



**Airtel Kenya Limited v Angila & another (Civil Appeal
91 of 2019) [2023] KEHC 2436 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 91 OF 2019
KW KIARIE, J
MARCH 23, 2023**

BETWEEN

AIRTEL KENYA LIMITED APPELLANT

AND

PAUL OJIGI OMANGA 1ST RESPONDENT

JACK ANGILA 2ND RESPONDENT

RULING

1. The 2nd respondent/applicant herein, moved the court by way of Notice of Motion dated May 4, 2022 and is seeking the following orders:
 - a. The application herein be certified urgent and be heard *ex parte* in the first instance.
 - b. The honorable court do find that the record of appeal is incomplete and therefore incompetent.
 - c. The honorable court strike out the entire appeal summarily for being bad in law.
2. The application is premised on the following grounds:
 - a. The appellant filed their Record of Appeal dated September 23, 2020 forming part of this court record.
 - b. It has come to the attention of the respondents and applicants that the record is incomplete since the respondents submissions in the lower court as well as an exhibit are missing.
 - c. This is a glaring anomaly and was done deliberately by the appellant.
 - d. Despite bringing this to the attention of the appellant, it has through its advocates neglected to rectify the position by filing a supplementary record of appeal.



- e. The 1st respondent's advocate filed an application seeking to have the anomaly in the record rectified but the appellant filed grounds opposing the said application/rectification.
 - f. The appellant has an order staying the execution of the judgment of the lower court and it's still enjoying the said stay orders while deliberately delaying the instant appeal.
 - g. The impugned painting on the suit property (that led to the appellant being found culpable of trespass) are still on the said property from sometime in the year 2015 and the delay in the determination of this appeal means that the trespass will persist.
 - h. The appellant has been and continues to advertise its brand through the said painting/trespass even as it delays the instant appeal while enjoying the stay orders.
 - i. By the time the appeal is finally determined if it's to follow the normal course, the revenue the appellant will have drawn from the said advertisement will immensely surpass the damages awarded to the respondents in the subordinate court.
 - j. The failure to file these crucial documents within the record of appeal is bound to have an adverse effect on the respondent's and applicant's cause when the judgment is finally rendered.
 - k. The judgment that shall result from the incomplete record of appeal will not be proper since the court will not have considered all the material required for it to render a decision.
 - l. The documents that are missing from the record ought to have been included therein compulsorily and as a matter of law.
 - m. The appeal in its entirety is incompetent and bad in law by dint of the incomplete record of appeal.
 - n. The appeal herein is ripe for summary dismissal for the foregoing reasons.
 - o. The appellant has come to this court of Equity with unclean hands and should not be allowed to benefit unconscionably from the same.
3. The appellant opposed the application on the following grounds:
- a. That the 2nd respondent's application herein has been brought after an inordinate and unreasonable delay.
 - b. That the appellant prays that the 2nd respondent's application date May 4, 2022 be dismissed with costs.
4. Order 42 Rule 13 (4) of the [Civil Procedure Rules](#) provides as follows:
- "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:

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)."

5. Submissions are not evidence. Mwera J (as he then was) in *Nancy Wambui Gatheru vs Peter W Wanjere Ngugi* Nairobi HCCC No 36 of 1993 expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

Failure to include submissions which were made in the trial court in the record of appeal does not disadvantage any party, and more so the second respondent.

- 6. If the exhibit which was not included in the record turns out to be material in the course of hearing the appeal, the court will make appropriate findings.
- 7. It is my considered opinion that these two cannot be reasons to strike out the appeal. The application is dismissed. Costs will abide with the outcome of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

