



**Anwar Mohammed Bayusuf Limited v Diamond Trust Bank (K) Limited (Civil Appeal (Application) E099 of 2024) [2025] KECA 762 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 762 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E099 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 4th April 2024 in HCCC No. 13 of 2013)*

**RULING**

1. The application before us is dated 20<sup>th</sup> June 2024. The respondent, Diamond Trust Bank (K) Limited, seeks orders to strike out the notice of appeal lodged on 4<sup>th</sup> April 2024 by the appellant, Anwar Mohamed Bayusuf Limited. The respondent also prays that the record of appeal dated 3<sup>rd</sup> May 2024 be struck out, and that the appellant bear the cost of this application.
2. The application is supported by the annexed affidavit of Harshil Shah and is based on inter alia the grounds that:
  - a. On 4<sup>th</sup> April 2024, the High Court rendered a ruling dismissing the appellant's application dated 14<sup>th</sup> November 2023.
  - b. The appellant filed a notice of appeal against the said ruling on 4<sup>th</sup> April 2024 and subsequently filed a record of appeal on 22<sup>nd</sup> May 2024.
  - c. The said record of appeal is incomplete; the appellant failed to comply with the mandatory provisions of Rule 89 of the Court of Appeal Rules; and also failed to file a supplementary record of appeal within the prescribed timeline contrary to Rule 90 of the Court of Appeal Rules.



- d. As such, the said record of appeal is incompetent and an appeal can therefore not be founded on the same.
  - e. The appellant's record of appeal should be struck out so that the respondent is not inconvenienced with further costs in defending an appeal filed in violation of this Honourable Court's rules.
3. In response to the application, the appellant, through its director, Nuru Islam Ali Jeizan, filed the replying affidavit sworn on 28<sup>th</sup> June 2024. In the affidavit, they 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, before being filed in the court.
  - 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 by the 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.
4. 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, which they orally highlighted.
5. Mr. Shah submitted that the appeal ought to be struck out because the record of appeal was defective as it lacked the primary documents required under Rule 89 of the Court of Appeal Rules. These missing documents were said to include the index, plaint, amended plaint, the defence, amended defence, further amended defence, decree, and the replying affidavit considered by the High Court. Counsel argued that this omission was a material error and insisted that the record was incomplete.
6. In their written submissions, the respondent reiterated that the replying affidavit sworn on 17<sup>th</sup> November 2023 by Faith Ndonga, which opposed the appellant's application dated 14<sup>th</sup> November



- 2023, was also missing entirely from the record. The respondent also noted that the order that was the subject of the appeal was also missing from the record.
7. The respondent submitted that despite the said deficiencies, the appellant did not seek leave from the court to file a supplementary record of appeal under Rule 90 of the Court of Appeal Rules, within the prescribed timelines. They asserted that no such leave had been sought to date.
  8. The respondent submitted that, due to the incompleteness and the failure to rectify the record, the same is incompetent, and consequently, no appeal can be founded on it.
  9. The respondent was of the view that the appellant's failure to adhere to these rules demonstrated a clear disregard for the mandatory nature of the Court of Appeal Rules, which conduct undermined the integrity of the appellate process and impeded the timely administration of justice.
  10. The respondent asserted that the appellant's failure to file a complete record of appeal was not a mere technicality but a fundamental flaw that goes to the heart of the appeal's competence.
  11. The respondent submitted that it was imperative for the court to exercise its discretion to strike out the appeal, thereby reinforcing the necessity of compliance with procedural rules and the preservation of the sanctity of the judicial process.
  12. In support of these submissions, the respondent relied on the cases of *Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others* [2014] KESC 29 (KLR); *Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 Others* [2015] eKLR; and *Chege vs. Suleiman* [1988] KECA 131 (KLR).
  13. In conclusion, the respondent urged that the Honourable Court exercises its discretion to strike out the appellant's record of appeal with costs.
  14. Opposing the application, Mr. Arunga, countered by stating that they relied on their filed documents, including the replying affidavit, case summary digest, and submissions. Counsel asserted that a complete record was filed and certified at the registry, and that the appellant was at liberty to file their own record instead of seeking to strike out the appeal.
  15. In their written submissions, the appellant reiterated that the record of appeal had been prepared in compliance with Rule 89 of the Court of Appeal Rules. They emphasized the proviso to Rule 89(1), which allows the appellant to exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal. The appellant submitted that the non-inclusion of certain documents in their case did not render the appeal defective.
  16. The appellant pointed out that Rule 89 provides that the record of appeal shall include a copy of the "judgment"/(ruling) or "order". They stated that a certified copy of the ruling has been included in the record of appeal at pages 5 to 9 and that, therefore, the inclusion of an order was not mandatory.
  17. The appellant contended that since the ruling was included, the omission of an order was a procedural technicality. They submitted that this technicality was curable under Article 159(2)(d) of *the Constitution*, which emphasizes the administration of justice without undue regard to procedural technicalities.
  18. The appellant pointed out that Rule 94(1) of the Court of Appeal Rules, allowed the respondent to lodge a supplementary record of appeal if they believed that the record was defective or insufficient for the purposes of their case. The appellant submitted that the respondent had not exercised this right and instead sought to have the appeal struck out, which was contrary to the principles of justice, and the objective of resolving disputes on their merits.



19. The appellant submitted that jurisprudence had shown a preference for resolving appeals on their merits with a view to giving effect to Article 159 of *the Constitution*. They were of the view that dismissing appeals on procedural grounds should be avoided, especially when any deficiencies could be rectified without undue prejudice.
20. To buttress their submissions, the appellant relied on the cases of *Mwangi vs. Vastu Company Limited* KECA 1234 (KLR); *Kilonzo David t/a Silver Bullet Bus Company vs. Kyalo Kiliku & Autosol (K) Limited* KEHC 6055 (KLR); *Safaricom Limited vs. Jack K. Khanjira & Another* [2019] KECA 865 (KLR); and *Intercounties Importers and Exporters vs. Teleposta Pension Scheme Registered Trustees & 5 Others* [2024] KECA 870 (KLR).
21. In conclusion, the appellant urged that the court dismisses the respondent's application to strike out the appeal and order that the appeal be heard on its merits. The appellant further prayed for the costs of the application.
22. 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 deficient as to warrant striking out of the appeal.
23. 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.
24. 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.
25. The case law cited by the respondent underscores the importance of complying with the rules of court. The decision in *Law Society of Kenya vs. Centre for Human Rights & Democracy & Others* (supra) highlights the mandatory nature of procedural rules. The ruling in *Bwana Mohamed Bwana vs. Silvano Buko Bonayo & Others* (supra) emphasizes that the absence of essential documents renders an appeal incompetent. Furthermore, the decision in *Chege vs. Suleiman* (supra) clarifies that the absence of the order appealed against is a jurisdictional issue.
26. 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 omission 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.
27. 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.
28. 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.
29. This Court in the case of *Tome & another vs. 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.”
30. 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.
31. In the premises, the application dated 20<sup>th</sup> June 2024 is hereby allowed. The appellant's record of appeal lodged on 3<sup>rd</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**

