



REPUBLIC OF KENYA



**KENYA LAW**  
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**King'ori v Njoroge (Civil Appeal E083 of 2024)  
[2025] KEHC 1503 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E083 OF 2024  
RC RUTTO, J  
FEBRUARY 14, 2025**

**BETWEEN**

**JAMES KING'ORI ..... APPELLANT**

**AND**

**SIMON NGANDU NJOROGE ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. N. Wambilyanga  
SPM, in Civil Case No. E573 of 2023 made on 22/4/2024)*

**JUDGMENT**

1. The appellant being aggrieved by the Ruling of the trial court delivered on 22/4/2024 in Thika Magistrate's Court Civil Case No. E573 of 2023 preferred this appeal. The ruling is as a result of an application by the Appellant dated 4<sup>th</sup> April 2024 in which he had sought that the trial court sets aside the interlocutory judgment entered on 21<sup>st</sup> February 2024 and judgment delivered in 28<sup>th</sup> March 2024.
2. The Appellant aggrieved by the ruling dismissing the Application dated 4<sup>th</sup> April 2024 has filed a Memorandum of Appeal dated 25<sup>th</sup> April 2024 on the following summarised grounds: -that the trial court erred in law and in fact and misdirected herself by stating that there was laxity on the part of the Appellant; by failing to consider the merits of the Defence dated 11<sup>th</sup> March 2024 which raises triable issues; by denying the Appellant an opportunity to be heard; no prejudice would be occasioned to the respondent.
3. The Appellant seeks orders that; -
  - a. The Ruling of the Learned Trial Magistrate dated 22<sup>nd</sup> April 2024 dismissing the Appellant's Application dated 4<sup>th</sup> April 2024 be set aside and substituted with an order allowing the same.
  - b. That the interlocutory judgment entered on the 21<sup>st</sup> February 2024 and all consequential proceedings and orders be set aside.



- c. That the Appellant's Defence dated 11<sup>th</sup> March 2024 and filed on 12<sup>th</sup> March 2024 be considered as properly on record.
  - d. That the lower court case, namely THIKA CMCC No. E573 of 2023 be heard afresh before any other Magistrate of competent jurisdiction other than Hon. J.N Wambilyanga.
  - e. That the costs of the appeal be awarded to the Appellant.
4. Pursuant to the directions of this court issued on 9<sup>th</sup> September 2024, the Appellant filed his submissions dated 3<sup>rd</sup> October, 2024 while the Respondent's submissions are dated 14<sup>th</sup> November 2024.
  5. In its submissions, the appellant delimited the issues into two: firstly, whether the trial court erred in concluding there was laxity on the part of the Appellant and secondly, whether the trial court failed to consider the merits of the Appellant's defence which raised triable issues and denied the Applicant the right to be heard and whether this denial resulted in a miscarriage of justice.
  6. On the first issue, the appellant submitted that the alleged laxity was unfounded. He states that when he received the court documents, he forwarded the documents to his insurers who immediately communicated to the respondents advocates expressing his willingness to settle the claim out of court and requested for a quantification of the claim. However, they did not receive any response from the Respondent's counsel. Therefore, he proceeded to file a Memorandum of Appearance and Defence unaware that interlocutory judgment had already been entered. The Appellant's counsel submitted that the mistake made by the Appellant's insurers and or counsel regarding the timing of the filings should not have been unjustly visited upon the Appellant who is an innocent litigant.
  7. On the second issue, the Appellant submitted that the Defence raised significant triable issues which the trial court did not consider. The issues relate to how the accident occurred and who was at fault, matters which can only be determined through full hearing. The Appellant relied on the cases of *Cyprian Jairo Odhiambo v Abel Mokaya Mose Civil Appeal No. E022 of 2022* and *[G.N Wahome v HKM & Another Civil Appeal No. 458 of 2018- 2021 eKLR.](#)*
  8. In conclusion, the Appellant urged this court to find that the trial court did not consider the merits or demerits of the filed Defence which then resulted to a miscarriage of justice. In that regard, the Appellant prays that the Appeal be allowed as prayed for.
  9. The Respondent in his submission set out the following three issues for determination namely: whether the appeal is fatally defective for failure to include primary documents in the record of appeal; whether the trial court misdirected itself in dismissing the Appellant's application dated 4<sup>th</sup> April 2024 and whether the Appellant was denied the right to have a fair hearing.
  10. On whether the appeal is fatally defective and ought to be struck out for failure to include primary documents in the record of appeal, the Respondent submitted that the Respondent's Replying Affidavit which was a primary document was not included both in the record of appeal and supplementary record of appeal. That no leave to file any supplementary record was sought to include the replying affidavit which embodies the entire basis of the opposition of the Appellant's appeal. It was submitted that by failing to include it, then this court will not benefit from the Respondent's response in the trial court. They contended that the omission was a design to deny this court the benefit of seeing the response. In submitting that the foregoing reason makes the appeal fatally defective, the Respondent relied on the case of *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others [2016] eKLR.*



11. On whether the trial court misdirected itself in dismissing the Appellant's application, the respondent submitted that the grant or refusal to set aside an ex parte judgment involved the exercise of discretion. He relies on the case of Mbogo v Shah [1968] EA 93. Also relied upon was the case of Fidelity Commercial Bank Limited v Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR). The Respondent submitted that the trial court was right in ruling that there was laxity on the part of the Appellant as the matter was in court on 18<sup>th</sup> March 2024 and 28<sup>th</sup> March 2024 but still, the Appellant did not attempt to set aside the interlocutory judgment. He submitted further that there was no proper precedent that was placed before the trial court that would have bound her to interfere with a regular judgment properly entered. The Respondent relied on the case of Hass Petroleum Limited v A.O Basid Limited [2015] eKLR and the case of Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR.
12. On the right to be heard, the Respondent submitted that the Appellant has not demonstrated how its rights to be heard were violated. In conclusion, the Respondent submitted that the Appellant was duly served and the Appeal is a further attempt to deny him the fruits of its judgment.

### **Analysis and Determination**

13. I have carefully considered the parties submissions and the impugned ruling of the Honourable learned magistrate delivered on 22/4/2024. The issues arising for determination are: -
  - i. Whether the appeal is fatally defective for failure to include primary documents in the record of appeal
  - ii. Whether the trial court erred in concluding that there was laxity on the part of the Appellant and failing to consider the merits of the Appellant's Defence which raised triable issues

### **Whether the appeal is fatally defective for failure to include primary documents in the record of appeal**

14. The respondent submitted that the appellant failed to include the Replying Affidavit in the record of appeal and supplementary record of appeal and that no leave was sought to file a further supplementary record of appeal. He argued that the Replying affidavit is a primary document that must be in the record of appeal since it embodies the entire basis of the Respondent's opposition to the Application whose determination is the impugned ruling appealed in this appeal.
15. A perusal of the impugned Ruling, shows that the Application dated 4<sup>th</sup> April 2024 was indeed opposed vide a Replying Affidavit sworn on 11<sup>th</sup> April, 2024 by the Respondent advocate. A further perusal of the Record of Appeal and the Supplementary Record of Appeal, reveals that the Replying Affidavit sworn on 11<sup>th</sup> April 2024 does not form part of the record and supplementary record of appeal. This court notes that the Replying Affidavit was a crucial document, as it presented the respondent's evidence and stance on the application, forming the foundation for the trial court's decision. It is a primary document and it ought to form part of the appeal. I agree with the Respondent's submissions on the issue that the Replying Affidavit embodies the basis of the opposition of the Appellant's appeal and therefore it is an important document that must for part of the Record of Appeal for this court's benefit.
16. Order 42 Rule 13(4) of the Civil Procedure Rules provides that a Record of Appeal shall contain the following documents –
  - “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).”

17. From the above Rules, it is clear that an affidavit is one of the crucial documents that form part of the Record of Appeal. In this case, noting that the Replying Affidavit is in response to an Application whose Ruling is the subject of the appeal herein, it was important that the same forms part of the Record of Appeal.
18. Additionally, as this is the first appeal, it is the duty of this court to thoroughly examine the facts as presented in the trial court, analyse them, and make independent conclusions. See the case of *Selle v Associated Motor Boat Co.* [1968] EA 123. Therefore, if documents filed in the trial court are excluded from the record, this court would be deprived of the opportunity to fully consider the respondent evidence and position in determining the appeal.
19. This court notes that the Appellant has not addressed this issue in his submissions and therefore, this means that no explanation has been issued regarding the submission made by the Respondent. The Appellant did not seek leave to file further submissions to address this issue. I take it therefore that there is no explanation for the omission of filing the Replying Affidavit. In perusing the record and supplementary record of Appeal, I have noted that none of the Respondent’s documents in relation to the Application dated 4<sup>th</sup> April 2024 that led to the impugned Ruling forms part of the Record of Appeal.
20. I am guided by the superior court in the case of *Salama Beach Hotel Limited and 4 others VRS Kenyariri and Associates advocates and 4 others* (2016) eKLR, the court of appeal while dealing with a similar matter held as follows;

“.....With respect, no legal provision allows for the exercise of this court’s discretion in such a manner, besides, the fate of an appeal anchored on a non-extracted order has not changed, not even with the advent of the new liberal approach afforded by the overriding objective and *the constitution* which encourages dispensation of justice without undue regard to procedural technicalities. As held in *Floris Pierro and another VRS Giancarlo Falasconi* ( as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) (2014) e KLR; 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, 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 that case, the court delivered itself thus: -“....



The order embodies the court's decision. If it is not included, the court of appeal will be at a loss in determining what the high court determined. It cannot be the business of this court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly, failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling. In the premises, we take the view that it would serve the overriding objective to strike to the appeal suo moto. Indeed, as indicated by this court in the case of Mohamed Aden Abdi VRS. Abdi Nuru Omar and 2 others (2007) e KLR; even in the face of a time barred application which is accordingly dismissed, the court nonetheless retains the inherent power to strike out the appeal where a record of appeal fails to contain one or more of the primary documents. In this case, no attempt was ever made under Rule 88 of the rules to either file a supplementary record of appeal availing the missing impugned order or to seek leave to do so. In the premises, the client's application and appeal are anchored on quicksand. They are accordingly struck out".

21. This court therefore holds the view that the absence of the Replying Affidavit which is a primary document renders the appeal incompetent and is struck out. Having struck out the appeal this court is stripped off the jurisdiction to evaluate and analyse the second issue.
22. The upshot of the above is that this appeal is incompetent and is hereby struck out with costs to the Respondent.

Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2025**

For Appellant:

For Respondent:

Court Assistant:

