Cooperative Bank of Kenya v Otiyo & 6 others (Environment and Land Appeal E039 of 2024) [2025] KEELC 8053 (KLR) (11 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8053 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E039 OF 2024

FO NYAGAKA, J

NOVEMBER 11, 2025

BETWEEN

COOPERATIVE BANK OF KENYA ..... APPELLANT

AND

SERAPHINA AUMA OTIYO ..... 1ST RESPONDENT

VICTOR MWAI OTIYO ..... 2ND RESPONDENT

EDWIN ODHIAMBO OTIYO ..... 3RD RESPONDENT

GEOFFREY OMONDI OTIYO ..... 4TH RESPONDENT

PRISCOT INTERPRICES LIMITED ..... 5TH RESPONDENT

THE LAND REGISTRAR ..... 6TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 7TH RESPONDENT

RULING

Brief Facts

1. The Applicants filed the instant application dated 7th March, 2025 seeking the following orders:
    1. Spent.
    2. Spent.
    3. That the Record of Appeal herein dated 19th August, 2024 and the Supplementary Record of Appeal dated 7th February, 2025 filed herein be and are hereby struck out. In the result, the Appeal herein be and is hereby struck out.

4. That consequently, the Applicant's title deed in respect of all parcel of land known as Kanyada/ Kotieno Katuma "B"/286 deposited in court on 4th November, 2024 pursuant to the consent of the parties dated 9th July, 2024 and the consent order of 21st August, 2024 in Homabay ELCL Misc Application No. E008 of 2024; Cooperative Bank V Seraphina Auma Otiyo and Victor Mwai Otiyo and 2 Others be and is hereby released to the Applicants herein.

5. That the Applicants be at liberty to execute the decree issued on 6th February, 2024 in Homabay CM ELC No E036 of 2021; Serphina Auma Otiyo & 4 Others V Priscot Interprices Limited & 3 Others.

6. That the Honourable Court do issue any such further orders as it deems fit in the circumstances.

7. That the costs of this Application be provided for.

2. The Application was based on grounds set out and supported by the Affidavit of Seraphina Auma Otiyo the 1st Applicant sworn on 7th March, 2025.

3. She stated that the Appellant filed an application for leave to file appeal out of time as well as stay of execution pending the intended appeal. She further stated that in order to facilitate speedy hearing and determination of the intended appeal, the Applicants indulged the Appellant on the said application wherein they recorded a consent.

4. She went on to state that the Appellant filed their record of appeal dated 19th August, 2024 in compliance with the consent order. She added that the said record was however incomplete and illegible and that it had not been remedied by the supplementary record of appeal.

5. She stated that both the Record of Appeal and Supplementary Record of Appeal being incomplete was defective and ought to be struck out. She also stated that both did not contain the decree in respect to which the appeal was filed.

6. She further stated that there was no competent appeal before the court in which directions could be given or admitted for hearing. She stated that the title deed of the suit property deposited in court pursuant to the consent order should be released to the Applicants. She stated that the Appellant's conduct of the proceedings demonstrated lack of commitment in prosecution of the appeal in respect of the judgment delivered on 23rd January, 2024 in ELC No. 36 of 2021.

7. In conclusion, she stated that the Applicants should be at liberty to execute the decree and that no prejudice would be occasioned to the Respondent if the orders sought are granted.

Response

8. The Appellant filed its replying affidavit sworn on 24th March, 2025 by one Linda Agatha, its advocate, where she deposed that the application was misconceived and brought in bad faith.

9. She further added that the illegible documents in the record of appeal as was alleged about pages 11, 43, 52, 56A, 145, 147, 300, 310, 496, 540, 543 and 547 was due to the process of reprinting and scanning thus compromised their quality. She added that they requested for legible copies which have since been provided at pages 498, 502, 510, 515, 516, 517, 518 and 519 of the Record of Appeal.

10. She also averred that while paragraph 9 of the affidavit alleged that the record of appeal and supplementary record of appeal are incomplete, it did not specify the documents that were allegedly

missing. She added that nothing stopped the Applicants from filing its own Record but instead they waited for more than 30 days before filing the present application which seeks to delay the appeal.

11. She averred that the application was an afterthought and that the record of appeal and supplementary record of appeal were properly on record. She added that the appeal raised triable issues which need to be fully canvassed.

12. She further averred that the Applicants have not demonstrated the prejudice they would suffer should the appeal proceed. She urged the court to dismiss both the application and appeal.

Submissions

13. Counsel for the 1st to 4th Respondents filed his submissions dated 26th March, 2025 where he gave a background of the case and submits that the Record of Appeal and Supplementary Record of Appeal are incomplete. He submits that the appeal is fatally incurably defective and should be struck out.

14. He submits that both record and supplementary record of appeal do not contain the decree in respect of which the appeal has been filed as required under Order 42 Rule 13(4) of the Civil Procedure Rules. He submits that without a decree of the judgment, there was no valid and competent appeal.

15. He relied on the case of Mburu & 6 Others v Kirubi (Civil Appeal E246 of 2021) [2023] KEHC 3599 (KLR) and Fredrick Mwangi Njuguna v East African Growers Ltd [2015] eKLR Civil Appeal 53 of 2011. He submits that the Appellant acknowledged that there was no decree in both the record of appeal and supplementary record of appeal. He submits that there is no competent appeal in which it can be admitted for haring or which directions can be given.

16. It was his submission that the title deed in respect of the parcel Kanyada/Kotieno Katuma "B"/286 be released to the Applicants as it will have served its purpose. He adds that the Appellant's conduct of the proceedings demonstrated lack of commitment in prosecuting the appeal.

17. In conclusion, he urged the court to grant the prayers sought in the application.

18. Counsel for the Appellant filed his submissions dated 7th April, 2025 where he submits that the Respondents failed to substantiate the ground that the Record and Supplementary Record of Appeal were illegible. It was his submission that the issue not being contested, the court need not expend further judicial time addressing it since it was no longer in dispute.

19. He relied on Order 42 Rule 13 (4) of the Civil Procedure Rules and Section 79 G of the *Civil Procedure Act* and submits that the Respondents claim that the Record of Appeal and Supplementary Record of Appeal not having a decree was misconceived and legally flawed.

20. Counsel further relied on Section 2 and 81 of the *Civil Procedure Act* and the case in Sumba & 4 Others v Independent Electoral & Boundaries Commissions and Another [2022] KEHC 131961 KLR. He submits that any procedural rule that attempted to make a formal decree mandatory contrary to the Act's express provision must yield to the parent statute. He also relied on the case of Malindi HCCA No. 59 of 2018-Elizanya Investments Limited v Lean Energy Solutions and submits that it was not mandatory to include a decree in the record of appeal.

21. It was his submission that the present appeal was yet to be admitted for hearing, nor have directions been taken regarding its further progression. He cited the case of Mburu & 6 Others v Kirubi and Frederick Mwangi Njuguna and East Africa. He submits that Order 42 rule 2 provides a flexible timeline, allowing the appellant to file the certified copy as soon as possible or within such time as the court may direct. He relied on Section 79B of the *Civil Procedure Act*.

22. He submits that no prejudice whatsoever will be occasioned to the Respondents if a formal decree is subsequently filed. He adds that the filing of the decree is a procedural formality that does not affect the substance or merits of the appeal, nor does it cause any injustice to the Respondents.

23. He further submits that striking out the appeal purely on procedural grounds constitutes a flagrant violation of the Appellant's fundamental right to a fair trial and offends the well-established principles of natural justice. He cited Article 50 (1), 47 (1), (2) and (3) and Article 48 of *the Constitution* and Sections 2, 3 (1) (b) and (c), 4 (1) of the Fair Administrative Actions Act, 2015. He relied on the case of Augustine Mulo Onyango V Migotiyo Plantations Limited & Another Civil Appeal No. 6 of 2017.

24. It was his submission that the Respondents waited almost one month after being served with the supplementary record to file the present application. He argues that this delay on the part of the Respondents undermines any assertion of prejudice or urgency on their part. He submits that the application is an afterthought aimed more at frustrating the expeditious resolution of the appeal rather than promoting the fair administration of justice.

25. He relied on Sections 3(1) and 3(3) of the *Environment and Land Court Act* and submits that the Respondents pursued the present application instead of taking a direct and constructive approach. He adds that they have not only delayed the proceedings but also undermined the court's efforts to resolve the matter efficiently.

26. In conclusion, he submits that the present application amounts to an abuse of the court process and urged the court to dismiss it with costs to the Appellant.

Analysis and Determination

27. This court has carefully considered the application, response and submission by the parties and the issue for determination is whether the application is merited. This court now proceeds to analyse the application and response using the simple legal procedure of arriving at a reasoned conclusion, which is to sequentially determine it starting with identifying first the Issue (I), then considering the law or Rule (R) on the issue, and then applying the law to the facts (A) before arriving at the conclusion (C), simply abbreviated as IRAC.

28. The Respondent argued that the appeal raised triable issues. In my view that is a misconception. An appeal only raises arguable grounds. Triable issues go for a trial. Be that as it may, the merits or otherwise of the application follows now.

29. The issue herein is that the Respondents, on the one hand, contend that the Record of Appeal and Supplementary Record of Appeal dated 19th August, 2024 and 7th February, 2025 respectively did not include a decree hence the same should be struck out together with the appeal. They also contend that the same contained documents that were illegible.

30. The Appellant, on the other hand, argues that it annexed a copy of the certified judgment which would suffice even where there was no decree in the record. It was his contention that the issue of illegibility was remedied and that the application was an afterthought since the Respondent never substantiated it.

31. Order 42, Rule 2 of the Civil Procedure Rules provides that:

> "where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."

32. Order 42 Rule 13 (4) (a), (b) and (f) further provides that:

> " Before allowing the appeal to go for hearing the judge shall be satisfied that inter alia, memorandum of appeal, pleadings and the judgment, decree or order appealed 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."

33. I have perused the Record of Appeal and supplementary Record of Appeal. It is not in dispute that there is no certified copy of the decree in them. In terms of Order 42 Rule 13(4) of the Civil Procedure Rules 2010 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;
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> (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).

34. The determining phrase herein above is that the judge has to be satisfied, before setting down the appeal for hearing, that the documents required to constitute the Record of Appeal are in it, and that those that are compulsory, being the Memorandum of Appeal, the pleadings and the judgment or ruling and decree or order appealed from are part of the Record of Appeal. The effect of failure to include the compulsory documents renders the Record of Appeal incurably defective.

35. However, what is not clearly stated expressly in the Rules is the effect of having a defective Record of Appeal on the record before the appeal is set down for hearing or even before the appeal is admitted for hearing. I state so because in this matter, I have noted from the record herein that since the appeal was filed, it was not filed with the decree or the decree was not filed as soon as practicable as required under Order 42 Rules 2 and 11 of the Civil Procedure Rules. Further, the Appeal has neither been admitted nor ever set down for hearing. Instead, the applicants moved the court to strike out both the appeal and the Record. How I wish they set the appeal down for admission and hearing fast! It appears they were quick to dispose it off by way of a technicality.

36. I note that paragraph (f) of Order 42 Rule 13 of the Civil Procedure Rules is explicit regarding the compulsory decision of the trial court which must be included in the Record. It provided that the Record of Appeal must contain "the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal." It is a fact that there is a copy of the judgment appealed from on the record of appeal. Only the decree is missing. Should that render the appeal completely defective? The answer lies in the interpretation of the sub rule. The conjunction "or" is definitive in the sense that a Record of Appeal should contain on or other of the documents mentioned. Thus, where a judgment is contained in a record of appeal there is no need for a decree. And unlike the Court of Appeal rules which require specific documents including a decree to be file and stipulate that where it is not filed the record of appeal is defective and the appeal is struck out, in the Civil Procedure Rules there is no provision as that. In any event the Court of Appeal rules contemplate an appeal in that court which is commenced with a notice of appeal rather than a memorandum of appeal. When a record of appeal is struck out in this level of appeal it leaves the memorandum of appeal still intact. Article 159(2)(d) of *the Constitution* obligates courts to determine matters on substantive bases rather than mere technicalities which do not go to the substance of the same. I belief and I am of the humble opinion that the issue raised falls under the latter, that is that it is a technicality.

37. In the case of Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] KEHC 6055 (KLR) the court held as follows:

> "Despite the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word "shall" in Order 42 Rule 2 of the *Civil Procedure Act* contemplates that the furnishing of the decree or order is mandatory and cannot be wished away."

38. Further, in the case of Loopa & another (Suing as the legal representative of the Estate of Stephen Ng'ulia (Deceased)) v Technoplast Ltd [2022] KEHC 13597 (KLR) the court held that:

> "The contents of the Record of Appeal by Order 42 Rule 13 of the Civil Procedure Rules include judgment, order or decree appealed from. Indeed Order 42 Rule 2 provides that where a certified copy of decree or order is not filed, the court need not consider whether to reject the appeal summarily under section 79B of the Act until "such certified copy is filed." Clearly, in the High Court, a certified copy of decree or order is a mandatory requirement the default of which may be cured by filing it in a supplementary record in accordance with Order 42 Rule 2 of the Civil Procedure Rules.
>
> While the requirement of attaching a decree or order appealed from is not a technicality, in the spirit of Article 159 (2) (d) of *the Constitution* and the overriding objectives stated under Section 1A and 1B of the *Civil Procedure Act*, this court is mandated to consider the wider interests of substantial justice and there is no room the draconian decision to strike out the appeal for want of a certified decree, judgment or order in High Court appeals governed by Order 42 Rule 2 and 13 of the Civil Procedure Rules. It is my understanding that the sanction for failure to attach a decree or order in appeals to the High Court is not the striking out of the appeal but the refusal to proceed to set down the appeal for hearing under Order 42 Rule 13 (4) of the Civil Procedure Rules until a certified copy is attached. The rule states that "before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record...."

39. In light of the above persuasive authorities together with the overriding objectives provided for under Section 1A and 1B of the *Civil Procedure Act*, this court shall consider the wider interests of substantial justice as striking out of the appeal for want of a decree would be draconian.

40. Notably as I have stated, the Appeal is yet to be admitted and or set down for hearing. The Supreme Court of Kenya in the case of Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 Others [2015] eKLR 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." [Emphasis mine]

41. It is this court's view that the Appellant despite having been given an opportunity to file its Supplementary Record of Appeal, it failed to include a certified copy of decree in it. In addition, no reason was provided for delay in having the same on record.

42. The upshot of the foregoing is that is that the record of appeal has not fulfilled its prerequisites. But it does not render the appeal susceptible to being struck out especially when it had not been admitted or fixed for hearing. What is to be struck out is the Record of Appeal and the Supplementary Record of Appeal. that leaves the Memorandum of Appeal intact.

43. I also note that the Respondents under prayers (4) and (5) have sought for an order that the title for the suit land held by the court be released to them for execution. It is this court's view that granting the same would be contrary to the orders already issued since it would only be applicable if this court had dismissed the appeal which is not the case.

44. To this end, I find that the application partially succeeds in terms of prayer (3) part (a) and (7). I thus issue the following orders:

    a. That both the Record of Appeal and Supplementary Record of Appeal are hereby struck out with costs to the Respondents/ the Applicant and other parties who took part other than the Appellant.

    b. The costs to the Respondents on this account are capped at KShs 30,000/= to each Respondent who participated in the instant application.

    c. That the Appellant shall file and serve a fresh and complete record of appeal, with clear or legible documents, within 21 days hereof and in default, the entire Appeal shall stand dismissed with costs to the Respondents, without further reference or application to the court.

    d. The appeal shall, assuming (c) above is complied with, mentioned for further directions on 21st January 2026.

45. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 11TH DAY OF NOVEMBER 2025

HON. DR. IUR NYAGAKA

JUDGE

From 3:14 PM in the presence of,

Court Assistant: Mr. Terence

Mr. Omondi holding brief Mrs. Oduor for the Appellant

Mr. Nyachoti for the 2nd, 3rd and 4th Respondents

Ms Gaceri for eh 6th and 7th Respondents.

Leave granted to appeal.