



**Airtel Kenya Limited v Angila & another (Civil Appeal
91 of 2019) [2023] KEHC 19909 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 91 OF 2019**

**KW KIARIE, J
JULY 12, 2023**

BETWEEN

AIRTEL KENYA LIMITED APPELLANT

AND

PAUL OJIGI OMANGA 1ST RESPONDENT

JACK ANGILA 2ND RESPONDENT

RULING

1. The 1st respondent/applicant herein, moved the court by way of Notice of Motion dated 28th January, 2022 and is seeking the following orders:
 - a. That the honourable court be pleased to grant leave to the 1st respondent to file a supplementary record of appeal herein.
 - b. That the 1st respondent's supplementary record of appeal dated the 2/12/2021 and filed on 6th December, 2021 be deemed duly filed and served.
 - c. That cost of this application be in the cause.
2. The application is premised on the following grounds:
 - a. The appellant's advocates on record for reasons best known to them omitted key evidentiary documents from their filed and served record of appeal dated the 23.9.2020 contrary to the provisions of order 42 rule 13(4) of the *Civil Procedure Rules*.
 - b. The 1st respondent's supplementary record of appeal thus seeks to cure the anomaly and avail to this honorable court and indeed the other parties, the said omitted documents which include an exhibit and submissions relied on before the trial court by the respondents.
3. The appellant opposed the application on the following grounds:



- a. That the supplementary records of appeal are devoid of merit and is an abuse of the court process.
 - b. That it is a preserve of the appellant to file records of appeal.
 - c. That the supplementary records of appeal have been brought after an inordinate and unreasonably delay.
 - d. That the supplementary records of appeal are aimed at defeating due process as the same have been relied on by the 1st respondent in his submissions.
 - e. That the supplementary records of appeal are aimed at defeating justice as the appellant was not accorded the opportunity to examine them before the submission stage.
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. When it has been pointed to the court that the record of appeal is incomplete, the court cannot proceed to hear and determine the appeal until when the record is regularized. The appellant ought to thank the respondent who is keen to ensure that the record of appeal is in order. The argument that that it is the preserve of the appellant to file records of appeal is misplaced. The 1st respondent is equally a party with interest in the outcome of the appeal.

6. I therefore allow the application. Costs be in the cause.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

