

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC APPEAL NO.E025 OF 2024

**STEPHEN OCHIENG
ONYANGO.....APPELANT**

VERSUS

**FRANKLIN SWAGA OLOO.....1ST
RESPONDENT**

**COLLINS OTIENO OMONDI2ND
RESPONDENT**

**CHARITY AOR ODHIAMBO.....3RD
RESPONDENT**

**THE DISTRICT LANDS REGISTRAR UKWALA4TH
RESPONDENT**

RULING

1. The subject of this ruling is the Notice of Motion application dated 1/04/2025 which application seeks the Memorandum of Appeal dated 5/8/2024 and the Record of Appeal dated 3/12/2024 be struck out. The application is premised on the grounds on its face and the supporting affidavit sworn by Moses Ngaywa counsel on record for the applicant.
2. It is deponed that following the filing of the present appeal through a Memorandum of Appeal dated 5/8/2024 and attendant Record of Appeal dated 3/12/2024, it has emerged that the said Record of Appeal is incompetent

and incurably defective for having omitted the Replying Affidavit sworn by Franklin Swaga Oloo on 22nd May, 2018 relied upon during the hearing in the trial court. The Record of Appeal is termed incurably and fatally defective in so far as it does not include the complete pleadings as required by Order 42 Rule 13(4) of the Civil Procedure Rules.

3. That primary documents being exhibits and witness statement of the applicants as well as a copy of certified order of the ruling contained in page 50 to 55 of the record of appeal were also missing which were material for a fair and just determination of the appeal.
4. It is averred that despite an e-mail to the Appellant's Advocates on the incompleteness of the Record of Appeal and requesting for rectification he insisted that the record of appeal was complete. The email communication is attached together with the Index of the Record of Appeal.
5. Additionally it is stated the omitted documents by the Appellant/Respondent from the Record of Appeal are primary documents in terms of Order 42 Rule 13(4) and it cannot be redeemed by any amount of amendment and/or filing of a supplementary record of appeal. According to Counsel no order has been made to exclude any of the Respondents/Applicants documents under Order 42 Rule 13(4) and as such the Appellant has abrogated to himself the authority of this Court's judge or Deputy Registrar to exclude the documents which are material.

6. The appeal is termed as unsustainable and an abuse of the process of this honourable court.

Replying Affidavit

7. The application is opposed by the affidavit sworn on 4/04/2025 by Edwin Omulama Onditi counsel on record for the appellant.
8. It is averred in rejoinder that it was incumbent upon the Applicants to annex to their Supporting Affidavit evidentiary material and specifically to exhibit the relevant Memorandum of Appeal, the entirety of the Record of Appeal and the "Replying Affidavit sworn by Francis Swaga Oloo on 22nd May, 2018". Having not done so, the entirety of the Supporting Affidavit dated 01/04/2025 and consequently the attendant Notice of Motion Application itself, are fatally incapacitated. This omission cannot be cured by belatedly attaching these exhibits in a Further Affidavit as the Appellant will not have the opportunity to controvert the same.
9. It is deponed that the Record of Appeal is complete and contains all the mandatory documents listed at Order 42 Rule 13 of the Civil Procedure Rules and Direction No. 14 (a) of the Practice Directions to Standardize Practice and Procedures in the Environment and Land Court, 2025 (Kenya Gazette Notice No. 3461 dated 13/03/2025). The Applicants would have been helpful to the Honourable Court if first, they had annexed as an exhibit the said "Replying Affidavit sworn by Franklin Swaga Oloo on 22nd

May, 2018" . That they were duty bound to demonstrate that the "omitted" document was a primary document falling under paragraphs (a), (b) and (f) and hence was indispensable under Order 42 Rule 13 (ii).

10. With respect to the "Replying Affidavit sworn by Franklin Swaga Oloo on 22nd May, 2018" it is asserted that it was never part of the mandatory documents that are required to accompany the defence and or counterclaim pursuant to Order 7 Rule 5 of the Civil Procedure Rules: verifying affidavit in the case of a counterclaim, list of defence witnesses, written witness statements signed by the witnesses except expert witnesses and copies of documents to be relied on at the trial.
11. It is contended that there is a proviso to Order 7 Rule 5 of the Civil Procedure Rules that the written statements signed by witnesses may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11: There was no such leave of court obtained with respect to this subject Replying Affidavit hence it is a nullity in law.
12. That Kenya Gazette Notice No. 5178 dated 25/07/2014, which was operational at the material time, and being the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating To the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts at Directions 28 and 29 are unambiguous that the Pre-Trial Conference under

Order 11 of the Civil Procedure Rules must be taken seriously and no hearing date will issue until all pre-trial directions have been complied with and the Judicial officer has certified the matter ready for hearing. By the time of conclusion of the Pre-Trial Conference herein on 14/08/2019, there was no mention of the subject Replying Affidavit or any indication that it would be adopted as the evidence in chief of one Franklin Swaga Oloo.

13. It is further averred that during the hearing of the case on 09/04/2024, the Applicants took advantage of the absence of the Appellant, and executed an ambush by purporting to introduce the subject Replying Affidavit by Franklin Swaga Oloo into evidence without as much of a prior notice. The Trial Magistrate was duty bound to inquire as to whether the subject Replying Affidavit had been part of the Pre-Trial Conference proceedings and if not, whether the requisite application for leave of Court to file additional documents post the Pre-Trial Conference had been filed, served upon the Appellant and dispensed with. But he did not. Counsel on record for the Applicants, as a long serving officer of the court, was bound to disclose this grave matter, but he did not.
14. Consequently, a document that required prior leave of Court to be entered on record was admitted without the said leave yet it is settled law that where leave of court is required, any pleading filed without leave is a nullity. The court was referred to *Moboko Shembekhe Limited versus*

Robert Kiptalam & 3 Others (2023) KEELC 19982 (KLR), Marriot Africa International Limited versus Murigu & 3 Others; Ukombozi Holdings Limited (Interested Party) (Environment and Land Case 4 of 2021)(2024) KEELC 1699 (KLR), Lawi Kigen Kiplagat versus Japheth Amenity Ratemo ELC Nakuru (ELC No. 38 of 2012), and Kiru Tea Factory Company Limited versus Stephen Maina Githiga & 13 Others (2019) e KLR).

15. The court is referred to the dissenting Judgement by Hon. Justice Patrick Kiage at the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat versus I.E.B.C & Z Others (2013) e KLR** upheld by the Supreme Court of Kenya, to buttress the contention that the conduct of the Applicants and the Honourable Trial Magistrate pertaining to the "Replying Affidavit sworn by Franklin Swaga Oloo on 22nd May, 2018" was illegal:
16. It is urged that the certified copy of the ruling is not the subject of the instant Appeal before this Honourable Court. The subject of the instant Appeal is the Judgement of the Lower Court dated 26/07/2024 and which is exhibited at pages 97 to 114 of the Record of Appeal.
17. That moreover paragraphs 8, 9 and 10 of the subject Supporting Affidavit are vague and do not specifically identify the "Respondents/Applicants' primary documents filed and produced during the hearing in the Honourable Magistrate's court and which are necessary and material for a fair determination of the appeal". If these assertions

were true, nothing would have been easier than for the Applicants to expressly exhibit the said documents to enable this Appellate Court to make an informed determination over the same. Exhibiting them in a Further Affidavit will not cure this omission as the Appellant will have been denied an opportunity to controvert the same.

18. Additionally it is stated that at the core of the Appeal herein is the fact that the Applicants purported to advance a "counter-claim" based on constructive trust on behalf of the Estate of a Deceased person by the name Elisha Oloo without first moving the Courts for a Grant of Letters of Administration ad litem as required by express provisions of statute and that the Learned Trial Magistrate had unjustifiably overlooked that fact despite being alerted to the same severally by the Appellant.
19. It is further averred that the deponent having perused the entirety of the Civil Procedure Rules as well as the Court of Appeal Rules on the question of what is to be done where a Respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, that the answer is clear and unambiguous: Rule 94 (1) of the Court of Appeal Rules is express that in such instance, a Respondent is at liberty to lodge a supplementary record of appeal " ... containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."

20. It is contended that the Court of Appeal Rules relate to the Court of Appeal and that it is the Civil Procedure Rules that are applicable at first instance to the Environment and Land Court. Moreover, if the Civil Procedure Rules are silent on a certain question in the course of the exercise of appellate jurisdiction recourse can be had to the Court of Appeal Rules on the very same question for guidance on how the same is to be resolved.
21. It is also averred that as early as 14/01/2025 the deponent had taken the liberty to advise Counsel on the option for filing a supplementary record of appeal in the event they felt that the Appellant's record omitted some documents which they considered material to their cause as evidence. They choose to wait for two and a half months to file the instant Application which is mischievous.

Applicants Further Affidavit

22. The applicant responded to the foregoing by Further affidavit dated 7/4/2025 where it is averred that a further supplementary affidavit is allowed in law where the any documents relevant to the case can be annexed. Moreover, the documents may be accessed in the lower court file which is already before the court. That the issue of the admissibility of the replying affidavit sworn by Franklin Osogo Oloo is not an issue in the present appeal and ought to have been dealt with then. The affidavit was relied heavily by the applicants in the trial court and its

omission is prejudicial. That the appellant should not delve into the merits of the appeal.

Submissions

23. The application was canvassed by way of written submissions. The applicants' submissions are dated 14/04/2025 together with a list of even authorities of even date. and the respondent 16/04/2025 with a bundle of authorities of even date.

ANALYSIS AND DETERMINATION

24. I have considered the application and the response thereto together with the submissions filed. The main issue for determination is whether the application is merited.
25. I have noted that the issues in the application were raised sometime on 19/3/2025 where I directed that counsel for the appellant should revisit the trial court file which had been availed with a view to filing a supplementary record of appeal. I then left it open to parties to apply if the issues are not resolved. The respondent in the appeal has now filed the instant application.
26. Before I embark on my analysis I must make it clear that this application simply seeks the striking out of the Record of Appeal for allegedly being incomplete. It is not the forum for arguing the merits of the appeal. I make this observation since I see postulations that argue the merits of the appeal and which I will disregard.

27. The application is brought under the provisions of Order 42 Rule 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
28. Order 42 Rule 13 (4) is on directions before hearing of an appeal and reads;-

Rule 13(4) 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).

29. Order 42 Rule 1 of the CPR is also relevant and reads thus;-

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

30. My interpretation of the foregoing provisions is that the Memorandum of Appeal, the pleadings and the judgment, order or decree appealed from are mandatory. These cannot be dispensed with.

31. But the question that must be answered is whether the absence of the documents listed is fatal to the appeal to warrant its striking out.

32. The document alleged to be missing is the affidavit sworn by Franklin Swaga Oloo on 22nd May, 2018 which is stated to have been heavily relied upon by the respondent during the hearing in the Magistrate's court. Others are said to be the Respondents/Applicants exhibits and witness statement produced in the trial court as well as

copy of certified order of the ruling contained in page 50 to 55 of the record of appeal.

33. I will at this juncture resolve the contention that the supporting affidavit was deficient for failure to annex the documents the subject of the application including the Record of appeal. The applicant in his further affidavit sworn by counsel proceeded to annex the said documents. I find no problem with this because a supplementary or further affidavit gives an opportunity for further reply which does not exclude attaching of such documents and which are available and not completely new.
34. The filing of the Record of Appeal is a matter of practice. The court sitting on the appeal is clothed with discretion to order and or even dispense with the production of some of the documents except the pleadings and the judgment, order or decree appealed. As long as these documents are part of the record then there would be no basis upon which to strike out an appeal.
35. I will first speak to the certified copy of the order of the ruling dated 20/6/2024. The application was brought under the provisions of Order 16 rules 1,7 and 10 to compel the attendance of the 4th defendant to give evidence and produce some documents. The application was dismissed. Is a copy of the certified order material? In my view the ruling which is available in the Record of Appeal will suffice for purposes of reference.

36. I now address the affidavit sworn by Franklin Swaga Oloo. The replying affidavit herein in my view is not a pleading since under the rules an affidavit is not listed as a pleading. Affidavits are listed separately under Rule 13(4) (e) and does not rank in priority with the pleadings, the judgment and order or decree appealed from. I therefore respectfully agree with the appellants submission that it is not one of the primary documents that cannot be dispensed with under Order 42 Rule 13(4) as it is neither the memorandum of appeal, pleading nor judgement or decree appealed from.
37. Looking at para 6(iv) of Replying affidavit in response to the present application, the court notes that indeed the above affidavit was introduced during the hearing in the trial court on 9/04/2024. It was therefore introduced into evidence, except that counsel for the plaintiff seem to now have a problem on its admissibility abnatio. It is contended the same was introduced unprocedurally.
38. The question I pose is whether counsel for the applicant is advancing the above as a reason for its non-inclusion in the record of appeal? Shouldn't he have raised it as a ground of appeal or better still raised the objection on the said date of 9/04/2024.
39. Rule 13(4)(e) list all affidavits, maps and other documents whatsoever put in evidence before the magistrate as one of the documents that the appellate court should be satisfied is in the record of appeal provided that it was put

in evidence. All the court needs to satisfy itself is that the document was placed in evidence during proceedings in the trial court noting that the court also has the leeway to render its production not relevant. Its admissibility at the point of trial is not a matter for consideration at this point unless it is one of the grounds of appeal.

39. I have further perused the said affidavit sworn by Franklin Swaga Oloo. In my view, to the extent that the supporting affidavit largely contains the history and annexures used to buttress the plea of customary trust, then based on the crux of the appeal as articulated in paragraph 11 of the replying affidavit to this application, the same becomes pertinent within rule 13(4)(e). In any case it is an affidavit that was introduced in evidence and perfectly fits the description under rule 13(4) (e).
40. I have noted the applicants concerns at paragraph 6 of the supporting affidavit that the omission include the respondents/applicants exhibits and witness statement produced in the trial court. These documents were not specifically identified. At item 13 and 14 of the index of the record of appeal is the defendants witness statement of Claris Awino Ochieng and John Otieno Okinyo which I note have indeed been supplied at pages 43 to 44 and 46 to 49 respectively of the record of appeal.
41. The 1st 2nd & 3rd defendants list and bundle of documents seems to be missing from the index. However, from the proceedings at page 194 of the Record of Appeal DW1 was

Frankline Swaga Otieno adopted the replying affidavit sworn on 22/5/2018 the documents annexed thereto. These are not in the record of appeal. The other two witnesses did not produce documents.

42. Additionally, I agree it is only the court sitting on appeal herein that is clothed with the power to exclude a document and not counsel.
43. I have keenly read the Supreme Court of Kenya decision in **Bwana Mohamed Bwana Vs. Silvano Buko Bonaya & 2 Others (2015) eKLR** cited by the applicants. In the said case Mandatory documents were missing in the record. In the present case I have already noted that the missing document is not a mandatory document as envisaged under Rule 13 (4).
44. I will now address the issue of the remedy available for an incomplete record. Counsel for the respondent clearly states that he addressed counsel for the Appellant to rectify the record but who insisted that the record is complete. This goes to buttress the fact that a record may be remedied.
45. In the case of **Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR**, the Supreme Court of Kenya considered an application for striking out the record of appeal which did not contain the record of proceedings before the Court of Appeal and stated thus;-

(22) Under Rule 33(4), the contents of a Record of Appeal (from a court or tribunal in its appellate jurisdiction) contains the following documents from the first appellate court: the certificate, if any, certifying that the matter is of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. This Court has timely reiterated that under Rule 33(6) a document omitted may be filed in a Supplementary Record without leave of the Court with fifteen days of filing of the Record of Appeal; and subsequently with leave of the Court, the same document may be filed.

(23) It therefore emerges that failure to include the ‘record of proceedings of the court of Appeal’ in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.

46. I have noted the proviso for sufficient explanation above. I must note that this court has not yet certified the appeal as ready for hearing. The court is yet to satisfy itself whether the record is complete for purposes of Rule 13(4) herein. Should the non-inclusion of the said affidavit and

the other documents cited be a basis for the striking out of the Record and the appeal at this stage? In my view there is discretion until such a reasonable time the court will be satisfied with the completeness of the record. A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice. It is also the duty of a court of law to guide and lead parties and even counsel towards a fair and just resolution of a cause.

47. Counsel for the Respondent has urged that the applicant ought to have filed his supplementary record of appeal if he felt that the record of appeal was incomplete. The court has been referred to Rule 94 (1) of the Court of Appeal Rules. I respectfully decline to be persuaded by this proposition. These are rules applying to the Court of Appeal under The Appellate Jurisdiction Act. The responsibility of the record of appeal lies with the appellant under the Civil Procedure Rules.
48. I think I have said enough to demonstrate why I see no reason to strike out the Memorandum of Appeal together with its record and I choose the path of a supplementary record of appeal.
49. The following orders therefore issue to dispose of the application dated 1/04/2025.
 1. Appellant is hereby granted leave to file a supplementary record of appeal.

2. The Supplementary record of appeal shall include the affidavit sworn by Franklin Swaga Oloo on 22nd May, 2018 together with the documents annexed thereto.
3. That in addition to (2) above parties shall appear before the Deputy Registrar Environment & Land Court Siaya on priority basis to enable identification of any further documents as shall be identified by the applicant for inclusion in the supplementary record of appeal.
4. That upon (3) above the supplementary record of appeal shall be filed within 7 days.
5. That the costs of this application shall be borne by the appellant.
6. That the matter is hereby fixed before the Deputy Registrar Environment & Land Court Siaya on 29th October 2025.

Orders accordingly.

**Delivered and Dated at Siaya This 21st Day of
October 2025**

**HON. LADY JUSTICE A.E. DENA
JUDGE
21/10/2025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Omulama for the Appellants

No appearance for the Applicant

No appearance for the rest of the parties

Court Assistant: Elisha Mboya

ORIGINAL