



REPUBLIC OF KENYA



**Cherutich v Theuri (Civil Appeal E457 of 2022)
[2024] KEHC 10544 (KLR) (3 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E457 OF 2022
WM MUSYOKA, J
SEPTEMBER 3, 2024**

BETWEEN

RICHARD KOISOK CHERUTICH APPELLANT

AND

BENSON THEURI RESPONDENT

(Appeal from judgment and decree of Hon. DW Mburu, Senior Principal Magistrate, SPM, in Milimani CMCCC No. 1984 of 2009, of 3rd June 2022)

RULING

1. The record of appeal filed herein is incomplete. It covers proceedings that were conducted between 2nd July 2009 and 7th September 2021, and then the judgment that was delivered on 3rd June 2022. In the proceedings, conducted between 2nd July 2009 and 7th September 2021, 3 witnesses testified, all for the respondent, and none testified for the appellant, being PW1, PW2 and PW3. The handwritten notes of the trial court indicate that further proceedings were conducted after 7th September 2021, before judgment was delivered. Those proceedings ran from 19th January 2022 to 21st February 2022, during which 1 witness testified for the respondent and 1 for the appellant, being PW4 and DW1, after which written submissions were filed, and judgment delivered. The proceedings between 19th January 2022 to 21st February 2022 were not typed, and are not in the record of appeal that was filed herein.
2. The proceedings between 19th January 2022 to 21st February 2022 were conducted by Hon. Mburu, SPM, after he took over conduct of the matter from Hon. DO Mbeja, Senior Resident Magistrate, SRM, who had handled it previously, and had taken evidence from the 3 witnesses who testified before Hon. Mburu, SPM, took over. The judgment appealed against was by Hon. Mburu, SPM, after he took over, and heard part of the case, when he handled 2 witnesses, including the 1 from the defence.
3. The record of appeal must be aligned to the original trial court record. It must be a true reflection of what the trial court recorded, given that the judgment appealed against is based on that trial record. An



incomplete record could mislead the appellate court to make determinations which are half-baked, on account of the gaps in the record of appeal.

4. Sitting as an appellate court, I could still resolve the appeal based on the original trial court notes, by ignoring the incomplete record of appeal. The risk with that, however, would be that either of the parties could be aggrieved with my verdict, as an appellate court, and may wish to escalate the dispute to the Court of Appeal, which does not usually act on original trial court records, but on records of appeal filed by the parties. It would be most likely that the incomplete record of appeal filed herein, of the proceedings at the trial court, could be filed at the Court of Appeal, denying it a chance to have access to the true record of what transpired at trial, presenting a real chance of miscarriage of justice.
5. In view of the above, I will refrain from writing judgment in this matter. I shall, instead, require that the appellant files a complete record of appeal, incorporating a certified typescript of the proceedings that the trial court conducted between 19th January 2022 to 21st February 2022, when the last 2 witnesses testified. This file shall be placed before the Presiding Judge, Civil Division, High Court of Kenya, at Milimani, Nairobi, for further directions. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 3rd DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Arusei, instructed by Arusei & Company, Advocates for the appellant.

Ms. Olung'a, instructed by Archer & Wilcock, Advocates for the respondent.

