REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E029 OF 2025

JANET ANGUZUZU ATONYA & LAUREEN MWENESI
(Suing as the legal representatives of the estate of PETER ORIEDO - Deceased)
……APPELLANTS

VERSUS

MILDRED INGASIA
T/A BLUE LINE SAFARIS SACCO LTD……1ST RESPONDENT

STANLEY MUNGAI NGUGI……2ND RESPONDENT

(Being an Appeal from the Judgment and decision of Hon. N. S. Lutta (CM) in Naivasha CMCC No. 298 of 2019 delivered on 26th February, 2025)

RULING

1. The 2nd Respondent filed the Notice of Motion dated 1st August, 2025 and prayed that this Appeal be struck out on the sole basis that the record of Appeal filed and dated the 28th May 2025 is incomplete by reason that the order issued on the 2nd April, 2025 which reviewed the terms of the judgment was not incorporated in the record.
2. On that basis the 2nd Respondent views the Record of Appeal as incurably defective for failure to comply with the mandatory stipulations of Order 42 Rule 13 (4), Civil Procedure Rules.
3. The application was resisted by the Appellant on the strength of the Replying Affidavit sworn by counsel on the 25th April 2025. The gist of the opposition is that the application is an afterthought in that the file was placed before the judge for directions and directions were given that the appeal be canvassed by way of written submissions, which were duly filed by the appellant but not the respondent, and matter was set for highlighting. To the Appellant the appeal is ready for hearing after the judge was satisfied that the record was complete, pursuant to Order 42 Rule 13

(4) f, and that at no time did the 2nd respondent complain about the defect in the record.

4. The affidavit then asserts that the allegations of incompleteness is not true because the order of 2nd April 2025 is contained at page 16 of the record while the application yielding that order is at Page 57-71 of the record. The appellant maintains that the decree appealed against is on record and that there is no decree exhibited by the applicant issued on 2nd April 2025 and reviewing the judgment.
5. Both sides have filed written submissions and the two counsel attended court and highlighted the same with the leave of the court.
6. The Respondent/Applicant's submissions are dated 11th November 2025 and cite to court not only the Rule relied upon, but also court decisions; four by the High Court and one by the Court of Appeal.
7. The appellants' submissions are dated 18th November 2025 which emphasize the application of the Oxygen Principles, Article 159 (2) of the constitution and some four decisions; three from the Court of Appeal and one from the High Court, all emphasizing that technicalities would be avoided for disputes to be decided on the merits.
8. The court has had the benefit of reading the submissions and only wish to point out that the decision in **Abok James Odera Vs. Patrick Machira [2013],** cited by both parties, was determined on the basis of Court of Appeal Rules which are not applicable before this court.
9. Based on the materials availed, the determination of the application must resolve the questions; *what legal obligation is upon the appellant to file a Record of Appeal before the High Court?*
10. The legal procedure for filing, processing and disposal of appeals in the High Court is governed by Order 42 of the Civil Procedure Rules. In the Rules the reference to *records* is only found at Rule 13, (3) and (4). Sub rule (3) obligates a judge who in giving directions, to direct on the typing of any records made or exhibits presented at trial and the costs of such typing. Sub rule (4) on its part, mandates the judge to ensure that the documents listed

in the sub-rule are on the court records and those that may not be in possession of the parties are served or otherwise availed to them.

11. The court reads Rule 13, in general, not to place any obligation on any litigant to compile and file what is called Record of Appeal. What the rule does is to task the judge with the duty to ensure that there is a complete record of material necessary from the just, expeditious and proportionate determination of the appeal. The obligation is purely on the court and not the parties.

12. It is therefore the finding of this court that in the High Court, unlike the Court of Appeal, there is no obligation under the Rules for a party to compile and file a Record of Appeal. The practice of filing a Record of Appeal in the High Court is thus a practice of convenience largely borrowed from the legal requirements in the Court of Appeal Rules but not a legal duty imposed by the Civil Procedure Rules. To the court, for an appeal before it, the record to be availed is the record at trial, the lower court file

13. This finding is, however, not to say that the court in its own discretion may not call on parties to complete and file a record of appeal while giving directions Under Rule 13 (3). That right exists all the time on the court as the manager of its docket. When such is done and even when penalties for default are imposed, the obligation is to the court order but not the Rules.

14. Consequently, it is a grave misconstruction of Order 42 Rule 13 (4) to assert that an appellant has a legal duty to compile a Record of Appeal which duty when not met attracts the draconian remedy of striking out. There is no such duty and an application grounded on such misconstruction of the Rules can only be adjudged misconceived not deserving being granted.

15. In addition, the record of this appeal file shows that the judgment, which by dint of Section 2 of the Act, can serve as a decree, is on the court file with the entire trial court file, the parties were directed to file respective submissions, but only the Appellant did so, and what was outstanding was

only highlighting of such submissions. The 2nd Respondent's Counsel should have done better to help fast resolution of dispute. On that duty he failed.

16. The court has agonized over; between letting the appeal be heard on its merits and striking it out, which action would serve the best interest of substantial justice.
17. Court takes the view that the courts exist for purpose of resolving disputes on the merits and that striking out a pleading, with the consequence of delaying the conclusion of the matter, or just shutting out the litigant from the seat of justice, should actually be a remedy of the very last resort and only where the default complained about is so fundamental and going to the root of the matter in a manner that denies a party of his right to fair and just determination of the dispute.
18. In this matter, the court notes that the order complained about has not attracted any appeal but the proceedings on it are duly captured in the file. The court discerns no prejudice that may visit the respondent by omission of the order from the file.
19. The application dated 1st August 2025 is thus deemed meritless and is dismissed with costs.

Dated, delivered and signed at Naivasha this 4th day of December 2025.

Patrick J O Otieno
Judge.

In the presence of;
Mr. Mwebi for the Appellant
Mr. Ontegi for the 2nd Respondent
Ms. Hannah – Court Assistant