Okello v Beyruha Academy Limited & another (Civil Appeal E1230 of 2023) [2025] KEHC 9275 (KLR) (Civil) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1230 OF 2023

WM MUSYOKA, J

JUNE 30, 2025

BETWEEN

DENISH OTIENO OKELLO ..... APPELLANT

AND

BEYRUHA ACADEMY LIMITED ..... 1ST RESPONDENT

LEAKEY'S AUCTIONEERS LIMITED ..... 2ND RESPONDENT

(Appeal arising from orders made in a ruling delivered by Hon. SA Opande, Principal Magistrate, PM, on 31st October 2023, in Milimani CMCCC No. 10779 of 2021)

JUDGMENT

1. The suit, at the primary court, was by the 1st respondent, against the 2nd respondent. It was with respect to a motor vehicle registration mark and number KBY 917M, that had been repossessed by the 2nd respondent, from the 1st respondent, and the suit sought permanent and mandatory injunctions.

2. The 2nd respondent did not enter appearance, nor file defence. The appellant applied to and was joined as a defendant.

3. The memorandum of appeal purports that the appeal is against a ruling that was delivered on 31st October 2023. That ruling was on an application, dated 8th March 2023, which sought recall of an order given on 9th September 2021, and review of the said order.

4. A copy of the ruling of 31st October 2023 is not in the record of appeal, but the original trial court records have been availed. The ruling dismissed the application of 8th March 2023. The grounds, for declining to review the orders of 9th September 2021, were that the appellant had not attached the application, dated 23rd August 2021, which gave rise to the orders of 9th September 2021. It was

also stated that the proceedings of 9th September 2021 were not attached, and so was the ruling of 9th September 2021 not attached. It was concluded that there was no documentary proof that that application, which gave rise to the order of 9th September 2021, was ever before the court, and that it was allowed, with the court applying its mind to it.

5. The appellant was unhappy with that outcome, hence his appeal, through the memorandum of appeal of 14th November 2023. There are only two grounds: the court arriving at a wrong decision for faulting the appellant for not attaching the application, dated 23rd August 2021, and failing to consider the authorities and submissions by the appellant.

6. Directions were given, on 27th March 2023, for filing of written submissions, for purposes of disposal of the appeal.

7. The appellant submits about the trial court failing to consider the court record, for the relevant proceedings were in the court file, and that there was no need for their copies to be annexed to an affidavit. A variety of decisions are cited in support.

8. The respondent argues that the threshold for review was not reached. It is argued that the error apparent on the record, and the new matter discovered, were not identified. Several decisions are cited in support. The other issue is whether the court order, sought to be reviewed, had been extracted. It is submitted that that was not done, and it was fatal.

9. The application, dated 3rd March 2023, sought review, and recall of an order, dated 9th September 2021. The grounds, upon which review is sought and obtained, are well known. Error apparent on the face of the record and discovery of new evidence, and any other sufficient reason. The decision of 31st October 2023 did not so much turn on that, but on a procedural matter, annexure of the material upon which an evaluation could be made, as to whether there was an error on the record or discovery of new evidence.

10. The focus of the application was an error, the omission to include, in the extracted order, one of the orders granted. To demonstrate that error, there was need to exhibit the order complained of, for perusal by the court, to assess whether or not there was an error. According to the trial court, the application itself ought to have been displayed, that dated 23rd August 2021, and so should have been a copy of the proceedings of the date when the application was allowed and a copy of the ruling itself.

11. The respondent appears to agree with that, although it anchors its submissions on the extracted order. The appellant takes the position that that was material that was already on record, in the various pleadings, filings and recorded proceedings, and there was no need to duplicate what was on record.

12. I agree and associate with the frustration by the appellant. Where the principal ground is error on the face of the record, that error would be in some ruling or judgement or order that is or should be in the court file. I do not quite appreciate the slavish need to reproduce what is already on record, and which the court can verify by perusing the record. It should, in my view, only be necessary to require filing of such material where, for some reason, it is missing from the court record. The trial record should, otherwise, speak for itself.

13. However, to the frustration of the appellant, and perhaps mine too, the dominant judicial view, which, I dare say, is not backed by statutory provisions, appears to be that failure to extract the order or decree, in respect of which the review is sought, and to attach it to the application, renders the review application incompetent, and the same must be dismissed. That is the language in *Gulam Hussein Jivanji & Another v Ebrahim Mulla Jivanji & Another* [1929-30] 12 EACA 41 (Sir Jacob Barth CJ (Kenya), Sir Charles Griffin CJ (Uganda) & Pickering CJ (Zanzibar)), which has been followed in such

decisions as the ones cited by the respondent, being *Exaktu Agencies Limited v Kamunyi Farm Ltd* Kitale HCCC No. 146 of 2001, *BK Mathenge v Credit Kenya Limited* Milimani HCC No. 4085 of 1992 (Mutungi J), *Kenya Seed Company Ltd v Ann Chandai* Kitale Civil Application No. 7 of 2000 (Karanja, J) and *Eco Bank Ltd v David Njoroge Njogu & Another* [2016] eKLR[2016] KEHC 1003 (KLR)(Ngaah, J). See also *Frodak Kenya Ltd v Makunda* [2024] KEELRC 820 (KLR) (Keli, J).

14. *Chege v Suleiman* [1988] KECA 131 (KLR) (Apaloo, Masime JJA & Gicheru, Ag JA) brought it out more clearly, when it was stated, with regard to section 66 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, on right of appeal, that the reference to "decrees and orders of the High Court," would mean that a right of appeal would only lie against a decree or order, and no competent appeal could be brought unless those decrees or orders are formally extracted, and exhibited in the record of appeal, to provide the basis for the appeal, as evidence that indeed the decree or order exists, and is available for appeal purposes.

15. By parity of reasoning, Order 45 rule 1 provides for the right to pursue the relief of review, where one is "aggrieved by a decree or order." The review application is predicated on "a decree or order," and no competent review application can be brought, unless the decree or order, sought to be reviewed, is formally extracted, and exhibited to the application. The jurisdiction to entertain an application for review is said to germinate from the decree or order. Decree or order does not refer to the judgement or ruling, but the decree and order formally extracted from the judgement or ruling. That formal order or decree, going by *Chege v Suleiman* [1988] KECA 131 (KLR) (Apaloo, Masime JJA & Gicheru, Ag JA), is the foundation for the review application, and without it, there would be no jurisdiction for the court to entertain the review application. It would be a jurisdiction issue.

16. However, the paradigm shifted, with the enactment of sections 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution* of Kenya. The courts are moving away from the previous position, that the failure to attach a decree, even where there is a judgement on record, is a jurisdictional point for striking out an appeal, or review application. The current thinking is that no prejudice would be suffered, if the decree or order is not attached, so long as there is a judgement or ruling on record, or so long as the appellate court, or the court seized of the review application, is able to access the original trial court records, which have copies of the decree or order, or the judgement or ruling from which the decree or order is to be extracted. See *Emmanuel Ngade Nyoka v Kitheka Mutisya Ngala* [2017] eKLR [2017] KECA 353 (KLR) (Makhandia, Ouko & M'Inoti, JJA) and *Bildad v Rentwork East Africa Limited* [2024] KECA 1133 (KLR) (Karanja, Kimaru & Muchelule, JJA).

17. I have perused the trial record. The appellant did not attach a copy of the order, extracted from the ruling of 9th September 2021. He did not attach the ruling itself either. However, the trial court had the proceedings before it, which had the original ruling of 9th September 2021. That would have sufficed to assist the court determine the application, dated 8th March 2023, absent the extracted formal order from the ruling of 9th September 2021. The trial court, no doubt, resolved the matter on the basis of a technicality of procedure, rather than on the substance. The omission to attach the order was not fatal.

18. The trial court did not go into the merits of the application, dated 8th March 2023. Was there merit in it? The issue, the appellant was raising, was that the trial court had granted, on 9th September 2021, the orders that he had sought in the application, dated 23rd August 2021, but there was still a problem. The orders were subsequently amended on 22nd November 2021, but there was still a problem. The order, in the ruling of 9th September 2021, allowed all the prayers in the application of 23rd August 2021, including that for possession of motor vehicle registration mark and number KBY 917M. When the appellant extracted the orders from that ruling, on 10th September 2021 and 22nd November 2021, that order was still missing, hence his application for review, dated 8th March 2023.

19. The application, dated 23rd August 2021, sought several orders, which included joinder of the appellant, stay or setting aside of orders that had been made on 22nd July 2021, stay of execution of those orders of 22nd July 2021, and the restoration of motor vehicle registration mark and number KBY 917M to him, the police to assist with compliance, and the suit be struck out. The application was placed before Hon. Mbeja, Principal Magistrate, who allowed it. The extract of that order, on 10th September 2021 omitted reference to the order on motor vehicle registration mark and number KBY 917M. The order was amended on 22nd November 2021, but it still left the portion of the order on motor vehicle registration mark and number KBY 917M, which appeared in prayer (d) of the application, dated 23rd August 2021.

20. For avoidance of doubt, that prayer was framed as follows:-

> "That pending the ruling and determination of this Application inter partes, this Honourable court be pleased to grant a stay of execution of the order issued on the 22nd July 2021 and the status quo ante obtaining prior to the issuance of the order of 22nd July 2021 between the plaintiff and the defendant herein and the subsequent effecting of the said order be restored, to wit, the intended defendant (Denish Otieno Okello) be given back the vehicle registration number KBY 917M currently surrendered to the plaintiff."

21. The allowing of the application, dated 23rd August 2021, meant that prayer (d) was allowed too. The omission of the order, on motor vehicle registration mark and number KBY 917M, in the orders extracted on 10th September 2021 and 22nd November 2021, was an error on the face of the record, which the court should have reviewed, through the application, dated 8th March 2023. The ruling of 31st October 2023, which dismissed that application, was not properly grounded.

22. Consequently, I find merit in the appeal herein. The same is allowed. The orders of the trial court, of 31st October 2023, dismissing the application, dated 23rd August 2023, are hereby set aside, and are substituted with orders allowing that application, with the consequence that an order, in terms of prayer (d), of that application, shall be factored in the formal order, to be extracted from the orders of 9th September 2021. The order extracted on 10th September 2021, and amended, on 22nd November 2021 shall be amended further, accordingly. The appellant shall have the costs of the appeal. The original trial court records shall be returned to the trial court. The appeal file, herein, shall be closed. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA ON THIS 30TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Obiero, instructed by Mukite Musangi & Company, Advocates for the appellant.

Ms. Wanjiku, instructed by Hassan N. Lakicha & Company, Advocates for the respondent.