



REPUBLIC OF KENYA



KENYA LAW
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**Mwai v Waumini Savings and Credit Society Limited (Appeal E034 of 2023)
[2025] KEHC 9172 (KLR) (Commercial and Tax) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL E034 OF 2023**

H NAMISI, J

JUNE 27, 2025

BETWEEN

JOSEPH RWAMBA MWAI APPELLANT

AND

WAUMINI SAVINGS AND CREDIT SOCIETY LIMITED RESPONDENT

*(Being an Appeal from Judgement of and Decree of the Co-operative
Tribunal at Nairobi delivered by the Hon. Mjeni Mwatsama, Deputy
Chairperson, on 26 January 2023 in Tribunal Case No. E453 or 412 of 2022)*

JUDGMENT

1. This appeal arises from a suit filed by the Appellant against the Respondent for:
 - i. Judgment against the Respondent in the sum of KShs. 100,610.53;
 - ii. Judgement against the Defendant for dividends lost over the duration till the end of this suit;
 - iii. Compound interest of savings and dividends lost till the end of this suit;
 - iv. Interest from the date of filing suit. e) Any other relief that this Honourable Court may see fit.
2. From the Record of Appeal, it is discernible that the case relates to a loan that was taken by one, Paul Ndungu Ngatia, from the Respondent, for which the Appellant was a guarantor. It was the Appellant's claim that the Respondent acted negligently in granting the loan, thus leading to the loss suffered by the Appellant.
3. The Record of Appeal does not contain any documents filed by the Respondent at the Tribunal and therefore, I am unable to ascertain if the same was defended and what the Respondent's defence was.



4. The trial court presumably entered judgement against the Appellant. Having filed an incomplete Record of Appeal, I am unable to discern the award by the trial court. The Record does not contain the proceedings, judgement or decree from the trial court. I also do not have the benefit of the trial court file to peruse.
5. However, being aggrieved by the judgement, the Appellant lodged this appeal. Parties were directed to canvass the Appeal by way of written submissions.
6. First, I note that the Record of Appeal dated 27 September 2024 does not contain the judgement, decree or proceedings of the lower court.
7. Section 65(1) of the *Civil Procedure Act* forms the basis of appeals from the subordinate courts to the High Court. It provides 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 10 of 1969, Sch.);
 - (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, 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.
8. Order 42 Rule 13(4) of the Civil Procedure Rules provides as follows: -

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).



9. Courts have severally dealt with the issue of incompleteness of the Record of Appeal. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR the Supreme Court stated as follows:

(16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17)

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition

(37)

(38) 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.

(39) 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. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

10. In *Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others* (2016) eKLR the Court dealt with the same issue in an election petition appeal from the subordinate court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

“What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.”

11. The provisions of Order 42 Rule 13 (4) are clear. Whereas a Judge may dispense with the production of documents or part of documents, certain documents must be contained in the Record of Appeal for the same to be considered complete. These are: the Memorandum of Appeal, the pleadings and the Judgement, Order or Decree appealed from. This is not something that an Appellant can simply wish away. A complete Record of Appeal must be placed before the court to enable the court understand and appreciate the factual or legal controversies before it. Furthermore, despite the clear provisions on extension of time, and the numerous opportunities accorded to them to do so, the Appellant did not seek any extension of time to file a complete Record of Appeal. I equally do not see any request for typed proceedings, certified copies of the judgement and decree.



12. I, therefore, find that the Record of Appeal is incomplete, hence the Appeal is incompetent. The appeal is, therefore, struck out with costs to the Respondent assessed at Kshs 50,000/=.

DATED AND DELIVERED AT NAIROBI THIS 27 DAY OF JUNE 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Mr. Mwai..... for the Appellant

N/A..... for the Respondent

Libertine Achieng.....Court Assistant

Page 4 of 4

