



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. 7 OF 2017**

**(Formerly Machakos ELC Appeal No. 118 of 2015)**

**MWAURA KARUGA.....APPELLANT**

**VERSUS**

**APOLLO J. KARUGA.....1<sup>ST</sup> RESPONDENT**

**JESSE MUTHIGA ALBERT.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before Court for determination is the 2<sup>nd</sup> Respondent's application dated the 7<sup>th</sup> October, 2015 brought pursuant to Order 42 rule 13 and Order 51 Rule 1 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The 2<sup>nd</sup> Respondent seeks for orders that the Appellant's Record of Appeal be struck out and or/ expunged.

The 2<sup>nd</sup> Respondent is basing his application on grounds that the Appellant's Record of Appeal dated the 7<sup>th</sup> July, 2015 contains extraneous/ foreign documents which were not introduced in evidence in the lower court. The said documents are prejudicial to the 2<sup>nd</sup> Respondent's Defence on Appeal including Cross Appeal. It will be in the interest of justice if the Appellant's Record of Appeal was struck out and he be ordered to file a Compliant Record.

The application is supported by the affidavit of EVANS WACHIRA who is the advocate conducting the matter on behalf of the 2<sup>nd</sup> Respondent where he avers that the documents appearing at pages 33, 34, 40, 41, 42, 65 and 67 in the Record of Appeal were never introduced in evidence in the lower court and were neither in the respective Parties' List including Bundle of Documents.

The Appellant filed Grounds of Opposition dated the 22<sup>nd</sup> June, 2018 where he stated that there is no legal basis under the Civil Procedure Act and its Rules to grant the instant application. He averred that the Respondent is attempting to urge the Appeal in pieces as the court will have to interrogate the evidence. Further that the provisions of Order 42 rule 27 allowed the Court to admit additional evidence. He insists Order 42 rule 13 of the Civil Procedure Rules deals with directions before hearing and the instant application is an abuse of the Court process.

Both the Appellant and the 2<sup>nd</sup> Respondent filed their respective submissions that I have considered.

**Analysis and Determination**

Upon perusal of the materials presented in respect of the Notice of Motion dated the 7<sup>th</sup> October, 2015, the only issue for determination is whether the documents appearing at pages 33, 34, 40, 41, 42, 65 and 67 in the Appellant's Record of Appeal should be expunged from record.

The 2<sup>nd</sup> Respondent submitted that the Appellant introduced certain documents appearing at pages 33, 34, 40, 41, 42, 65 and 67 in the Record of Appeal which had not been part of the lower Court record, which said documents should be struck out or expunged from the record. The Appellant submitted that there are no provisions in the Civil Procedure Rules for striking out the Record of Appeal and Order 42 rule 27 allows the Court to admit additional evidence if it is satisfied that the said evidence is necessary. He relied on Article 159 (2) (d) of the Constitution to buttress his argument that justice should be administered without undue regard to technicalities of procedure. He reiterated that the 2<sup>nd</sup> Respondent has not demonstrated what prejudice he will suffer from, if the Record of Appeal remains as it is. Further, that even if the Court were to agree with the 2<sup>nd</sup> Respondent, then it is only the new documents that should be expunged and not the entire Record of Appeal.

Order 42, rule 13 of the Civil Procedure Rules provides that: '**(1) On notice to the parties delivered not less than twenty-one days after**

the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers. (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule. (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise. (4) 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;'

Further Order 42, rule 27 of the Civil Procedure Rules provides as follows: ' (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if— (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined. (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.'

These provisions are very clear in terms of the evidence to be presented in respect of an Appeal. It infers that all parties are to present the evidence from the lower court in their Record of Appeal. However, it gives a discretion to the Court to allow additional evidence in an appeal. But this does not mean, a party introducing the fresh evidence should ambush the opposing party. Further, it is the Court mandated to seek for additional evidence and not a party to include the same in the Record of Appeal without informing the Court. I opine that if the Appellant intended to present new evidence in his Record of Appeal, he should have sought the leave of the Court to do so before directions to the Appeal were undertake.

In relying on the above cited legal provisions, I find the 2<sup>nd</sup> Respondent's application dated the 2<sup>nd</sup> October, 2015 merited and will proceed to expunge from Appellant's Record documents presented at pages 33, 34, 40, 41, 42, 65 and 67 of the Said Record. I direct the Appellant to file and serve a fresh record of Appeal within the next 30 days from the date hereof.

Costs will be in the cause.

**Dated signed and delivered in open court at Ngong this 13th day of November, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**