



**Harj Construction Co. Ltd v Karanja & another (Civil Appeal
E291 of 2022) [2024] KEHC 9354 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E291 OF 2022
AM MUTETI, J
JULY 31, 2024**

BETWEEN

HARJ CONSTRUCTION CO. LTD APPELLANT

AND

JOHN MUTHUI KARANJA 1ST RESPONDENT

NAOMI WANJIRU MEGA 2ND RESPONDENT

(Being an appeal from the judgment of the SPM's Court Ruiru delivered on 26th October 2022 by the learned HONOURABLE JOSEPH WERE in Ruiru CMCC No. E 487 of 2021)

JUDGMENT

1. The appellant by a memorandum of Appeal filed on 24th November 2022 Lodged the appeal before this court raising four grounds of Appeal.
2. The memorandum in ground one raises the issue of dependency being a matter of fact not having been proved.
3. The appellant also challenges the adoption of a multiplier of 14 years by the Learned Honourable Magistrate.
4. In his third ground the appellant contends that the deceased was unemployed therefore the multiplicand of Kshs 24,250.00 was improper.
5. Lastly, he faults the Learned Honourable Magistrate for failing to discount the award under the Law Reform Act from the award under the Fatal Accidents Act noting that the beneficiaries are the same. The parties to this appeal have both filed written submissions.
6. At the hearing of the Appeal Counsel for the appellant appeared and urged the court to proceed and deliver judgment on the basis of the submissions filed.



7. I have noted from the record the appellants submissions we filed in court on 3rd April 2023 whereas the Respondents filed theirs on 13th April 2023. The Respondents were not represented when the matter came up before me on 4th June 2024.
8. I have noted from the record that on 14th March 2023 the court had issued directions that the matter be disposed off by way of written submissions.
I now proceed to consider the appeal.
9. In the course of perusing the submissions by counsel, I have noted that counsel for the Respondent has raised an issue that I consider germane to the just determination of this Appeal.
10. Counsel for the Respondent has dedicated considering time in addressing the issue whether indeed the appeal before me is competent. The gravamen of his arguments is that the Appellants did not include the Decree or order appealed from this the appeal is incompetent.
11. Counsel for the Respondent christines this as a jurisdictional point that in his view should be determined in Limine and lead to the dismissal of the Appeal without going into the merits.
12. In support of his argument counsel for the Respondent has placed reliance on S. 79 of the Civil Procedure Act which provides that;-

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of decree or order appealed against excluding such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
13. The Respondent’s counsel further posits that the failure to include a decree in the record of Appeal is a fatal omission that should lead to the dismissal of the appeal.
14. The Respondent has also referred this court to Order 42 rule 2 of the Civil Procedure Rules, 2010 which provides;-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of the 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 79 B of the Act until such certified copy is filed.”
15. The court is minded to ask if the failure by a party to annex a copy of the decree a jurisdictional question? This court finds that in indeed it is a jurisdictional question that must be determined in limine.
16. In the Owners of Motor Vessel Lillian’s v Caltex Oil (K) Ltd [1989] eKLR The Court of Appeal Nyarangi, J had this to say:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of Law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
17. These powerful words by Nyarangi, J have impacted our juris prudential landscape overtime and that position remains key whenever courts are faced with the issue of jurisdiction. It would be pointless for



a court to engage in further proceedings only to determine much later that it had no jurisdiction. That would amount to waste of precious judicial time a luxury our courts today cannot afford.

18. It is clear from order 42 Rule 13 that before an appeal goes for hearing the judge should 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. A Memorandum of Appeal
 - b. The pleadings.
 - c. The notes of the trial court made at the hearing;
 - d. The transcript of any official shorthand notes
 - e. All affidavits maps and other documents put in the evidence before the magistrate.
 - f. the judgment, order or decree appealed from, and where appropriate the order (if any) giving leave to appeal.
19. The rule makes it mandatory for a party to ensure that a decree or the order appealed from is included in the record of appeal. The record in this matter does not contain the decree or order.
20. The index captures what the Appellants included in his record of Appeal. No doubt the list does not include the decree or order. For certainty, I have perused the entire record just in case the decree was included but omitted inadvertently from the index. That too did not help. The record does not contain the decree.
21. The consequence of not annexing a decree or order appealed from is that the appeal is rendered incompetent thus the same ought to be struck out.
22. Striking out an appeal may appear rather drastic but that is the only course one has in law.
23. In *Bwana Mohamed Bwana v Silvano Buko Bonaya and 2 others* [2015] eKLR the Supreme Court held at paragraph 39 of its judgment thus:

“Rule 87 prescribes the contents of record of Appeal, such as will render such of case competent one before the court of Appeal. It specifies the requisite documents to form part of the bundle to accompany the memorandum of Appeal being such material as will enable the court to make of determination on the issues of law and fact that may be the subject of contest”.
24. It is not in doubt that a decree or order would concisely set out the orders that the Appellant is appealing against. The court would therefore have to scrutinize the decree or order for it to make an informed decision on all the issues the appellant has raised in the Memorandum of Appeal.
25. It is not enough for the appellant set out grounds in the memorandum of Appeal and proceed with the appeal without a decree.
26. The appellants counsel appeared at the hearing and having indicated to the court that both parties had filed submissions, this court expected him to comment on this threshold issue but he did not.
27. In their submissions filed in court on 3rd April 2022 the appellants did not touch on the same.



28. The court in deciding on this finds guidance in the holding of the Supreme Court of Nigeria in *Ocheja Emmanuel Dangona v Hon. Aidoko Aliusman & 4 others*, SC 11/2022 where judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:-

“ A court is competent, that is to say, it has jurisdiction when:-

- i. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;
- ii. the subject matter of the case is within its jurisdiction and no feature in the case prevents the court from exercising its jurisdiction; and
- iii. the case comes before the court initiated by the (due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction” (emphasis mine).

29. Order 42. Rule 13 (4) imposes a condition precedent to the hearing of an appeal. The use of the word “before” in the rule makes it mandatory.

The *Black’s Law dictionary* defines the word before to mean:-

“Prior to preceeding” It therefore follows that the High Court cannot properly be seized of an appeal and proceed to determine the same if the documents set out in rule 13 of order 42 are not on record.

30. The proviso to the Rule is clear that a decree or order appealed from is not one of those documents that a judge can dispense with before hearing an appeal. The appellant must there as of necessity ensure that his record of Appeal contains the documents specifically set out under order 42 Rule 13 (4) (f).

31. In the instant Appeal the appellant did not do so. This court would be acting without jurisdiction if it went further to entertain the appeal.

32. The court cannot exercise its mind over an incompetent appeal such as the present one.

33. In Kisumu Civil Appeal No 27 2020 *Lucas Otieno Mesaye v Lucia Olewe Kidi* [2022] eKLR Ombwayo J, held that:-

“ 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”.

34. The seminal phase of an appeal is the preparation of the record of Appeal. It calls for an appellant to be methodical in the preparation and prosecution of his appeal in order to avoid committing fatal errors in the process of Appeal from which he cannot walk out. The appellant herein must have paid very little attention to detail thus the fatal omission.

35. Having found that the appeal is incompetent on account of failure to annex the decree or order appealed from, I proceed to strike out the appeal with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2024.

HON. A.M MUTETI



JUDGE

In the presence of:

Kiptoo: Court Assistant

Irungu Ms for the Respondent

Ngechu for the Appellant

Absent - Appellant

