



**Anwar Mohammed Bayusuf Limited v Diamond Trust Bank (K) Limited (Civil Appeal (Application) E100 of 2024) [2025] KECA 766 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 766 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E100 OF 2024  
KI LAIBUTA, GWN MACHARIA & FA OCHIENG, JJA  
MAY 9, 2025**

**BETWEEN**

**ANWAR MOHAMMED BAYUSUF LIMITED ..... APPELLANT**

**AND**

**DIAMOND TRUST BANK (K) LIMITED ..... RESPONDENT**

*(An application to strike out the notice of appeal arising from the ruling of the High Court of Kenya at Mombasa (K. Magare, J.) dated 6th May 2024 in HCCC No. 13 of 2013)*

**RULING**

1. The application herein filed by the substantive respondent to the appeal, Diamond Trust Bank Kenya Limited, seeks to strike out the notice of appeal lodged by the appellant, Anwar Mohamed Bayusuf Limited. The respondent is asking the court to make orders to strike out the record of appeal dated 13<sup>th</sup> May 2024. This application is similar to and/or related to Civil Application No. E099 of 2024.
2. The application is premised on the grounds that:
  - a. The appellant lodged a notice of appeal against the High Court's ruling on 6<sup>th</sup> May 2024 and subsequently filed a record of appeal on 13<sup>th</sup> May 2024 and 22<sup>nd</sup> May 2024.
  - b. However, the record of appeal dated 13<sup>th</sup> May 2024 is incomplete and does not comply with the mandatory provisions of Rule 89 of the Court of Appeal Rules.
  - c. Consequently, this record of appeal is incompetent, and the appeal cannot be based upon it.
3. In the supporting affidavit sworn by Harshil Shah, he reiterated the grounds on the face of the application. He further stated that the appellant failed to file a supplementary record of appeal within the stipulated timeframe, contravening Rule 90 of the Court of Appeal Rules and, to date, no application had been filed seeking the court's leave to file any necessary supplementary record of appeal.



4. In the replying affidavit sworn by Nuru Islam Ali Jeizan, who is the director of the appellant, it was stated that:
  - a. The record of appeal was duly scrutinized by the Deputy Registrar of the Court of Appeal and accepted. Thereafter, the same was approved for filing, and the court fee was paid accordingly.
  - b. The record of appeal was filed pursuant to direction 2(c) of the Court of Appeal Practice Directions, which gives guidance on confining the records of appeal to essential documents.
  - c. The Court of Appeal Practice Directions and the Court of Appeal Registry Manual set out the procedures for the scrutiny and approval of appeals before filing. According to these guidelines, an appeal that does not comply with the rules is rejected at the point of filing, ensuring that only compliant appeals are admitted for filing and payment of court fees.
  - d. The record of appeal, having been admitted by the court, meets the requisite standards set out in the Court of Appeal Rules.
  - e. The respondent's application lacks a legal basis. There is no provision in the Court of Appeal Rules or any other relevant law that allows for an application to strike out an appeal on the grounds of incompleteness after it has been approved by the court, before it was filed.
  - f. Rule 89 of the Court of Appeal Rules addresses the requirements for filing an appeal; it does not provide for the striking out of an appeal on the grounds of incompleteness once the appeal has been approved and filed in court. The respondent's interpretation of Rule 89 is misguided and contrary to the established procedure.
  - g. Article 159(2)(d) of *the Constitution* emphasizes the need to administer justice without undue regard to procedural technicalities. Striking out an appeal on the grounds of procedural technicalities, when the record of appeal has already been approved and filed, would contravene the spirit of Article 159.
  - h. The respondent's application to strike out the appeal is without merit and should be dismissed with costs.
5. When the application came up for hearing on 27<sup>th</sup> November 2024, Mr. Shah, learned counsel, appeared for the respondent, while Mr. Arunga, learned counsel, appeared for the appellant. Counsel relied on their written submissions and the oral submissions made in Civil Application No. E099 of 2024, a matter which is related to the present application.
6. In their written submissions, the respondent reiterated that the record of appeal was incomplete and failed to comply with the mandatory provisions of Rule 89(1) and (2) of the Court of Appeal Rules. They contended that the record was missing the primary pleadings, such as the plaint, amended plaint, the defence, amended defence, and further amended defence.
7. The respondent submitted that the typed proceedings and the order that was the subject of the appeal were also missing from the record. They asserted that despite this, the appellant did not seek leave to file any supplementary record of appeal within the prescribed timeline under Rule 90 of the Court of Appeal Rules, nor did they proffer an explanation for why these primary documents were missing.
8. The respondent pointed out that, although the appellant contended that the record was checked by the Deputy Registrar before it was filed, the appellant was bound by the Court of Appeal Rules.
9. The respondent submitted that, according to the mandatory provisions of Rule 89 of the Court of Appeal Rules, the record of appeal must contain the pleadings; any document with respect to



interlocutory proceedings that may be relevant; and the certified order, amongst many others that are listed. They asserted that the ruling of 6<sup>th</sup> May 2024, which dismissed the appellant's suit for want of prosecution was the subject of the present appeal and related to the exercise of discretion by the Honourable Judge.

10. The respondent further submitted that the appeal would revolve around the question as to whether the learned judge exercised his discretion properly and judiciously. They argued that, unfortunately, the Honourable Court would not be able to adjudicate this issue properly without the primary pleadings.
11. They also submitted that the record of appeal was fatally and incurably defective for being incomplete as it did not contain a certified copy of the order upon which the appeal lies. The respondent reiterated that the appellant had made no reasonable attempt to remedy the defective record of appeal pursuant to the Court of Appeal Rules.
12. To buttress its submissions, the respondent relied on the cases of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others* [2014] KESC 29 (KLR); *Bwana Mohamed Bwana v Silvano Buko Bonayo & Others* [2015] eKLR; and *Chege v Suleiman* [1988] KLR 194.
13. The respondent concluded by asserting that the appellant's lack of due regard for the mandatory nature of the Court of Appeal Rules not only demonstrated a clear disregard of the procedural requirements set forth by law, but also undermined the integrity of the appellate process and the timely administration of justice. They pray that their application be allowed with costs.
14. Opposing the application, the appellant submitted that the record of appeal was compliant with the relevant provisions of the Court of Appeal Rules, and that any perceived omissions did not warrant striking out of the appeal.
15. The appellant submitted that Rule 89(1) of the Court of Appeal Rules allows the appellant to exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy in the appeal. The appellant submitted that the record of appeal had been prepared in compliance with this rule.
16. The appellant further submitted that Rule 94(1) of the Court of Appeal Rules allows the respondent to lodge a supplementary record of appeal if the respondent was of the opinion that the record of appeal was defective or incomplete. The appellant pointed out that the respondent had this right but had not exercised it.
17. To buttress its submissions, the appellant relied on the cases of *Mwangi v Vastu Company Limited* [2024] KECA 1234 (KLR); *Safaricom Limited v Jack K. Khanjira & Another* [2018] eKLR; and *Intercountries Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 Others* [2021] KECA 44 (KLR).
18. In conclusion, the appellant submitted that striking out the appeal was contrary to the principles of justice and the objective of resolving disputes on their merits, especially when any perceived deficiencies could be rectified by the respondent filing a supplementary record.
19. We have carefully considered the application, the affidavits, the submissions by counsel, the authorities cited, and the law. The issue for determination is whether the appellant's record of appeal is so defective that it warrants striking out.
20. Rule 89 of the Court of Appeal Rules is couched in mandatory terms, requiring the inclusion of specific documents crucial for the proper hearing and determination of an appeal. The rule provides that:



1. For the purposes of an appeal from a decision of a superior court in exercise of its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—
  - a. an index of the documents in the record with the numbers of the pages at which they appear;
  - b. a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by rule 79, that respondent's last known address and proof of service on him or her of the notice of appeal;
  - c. the pleadings;
  - d. the trial judge's notes of the hearing;
  - e. the transcript of any shorthand notes taken at the trial;
  - f. the affidavits read and documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof;
  - g. the judgment or order;
  - h. the certified decree or order;
  - i. the order, if any, giving leave to appeal;
  - j. the notice of appeal; and
  - k. such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:  

Provided that the copies referred to in paragraphs (d), (e), and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.
2. For the purposes of an appeal from a decision of superior court in exercise of its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and the following documents relating to the appeal to the first appellate court—
  - a. the order, if any, giving leave to appeal;
  - b. the memorandum of appeal;
  - c. the record of proceedings; and
  - d. the certified decree or order.
3. A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally.
4. The documents specified in sub-rule (1) shall be bound in the order in which they are set out and documents produced in evidence shall be put in order of the dates they bear or, where they are undated, the dates when they are believed to have been made, without regard to the order in which they were produced in evidence: Provided that an affidavit filed in support of a



chamber summons or notice of motion shall be bound immediately following the summons or notice, as the case may be.

5. Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 22 to appear on the appellant's behalf.
21. The primary pleadings form the foundation of the suit and are indispensable for understanding the context and issues that were before the High Court and are now the subject of appeal. Similarly, the order of the High Court dated 6<sup>th</sup> May 2024, being the decision appealed against, is fundamental to the appeal process.
22. The case law cited by the respondent underscores the importance of complying with the rules of court. The decision in *Law Society of Kenya v Centre for Human Rights & Democracy & Others* (supra) highlights the mandatory nature of procedural rules. The ruling in *Bwana Mohamed Bwana v Silvano Buko Bonayo & Others* (supra) emphasizes that the absence of essential documents renders an appeal incompetent. Furthermore, the decision in *Chege v Suleiman* (supra) clarifies that the absence of the order appealed against is a jurisdictional issue.
23. While the court has discretion in determining whether to strike out an appeal for non-compliance, this discretion must be exercised judiciously, considering the extent and impact of the defects. In the present case, the alleged omissions of primary pleadings and the order appealed against are significant. Without these documents, this Court would be severely hampered in its ability to properly consider the merits of the appeal, particularly concerning the learned judge's exercise of discretion.
24. Furthermore, Rule 94(1) of the Court of Appeal Rules, 2022, provides a remedy for a respondent who considers the record of appeal defective or insufficient by allowing them to lodge a supplementary record of appeal. The rule provides that:
  - (1) If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent's case, he or she may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.
25. However, this does not absolve the appellant of their primary responsibility to file a complete and compliant record of appeal in the first instance, as dictated by Rule 89(1). The appellant has not provided any explanation for the omission of these crucial documents nor sought leave to file a supplementary record of appeal within the prescribed timelines. This demonstrates a lack of diligence in complying with the mandatory requirements of the rules of this Court.
26. This Court in the case of *Tome & Another v Attorney General & 2 Others* [2021] KECA 150 (KLR) stated that:

“It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstances of each case.”
27. However, considering the mandatory nature of Rule 89(1), the significance of the omitted documents, and the lack of any attempt by the appellant to rectify the deficiencies, this Court finds that the respondent's application to strike out the appeal has merit.
28. In the premises, the application dated 20<sup>th</sup> June 2024 is hereby allowed. The appellant's record of appeal lodged on 13<sup>th</sup> May 2024 is hereby struck out. The appellant shall bear the costs of this application.



Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**DR. K. I. LAIBUTA CArb, FCIArb.**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

