



**Philip v Ochung (Civil Appeal E022 of 2022)
[2023] KEHC 26979 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E022 OF 2022
KW KIARIE, J
DECEMBER 20, 2023**

BETWEEN

OCHUNG TOM PHILIP APPELLANT

AND

MICHAEL HARRISON OCHUNG RESPONDENT

RULING

1. The respondent herein raised a preliminary objection dated 25th September 2023 premised on the following grounds:
 - a. The respondent's record of appeal offends the provisions of Order 42 Rule 13(4) of the [Civil Procedure Rules](#) by virtue that the appellant's record of appeal is incomplete in lacking part proceedings, judgment in its entirety, decree of the trial court and witness statements supporting the respondent's case in the two Succession Causes.
 - b. The appellant has since consolidated the two-trial court matters in his appeal, taking notice that the appeal arises from probate and Administration issues, yet the estates of the deceased are two different and distinct estates that ought to be handled distinctly and separately.
 - c. the applicant in this appeal has contravened the provisions of Order 5 of the [Civil Procedure Rules](#) as stipulated under Order 42 rule 17 of the [Civil Procedure Rules](#) by failing to serve the respondent or his advocate on record of the various dates the appeal came up including the date for directions on the appeal.
 - d. The appellant's record of appeal is incomplete, fatally defective, bad in law and an abuse of the court process and should be struck out with costs to the respondent.
2. The preliminary objection was opposed on grounds that:
 - a. The appeal is still at the pre-trial stage.



- b. The inclusion of two estates in one appeal is an error that can still be rectified.
3. Order 42 Rule 13(4) of the *Civil Procedure Rules* provides:

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:
4. I agree with the respondent that this matter has not gone to trial. However, the appellant ought to have ensured that the documentation was in order. This cannot be a basis for striking out the appeal.
5. Service of the record of appeal or any other service on the other party is very important for it ensures full participation by all the parties in the case. Non-service, however, cannot be a basis for a preliminary objection seeking to strike out a matter as in this case.
6. From the foregoing, the appellant ought to regularize his appeal before the same is set for hearing and in any case, not later than 14 days of this ruling.
7. The costs will abide by the outcome of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE

