



In re Estate of Paul Makani Ndula (Deceased) (Succession Appeal E012 of 2023) [2024] KEHC 5540 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E012 OF 2023**

PJO OTIENO, J

MAY 6, 2024

IN THE MATTER OF THE ESTATE OF PAUL MAKANI NDULA (DECEASED)

BETWEEN

TABITHA ATAMBA MAKANI 1ST APPELLANT

FREDRICK NGAIRA 2ND APPELLANT

AND

PRISCAH SHIMULI MAKANI 1ST RESPONDENT

MAXIMILLA KHARONDA ANGALWA 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 29.01.2024, the Respondent seeks the striking out of the record of appeal on the grounds that it is defective because it contravenes the provisions of Order 42 and Section 65 of the Act for failure to extract and include in the record a proper decree, certified Judgment and exhibits produced at trial which are primary documents; and for including on the record documents which were not produced at the trial.
2. Even though the court directed the Appellant (as the Respondent to the application) to file and serve a Replying Affidavit within fourteen (14) days from the 6.2.2024, by this morning, the same had not been filed. For that failure, the Applicant prayed that the matter be deemed unopposed and the court acceded to that request. The court acceded to the request for it considers the Appellants' failure to comply with directions of 6.2.2024 to affront the Counsel and litigants' obligations to help court meets its primary objective of just and expeditious disposal of court disputes.
3. That failure of the Appellant to meet its obligation to court is however no bar to the court executing its inherent mandate. The Court has thus perused the file and the application and now considers a determination that will result in a just and effective determination of the appeal.



4. To this Court, the practice in the High Court by which parties file a document called Record of Appeal is merely an innovative practice of convenience without any statutory provision creating an obligation on the parties. It is a practice of convenience because neither Section 65 nor Order 42 of the Act vests any duty upon the parties to compile, file and serve a Record in a fashion akin to the dictates of the Court of Appeal rules, without a legal obligation, it would be unjust to strike out the Record of Appeal on failure to include what the Respondent considers primary documents.
5. It has always been the view of this court that it is not fatal to file a non-complete Record of Appeal before it. In *CMA – CGM Kenya Limited v Diamond Gate General Trading Llc & 4 others* [2019] eKLR and delivered itself in the following words:-

" On the second limb alleging shoddy compilation of the record that equally has no legal foundation because no law provides how a Record of Appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the *Court of Appeal Rules* but with no legal underpinning. I say no legal underpinning because Order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with Rule 87, *Court of Appeal Rules*, which obligates the appellant to prepare and serve the record and defines what must be contained therein."
6. It would be unjust to reject the appeal on the stated grounds because, in accordance with the Rules, Order 42, Rule 13, all the High Court, on appeal, needs to confirm to have been availed is the trial court Record containing the documents enumerated at Order 42 Rule 13 (4).
7. Here, the Court confirms that the trial court Record has been availed and the requisite documents are indeed demonstrated in it. For that reason, the application misconceives the obligations of an Appellant before the High Court and confuses same with what obtains before the Court of Appeal. The application thus must fail for being misconceived.
8. The second reason the application ought to fail is that even if it be granted as prayed, it has no prospects of closing the file. The Record of Appeal when struck out will leave the appeal initiated by the Memorandum of Appeal dated 25/8/2023 intact and pending and the Appellant may still file a compliant record and the Court will then be obliged to hear the appeal. No meaningful purpose would have been served by the order of striking out.
9. In the court's humble view, what the Respondents ought to have one, if they were convinced that the record is deficient, was to file a Supplementary Record and include what had been left out. He would as well at the hearing point out to court any documents which have been irregularly introduced and have the same excluded. That is what Counsel's obligation under Section 1A (3) *Civil Procedure Act*.
10. In conclusion, the application dated 29.1.2024 is adjudged to have no merit and is thus dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MAY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mbetera for the Respondent



No appearance for Ms. Rauto for the Appellant

Court Assistant: Polycap

