



**Flying Horse Travellers Limited v Adhel & another (Civil Appeal
E1075 of 2024) [2025] KEHC 15131 (KLR) (Civ) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1075 OF 2024

JM CHIGITI, J

OCTOBER 28, 2025

BETWEEN

FLYING HORSE TRAVELLERS LIMITED APPELLANT

AND

MONDENG ADHEL 1ST RESPONDENT

KAMPALA EXPRESS PARCEL & SERVICES 2ND RESPONDENT

(Being an Appeal from the Judgement of the Honorable Resident Magistrate Hon. G Simatwo delivered on the 28th August, 2024 in SCC Comm No. E2071 of 2024 at Nairobi)

JUDGMENT

Brief background;

1. The Small Claims Court (Hon. G. Simatwo) delivered its judgment in Milimani SCCC NO. E2071/2024 on 28th August, 2024 in favour of the 1st Respondent herein and against the Appellant and the 2nd Respondent jointly and severally.
2. The decretal sum of Kshs. 193, 572.00, costs of the suit and interests from the time of filing of the claim to the date of payment of the decretal sum in full.
3. Being dissatisfied with the said judgment, the Appellant filed its Memorandum of Appeal dated 13th September, 2024 raising 7 grounds on the face thereof.

The Appellant's Case;

4. The Small Claims Court delivered a judgment 28th August 2024, in which the Honourable Trial Magistrate awarded the 1st Respondent the sum of Kshs 193,572.00.



5. According to the applicant, the claim was founded on allegations of breach of contract and duty of care, despite the fact that the Appellant was neither a party to the alleged contract nor proved to have owed any legal duty to the 1st Respondent.
6. It is its case that the 1st Respondent filed a Statement of Claim dated 19th April 2024, alleging that on 1st February 2024, she contracted the 2nd Respondent to transport a parcel consisting of four dummies and a bale of clothes worth USD 1,200 from Nairobi to Juba.
7. The 2nd Respondent issued a receipt confirming payment and acknowledgment of the goods. It was further alleged that an “authorized agent” of the 2nd Respondent delivered the said items to the Appellant for purposes of delivery.
8. The 1st Respondent claims to have visited the Appellant’s offices and was falsely informed that the goods had been delivered, which later turned out to be untrue.
9. It alleged economic loss and attached (i) the receipt issued by the 2nd Respondent, and (ii) a demand letter addressed jointly to the Appellant and 2nd Respondent.
10. The Appellant, in its Memorandum of Reply, denied any contractual or legal relationship with the 1st Respondent. It contended that:
 - a. It had not received any parcel from the 1st Respondent;
 - b. No consideration had been paid to it;
 - c. The 1st Respondent failed to provide any delivery receipt or tracking reference from the Appellant;
 - d. The documents produced established a contractual relationship solely between the 1st and 2nd Respondents.
11. The Trial Magistrate made the following findings:
 - i. That the 1st Respondent had proved her case on a balance of probabilities.
 - ii. That once the parcel “exchanged hands,” the Respondents owed a duty of care to the 1st Respondent.
 - iii. That there was breach of both contractual and tortious obligations due to failure to deliver or communicate.
 - iv. That the Appellant failed to adduce evidence to refute the claim.
12. The Appellant is aggrieved by the judgment and appeals on the following grounds:
 - a. The Trial Magistrate erred in law by holding the Appellant liable for breach of contract in the absence of any contractual relationship.
 - b. The Court failed to appreciate the principle of privity of contract, which prevents the enforcement of obligations against a non-party.
 - c. The Trial Court wrongly imposed a duty of care on the Appellant without any factual or legal basis.
 - d. The burden of proof was wrongly shifted to the Appellant.
 - e. The Court ignored relevant submissions and evidence presented by the Appellant.



- f. The Court failed to evaluate the evidence in totality, leading to a misapplication of the law.
13. In advancing its case, the Appellant advanced its appeal in diverse fronts.
On the legal aspect of Privity of Contract & Absence of Contractual Relationship
14. It is its case that for a party to be held liable in contract, a valid contract must exist between the claimant and the defendant. The essentials—offer, acceptance, and consideration—must be proved. The only document presented, a receipt dated 1st February 2024, was issued by the 2nd Respondent. No document or testimony was tendered to establish any agreement between the 1st Respondent and the Appellant.
15. Reliance is placed in the case of *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] eKLR; Where it was held,
 “As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if it is made for his benefit and purports to give him the right to sue or to make him liable...”
16. The Appellant also relies in *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR, the learned Judges held;
 “In the appeal before us, the contract was between the Appellant and the 1st Respondent. The Appellant and the 1st Respondent failed to identify any agreement or contract by which the 2nd Respondent undertook to take over the Appellant’s liabilities. The Appellant did not adduce evidence to the effect that the 2nd Respondent was a party vide the exceptions to the doctrine of privity of contract; for example, it did not demonstrate the existence of:
- i. a collateral contract to the one in question in which the 2nd Respondent was a party;
 - ii. an agency relationship in which the 2nd Respondent transacted on behalf of the Appellant;
 - iii. a trust by which the 2nd Respondent contracted on behalf of the Appellant; and
 - iv. an express provision or implied term in the contract made for the benefit of the 2nd Respondent.
- It is its case that the 2nd Respondent was a third party to the contract.
 The Appellant and the 1st Respondent failed to identify any agreement or contract by which the 2nd Respondent, undertook to take over the Appellant’s liabilities.
 It is its case that here is no privity of contract between the 1st Respondent and the 2nd Respondent”.
17. The Appellant is convinced that the trial Court erred in holding that the Appellant owed a duty of care to the 1st Respondent in tort. The Appellant submits that the finding was unsupported by evidence of a relationship giving rise to such a duty.
18. It is its case that in tort, duty of care arises where a party’s conduct can foreseeably cause harm to another. It advances the case that the Appellant neither received the goods, issued a delivery receipt,



nor interacted directly with the 1st Respondent and the Appellant cannot be said to have voluntarily assumed a duty which forms the foundation for liability in negligence.

19. The Appellant is also of the strong persuasion that the magistrate wrongly shifted the burden of proof to the Appellant. According to Section 107(1) of the *Evidence Act* (Cap. 80):

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

20. It is its case that the 1st Respondent failed to prove on a balance of probabilities, that the Appellant:

- a. Received her goods,
- b. Undertook to deliver them,
- c. Failed in that obligation.

21. Reliance is placed in *Mburo v Owuor* (Civil Appeal E181 of 2023) [2024] KEHC 6440 (KLR) (14 May 2024) (Judgment), the learned Judge held that;

“The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.”

22. The Appellant also advances the argument that the Magistrate failed to appreciate the law in finding that there was no contract between the Appellant and the 1st Respondent, then under the Privity doctrine, there was no cause of action that could be maintained in law.

23. In *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* (supra), the court further held that;

“In this regard Halsbury’s Laws of England, 4th Edn. Vol. 9 (1) Para. 748 states:

“The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations.”

24. Reliance is also Placed in the case of *Agricultural Finance Corporation v Lengetia*, 1982-88 I KAR 772 which stated:

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom



the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

25. In *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR, the Learned Judge held;

“Firstly, the position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal stated that:

“It was clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject reiterated, they that it was “alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

26. It is its case that the contract was strictly between the Appellant and another and not with the Respondent.

27. The Court in *Mark Otanga Otiende v Dennis* (supra) continued as follows;

“In *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, the Court of Appeal relying on its previous decisions in the cases of *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765, *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another*, CA NO 274 of 2003 and *William Muthee Muthami v Bank of Baroda*, CA NO 91 of 2004, reiterated that a contract affects only the parties to it and that it cannot be enforced by or against a non-party.”

28. In its classical adaptation, the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, except in certain cases only.

29. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

30. It is its case that no court of law can rewrite a contract for parties and imply parties that were never privy to a contract.

31. The Appellant urges the court to allow the appeal.

The 1st Respondents Case;

32. It invites the court to consider whether the Appellant and the 2nd Respondent are Jointly Liable for Breach of Contract.

33. The 1st Respondent contracted the 2nd Respondent to deliver various assorted items in Juba as claimed in the Statement of Claim.



34. The 2nd Respondent then engaged the Appellant to effect the said delivery.
35. It is its case that the Appellant and the 2nd Respondent are liable for breach of contract for delivery of the 1st Respondent's goods and are fully liable for the loss thereof.
36. It raises a concern that, the Record of Appeal herein does not contain the Memorandum of Response and documents filed by the 2nd Respondent before the Small Claims Court.
37. It is its case that The Record herein is not a complete one as it ought to be.
38. It argues that The Appellant may choose the grounds of appeal but has no liberty to choose what goes to the Record of Appeal.
39. The 2nd Respondent produced the Appellant's receipt of payment for transportation fees totaling to KShs. 10,000.00 which has neither been denied nor controverted by the Appellant herein.
40. Furthermore, the 2nd Respondent herein produced the Appellant's copy of a records book described as a manifest showing that indeed there was a contract entered into between the two regarding the transportation and delivery of the goods to Juba.
41. All these documents and pleadings have not been produced in the Record of Appeal.
42. The Appellant and the 2nd Respondent have not denied having lost the 1st Respondent's items as claimed and to that extent are liable for the loss thereof.
43. The 1st Respondent retains a legitimate expectation that having dropped her items with the 2nd Respondent herein, her items would be delivered safely at Juba.
44. This expectation was unjustifiably thwarted by the Respondents' conduct herein and to that extent, the Appellant and the 2nd Respondent are liable for the loss of the said goods in transit.
45. It is submitted that the 1st Respondent herein and her Counsel on record did visit the Appellant's premises on 18th March, 2023 with an aim of establishing the status of delivery of the items herein and an authorized agent of the Appellant acknowledged having sent the items and that they were liaising with their Juba office to confirm the position.
46. It is its case that the three parties herein are privy the contract of transportation and delivery of goods in question.
47. The Appellant's act of attempting to hide under the auspices of the doctrine of privity of contract as to escape liability is untenable.
48. The doctrine of privity of contract and benefits of third parties to a contract have been addressed with a great magnitude of precision by the Court of Appeal in the case of Aineah Liluyani Njirah v Agha Khan Health Services (Civil Application 194 of 2009) [2013] KECA 481 (KLR) (Civ) (12 July 2013) (Ruling) wherein the learned Judges held at paragraphs 4-8, 12, 14 and 15 in this regard as follows:

“ 4. Privity of contract is a long-established part of the law of contract.

In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See *Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd.*[1] The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract,



he cannot enforce any of its terms nor have any burdens from that contract enforced against him.[2]

5. Throughout its development, however, this doctrine has provoked much criticism and debate.[3] In the year 2008, the report of the Law Reform Commission of Ireland on “The Privy of Contract and Third Party Rights” recommended that, subject to certain limitations, the privity of contract rule should be reformed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to rely on and enforce the agreement if it is not carried out properly.[4] That Commission confirmed its view, and indeed the view of the majority of the Commissioners, legal consultants[5] and academicians,[6] that the doctrine of privity of Contract is ripe for reform.

6. Before that recommendation was made, the major argument had been that the privity rule “can thwart the intentions of the contracting parties” and run counter to the basic principle of freedom of contract. Lord Steyn summarized this criticism of the privity rule as follows:

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties ... [T]here is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties ... It is, therefore, unjust to deny effectiveness to such a contract...”[7] (Emphasis supplied).

7. Thus in its central recommendation, that Commission proposed that third parties (subject to being expressly identified) should have the right to enforce contractual provisions where:

1. The contracting parties expressly so provide the “first limb” of enforcement, and
2. The contracting parties intend to confer a benefit on the third party the “second limb” of enforceability- provided that the contracting parties do not also intend that the third party beneficiary should not have the right to enforce the contract. The Report thus signaled a decisive break from the orthodoxy of the privity doctrine.

8. More fundamentally, however, when the contracting parties intend to give a right of enforcement to a third party, “it is difficult to see how it can be said that effect is given to that intention by allowing the promisee, but not the third party, to sue...where an unjust or illogical result is caused by the privity rule. [8] (Emphasis supplied). It would surely be much simpler and clearer to give effect to the intentions of the contracting parties by allowing the third party to enforce the contract...

12. There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a



contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so...

14. When ascertaining the intentions of the parties, the court should interpret the contract “in light of the surrounding circumstances which are reasonably available to the third party.”[12]The English Court of Appeal confirmed this position in *Prudential Assurance Co Ltd v. Ayres*[13] although it is unclear whether or not there is a requirement that these surrounding circumstances should be readily available to the third party.[14]

15. Third party rights have also been long recognized in the United States [15] and in civil law jurisdictions such as France [16] and Germany,[17] and, as stated, in recent years the privity rule has been significantly reformed in common law jurisdictions such as England and Wales, [18] Singapore,[19] New Zealand, [20] Canada [21]and Australia.[22]” [Emphasis added].

49. It submits that it is clear that the agreement between the Appellant and the 2nd Respondent was for the direct benefit of the 1st Respondent herein and there is no way the Appellant can deny the same.

50. The doctrine of privity of contract cannot be asserted by the Appellant herein cannot be applied to escape liability that is so glaring in the circumstances.

51. Reliance is place in the case of *Eastern Produce Kenya Ltd v Rongai Workshop & Transporters Ltd* (Civil Appeal 125 of 2018) [2023] KEHC 24810 (KLR) (7 November 2023) (Judgment) the learned Mohochi J. held as follows:

“ 36. It is my considered view that failure to deliver was a fundamental breach of duty which goes to the root of the contract thereby occasioning a breach of contract. The Respondent was liable for the loss incurred by the Appellant when its goods were stolen while on transit...”

52. In the case of *Khetshi Dharamshi Co. Ltd v P. N. Mashru Ltd* [2006] eKLR wherein the learned Judge held as follows:

“I have to state that the defendant has placed no material before the Court to show how it could escape liability under the conception of the tort of negligence as defined above.

It is well known that in a suit such as the instant one, the legal burden always rests upon the plaintiff; and this burden is discharged when substantial proof is executed of the several assertions in the pleadings. I have earlier-on summarized the nature of the plaintiff’s case; and from the review of evidence and submissions, it is clear to me that the plaintiff did make out a case which required focused response from the defendant. Even as the plaintiff discharges the legal burden of proof, the defendant is always, from time to time, called upon to respond to the play of evidence, to discharge the evidential burden. It is asserted that the defendant did not take due care of the plaintiff’s goods as they were being transported to Nairobi; that the defendant rarely responded to the plaintiff’s inquiries about the whereabouts of



the goods; that the defendant took no sufficient action to follow up on the fate of the lorry transporting the plaintiff's goods; that the defendant had no real explanation for then on delivery of the plaintiff's goods. To these assertions, the defendant has no response of substance. In the discharge of the evidential burden, I think, the defendant has not been successful.”

53. The 1st Respondent's items as claimed were lost as a result of the Appellant's and 2nd Respondent's joint negligence and they should be held to account and compensate the 1st Respondent herein.
54. In addressing the issue whether the Appeal is meritorious; It is argued that the Appellant herein tendered not even a scintilla of evidence before the Small Claims Court to challenge the Claim or at all.
55. On its part, the 1st Respondent has ably demonstrated by way of documents that indeed she contracted the 2nd Respondent to offer transport services for the lost assorted goods.
56. The documents produced by the 2nd Respondent demonstrate a clear nexus of an agreement between the Appellant and the 2nd Respondent. The said agreement was entered into by the said parties for direct benefit of the 1st Respondent.
57. The Appellant raised various grounds of appeal though without any evidentiary backing from the subordinate court below.
58. Section 107 of the *Evidence Act* (Chapter 80) succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
59. Section 108 of the *Evidence Act* (Chapter 80) further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
60. Reliance is placed in the case of *Sanganyi Tea Factory v James Ayiera Magari* [2016] eKLR. In this case, the Honourable Court relied on the case of *Susan Mumbi –vs- Kefala Grebedhin* (Nairobi HCCC No.332 of 1993), where Justice Juma, as he then was, stated:

“The question of the Court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”
61. On costs it is submitted that the general rule concerning costs is that costs follow the event. Reliance is placed on Section 27(1) of the *Civil Procedure Act*, which states that awarding of costs shall be at the discretion of the Court or Judge who has the power to determine to whom the costs will be awarded, out of what property and to what extent such costs are to be paid.

Analysis and Determination;

The court finds the following to be the issues for determination;

1. Whether the court has jurisdiction.
2. Whether the appeal has merit.



3. Who shall bear the costs.

Whether the court has jurisdiction.

62. Being a first appeal, this Court is called upon to re-assess and analyse the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123).
63. The next and most critical question that this court must satisfy itself with before delving into the merits of the appeal is whether or not the court has jurisdiction. Jurisdiction is everything.
64. In the case of *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus;

“(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *Commission (Applicant), Constitutional Application Number 2 of 2011*. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law.” (Emphasis provided) where it quoted with approval the oft cited case of *Owners of Motor Vessel 'Lillian S' v Caltex In Re the Matter of the Interim Independent Electoral Commission* where the Court stated: - “[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”(underlining supplied) [30] The *Lillian 'S'* case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

65. The applicable law that governs what an Appellant should lodge in an appeal is Order 42 of the Civil Procedure Rules which lists in very clear terms the documents that must be on the court record.
66. 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).

67. The Court may however dispense with the production of any document it deems irrelevant. Notably, the production of the memorandum of appeal, the pleadings and the decision appealed against may not be dispensed with.
68. In the instant case, some of the fundamental documents are missing from the record. This Court has not dispensed with the production of the same. In the premises, the record of appeal is incomplete.
69. The Record of Appeal herein does not contain the Memorandum of Response and documents filed by the 2nd Respondent before the Small Claims Court.
70. The 2nd Respondent produced the Appellant's receipt of payment for transportation fees totaling to KShs. 10,000.00 which has neither been denied nor controverted by the Appellant herein.
71. The 2nd Respondent herein produced the Appellant's copy of a records book described as a manifest showing that indeed there was a contract entered into between the two regarding the transportation and delivery of the goods to Juba.
72. The Appellant did not file a supplementary record to cure that lapse.
73. After the issue was raised by the 1st Respondent in its submissions, the Appellant failed to harness the second opportunity to cure the lacuna. No reference was made to this issue. It would appear to the Appellant satisfied with the record of appeal.
74. The documents that were left out are critical and relevant and important in the determination of this appeal.
75. In failing to include them as part of the record or supplementary of appeal this court jurisdiction has been taken away and I so hold.



76. In the case of *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR, the Supreme Court 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:

“(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.

77. Where an appellant falls into this kind of situation and no sufficient explanation for the omission is provided, such record of appeal may be struck out as incompetent.

78. In my considered view, the Appellant cannot seek refuge under Article 159 of *the Constitution* in a bid to cure the fundamental lapse.

79. The documents omitted are very critical. In the circumstances this does not look like a case of inadvertent omission. Were it so, the Appellant would have surely sought leave to file a supplementary record with a view to incorporating the said documents.

80. Where there is an omission of required documents in the record of appeal and no sufficient explanation for the omission is proffered, the Court will be justified in striking out that record of appeal.

81. In the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR the Supreme Court considering the incompleteness of a record of appeal stated and held that without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

Determination;

82. Faced with an incomplete record, the appeal before this court is incompetent and defective. The Court is thus divested of the jurisdiction to consider the issues placed before it, as the conditions set by law have not been met.



Order:

The Appeal is hereby struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2025.

.....

J. CHIGITI (SC)

JUDGE

