court process. Nevertheless, this matter is now concluded for the benefit of both parties.

Determination

14. This appeal is hereby dismissed. The judgement by Hon. M. Mutua RM delivered 16th December 2022 in SCCE No. 715 Of 2021 is hereby upheld. Costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Muigai Hb Amboko

For Respondent.....No Appearance

Court Assistant.....Jackline

