



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU.
CIVIL APPEAL NO. E233 OF 2023

PANIJ AUTOMOBILES (K) LIMITED..... 1ST
APPELLANT
JOSEPH MUCHIRI.....2ND
APPELLANT
BENARD KINYANJUI NJUGUNA.....3RD
APPELLANT

VERSUS

DUNCAN OUMA OGUTU AKA DUNCAN OUMA ...
RESPONDENT

RULING

1. The Appeal before me is against the trial court's Judgement delivered on 27th July 2023 by which the Appellants' liability for the Respondent's tortious claim against them arising from injuries he suffered in a road traffic accident was determined wholly

against them. The Respondent was subsequently awarded Kshs. 470,721/= and Kshs. 22,700/= in general and special damages respectively.

2. Aggrieved by the lower court's Judgement, the Appellants filed a Memorandum of Appeal dated 28th August 2023 predicated upon grounds set out thereon.
3. The Respondent has now brought a Notice of Motion dated 10th December 2024 seeking striking out and/or dismissal of the Appeal, and/or in the alternative the Court does give any other orders or directions deemed fit to grant. In a brief affidavit in support of the Application, the Respondent attacks the Appellant's Record of Appeal for missing out typed proceedings recorded before the Magistrate's Court he thinks are crucial to the determination of the Appeal. The Appellants are said to have failed to put in the proceedings through a Supplementary Record of Appeal despite indulgence by the court on various occasions.
4. Although the Appellants refer to an affidavit in reply to the Application purportedly sworn on 3rd June 2025 and

filed herein, the court could not find the same in the court's e-filing portal. Neither is a hard copy of the affidavit placed in the court file. The Respondent's Advocate (Ms Kurere) also disputes service of the affidavit upon them.

5. It is in the premises deemed that an affidavit in reply was neither filed in court nor served upon the Respondent.
6. I have perused written submissions filed on the Application. Contents of the Record of Appeal are provided for under **Order 42 Rule 13 (4)** of the **Civil Procedure Rules 2010** thus:-

"...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.”*

7. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete. The Supreme Court in **Law Society of Kenya vs Centre for Human Rights and Democracy & Others (Petion No. 14 of 2013) [2014] KESC 29 (KLR)** held;

“[38]The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33 (1) of the Supreme Court Rules”.

8. Pursuant to **Order 42 Rule 13(4) of the Civil Procedure Rules 2010** *supra* the Court may dispense with some documents being part of the Record, but the lower court’s proceedings/notes, Judgment and the Decree flowing therefrom are among essential contents of a Record of Appeal, without which the Appeal will not be decided.

9. I am further guided by the Supreme Court decision in **Mwicigi and 14 others vs Independent Electoral and Boundaries Commission and 5 Others [2016] KESC 2 (KLR)** where it is stated:-

“[65]. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so

clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

[66]. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that;

“ courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.”

10. The Appellants do not dispute the fact that the Record of Appeal filed herein is incomplete. Notes of the trial

court recorded at the hearing of the suit or part thereof as well as a copy of the impugned Judgement and/or Decree flowing therefrom are indeed missing from the Record of Appeal. These are crucial documents without which this court may not properly determine the Appeal.

11. When the Appeal came up for mention on 7th October 2024, the Appellants were granted the last chance to put in the missing records. Come the 2nd December 2024 when the matter was listed for further mention, it transpired that the documents had not been filed and the Appellants' Advocates never even turned up in Court to explain the default. On 3rd March 2025 when the Appeal next came up for mention, the Appellants' Advocate sought to have the Appeal admitted, but was reminded by the Respondent's Counsel that the missing contents of the Record of Appeal were yet to be availed. The Respondent then brought to the court's attention that he had filed this Application praying for striking out of the Appeal for the anomaly pointed out.

12. Clearly, the Appellants have not diligently moved to prosecute the Appeal despite being indulged on several occasions as shown. There is no demonstrated interest to continue with the Appeal. I have seen the Appellants' Counsel's letter dated 11th May 2024 in the partial Record of Appeal filed, by which the lower court was asked to supply the relevant proceedings. There is , however, no evidence of follow-up with the subordinate court until this Application was brought about 7 months later.
13. The upshot is that the Application is allowed and this Appeal is struck out. The Respondent is granted the costs of the Application and the Appeal.

J. M. NANG'EA , JUDGE.

Ruling signed and delivered virtually this 19th day of November, 2025.

In the presence of:

The Appellants' Advocate, Ms Chemutai.

The Respondent's Advocate, Ms Kurere.

The Court Assistant, Jeniffer.

J. M. NANG'EA, JUDGE.