



International Centre for Insect Physiology and Ecology (ICIPE) v McNally & another (Civil Appeal (Application) 165 of 2020) [2025] KECA 1123 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1123 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 165 OF 2020
W KARANJA, K M'INOTI & LA ACHODE, JJA
JUNE 20, 2025**

BETWEEN

**INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND ECOLOGY
(ICIPE) APPLICANT**

AND

**NANCY MCNALLY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

(Being an application to strike out Supplementary record of Appeal and the entire appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (O. N. Makau, J) dated 5th April 2019 in Petition no. 67 of 2015)

RULING

1. There are two Notices of Motion before us filed in Civil Appeal No. 165 of 2020. The first is dated 18th February, 2021 and is brought under rules 82, 84, 87 and 90 of the Court of Appeal Rules 2010 and is seeking orders to strike out the Memorandum of Appeal dated 9th April 2020, the Record of Appeal filed on the 1st February 2021 and the entire appeal, with costs be to the Applicant.
2. The second application dated 27th January, 2023 is brought pursuant to rules 82, 84 and 90 of the Court of Appeal Rules 2022 and it seeks orders to strike out the Supplementary Record of Appeal dated 7th December 2022 and the entire appeal, with costs to the applicant.
3. The appeal arose from the judgment of O.N. Makau J, delivered on 5th April 2019 in ELRC Petition No. 67 of 2015, and these two applications are between the International Centre for Insect Physiology and Ecology, (ICIPE) as the applicant, and Nancy McNally the 1st respondent.
4. The grounds on the face of the application dated 18th February, 2021 are that the 1st respondent (appellant), filed a Memorandum of Appeal on 9th April 2020, but neglected to serve it upon the



- applicant within 7 days as required under rule 82. She served it on 2nd February 2021, more than 9 months out of time and without leave of court.
5. The applicant also avers that the Record of Appeal is fatally defective for failing to conform to the requirements of rule 87 (1), as it does not include certified copies of the proceedings and the Decree of the court and is therefore for striking out.
 6. The application is supported by an affidavit of even date sworn by Henry Omino learned counsel, on behalf of the applicant. It is deposed that the appellant served the applicant's advocates with a Notice of Appeal on 17th April 2019 and filed the Memorandum of Appeal on 9th April 2020. The Record of Appeal was filed on 1st February 2021, more than 9 months out of time and without leave of court.
 7. The applicant deposes that the record of appeal is fatally defective and is for striking out for failure to conform to the mandatory requirements of the Court of Appeal rules for failing to include a Certified Copy of the Decree of the court and a certified copy of the proceeding.
 8. The second Notice of Motion is dated 27th January, 2023 and is founded on the grounds set out on the face thereof, and the supporting affidavit of even date sworn by Henry Omino, learned counsel. It is averred that the 1st respondent filed a Supplementary Record of Appeal almost three years after filing the Memorandum of Appeal on 9th April 2020 and served it upon the applicant on 9th December 2022. The delay is said to be unreasonable, unexplained and the filing was without leave of Court.
 9. The applicant deposes that the Supplementary Record of Appeal purports to introduce a certified copy of proceedings and decree issued in Nairobi ELRC Petition No. 67 of 2019, together with the Certificate of Delay issued by the Deputy Registrar into the appeal, without giving any valid reason for the delay of almost three years. Further that the Certificate of Delay issued by the Deputy Registrar contained at page 42 of the impugned Supplementary Record of Appeal, indicates that the proceedings were ready for collection and the 1st respondent was duly notified as such, via email on the 21st of November 2019.
 10. The applicant states that the court record in the Employment and Labour Relations court indicates that a physical copy of the letter informing the respondent that the proceedings were ready for collection, was duly served upon the 1st respondent's advocates on 12th February 2020. That despite evidence of physical service upon the 1st respondent's advocate and the notification that the proceedings were ready for collection, the proceedings were only paid for on 7th June 2022 and collected on 27th June 2022, more than two years and eight months later. Upon collecting the certified copy of proceedings on 27th June 2022, the 1st respondent waited another four and a half months until 7th December 2022, to file the Supplementary Record of Appeal containing the proceedings. The foregoing delay on the part of the 1st respondent is said to be inordinate.
 11. The applicant avers that the Decree contained at page 40-41 of the Supplementary Record of Appeal indicates that it was signed by the Deputy Registrar on 19th August 2020, and there is no valid reason for purporting to introduce it as part of the record vide the Supplementary Record of Appeal filed on 7th December 2022, more than two years and four months after the appeal was filed. That in any event, the judgment of the court having been delivered on 5th April 2019, there is no plausible reason why it took the 1st respondent more than one year, up to 19th August 2020, to extract the Decree and a further two years and four months to take steps to introduce it into the record in the instant appeal.
 12. For the foregoing reasons the applicant seeks to persuade this Court that it is in the interest of justice for the Supplementary Record of Appeal and the entire appeal to strike out with costs to the applicant.



13. The 1st respondent filed a Replying Affidavit dated 18th October 2024 sworn by Nancy McNally, in response to the Notices of Motion dated 18th February 2021 and 29th January 2023 respectively. She deposes that she served the applicant with a Notice of Appeal dated 17th April 2019 notifying them of her intention to appeal and thereafter, requested the court to issue certified copies of proceedings to prepare the record of appeal, a request which was made within the stipulated period and served upon the applicant.
14. The 1st respondent deposes that her advocates followed up with the certified proceedings and due to the delay, the Deputy Registrar issued a Certificate of Delay on 22nd November 2022 indicating that the time taken for preparation and delivery of the certified proceedings by the court was from 17th June 2019 to 8th June 2022, being 1147 days. She therefore had until 8th July 2022 to prepare and file the Record of Appeal. After filing the Record of Appeal, she sought to file the Supplementary Record of Appeal on 8th December 2022 which, according to her computation, was within the stipulated 14 days after the issuance of the Certificate of Delay.
15. She deposes that service of the Memorandum of Appeal, Record of Appeal and Supplementary Record of Appeal was effected way earlier than the expiry of the statutory timeline being 4th February 2022. In any case, the applicant was aware that there was a pending appeal and cannot state that they were caught by surprise. She therefore prays that both applications be dismissed with costs.

Submissions

16. Through their written submissions dated 25th October 2024 filed by the firm of Walker Kontos Advocates, the applicant identified two issues for determined as follows:
 - I. Whether the application has been brought within time pursuant to Rule 86 of the Court of Appeal Rules
 - II. Whether the application is merited.
17. The applicant asserts that this application was brought within the 30 days' timeline contemplated under rule 86, having been filed on 27th January 2023, after the impugned Supplementary Record of Appeal was served upon the applicant's advocate on 9th December 2022. Further, that the basis of the prayers has been set out in detail on the face of the application and in the supporting affidavit of Henry Omino sworn on 27th of January 2023. It is further urged that it should be noted that rule 90 is couched in mandatory terms.
18. The applicant submits that the Supplementary Record of Appeal was filed exactly one year and eight months after the record of appeal was lodged, and it was incumbent upon the 1st respondent to apply to the Deputy Registrar for leave to file it. No such Leave has been sought two years later and as such, the Supplementary Record of Appeal is not properly on Record and is for striking out. To buttress this point the applicant makes reference to the cases of *Mukenya Ndunda vs Crater Automobiles Limited* [2015] eKLR, and *Kipkeu vs Kangogo & 2 Others* (Petition 23 of 2018) where the Court of Appeal and the Supreme Court respectively, struck out the Supplementary Record of Appeal filed more than 15 days after the Record of Appeal had been filed and without seeking leave of the Deputy Registrar.
19. Finally, the applicant states that if the 1st respondent had filed an application for leave to file the Supplementary Record of Appeal out of time, such an application would have had no merit for the reasons deposed in the supporting affidavit. That is, no valid reasons were advanced; for seeking to introduce the decree into the record almost three years after the appeal was filed; or for taking more



than one year to extract the decree after the judgment was delivered; or for taking more than two years after the extraction of the decree to seek to introduce it into the record.

20. The firm of Kilonzo and Company Advocates filed written submissions dated 18th October 2024, on behalf of the 1st respondent in opposition to the two applications. The applications are said to offend rule 84 and therefore the orders sought are without legal basis.
21. The 1st respondent submits that according to the Certificate of Delay, the time line for the preparation and delivery of the certified copies of proceedings by the court was from 17th April 2019 to 8th June 2022 being 1147 days. This meant that the 1st respondent had until 8th July 2022 to prepare and file the Record of Appeal being within the stipulated 60 days period. The Certificate of Delay was issued on 29th November 2022 and the 1st respondent sought to file the Supplementary Record of Appeal on 8th December 2022, within 14 days after the issuance of the Certificate of Delay which was still within the stipulated time.
22. The 1st respondent has placed reliance on the decision of this Court in the case of Michael Mwalo vs Board of Trustees, National Social Security Fund [2014] KECA 706 (KLR), where the Court stated that a Certificate of Delay is prima facie, evidence that the court took the period it states to prepare and deliver proceedings. The Court further noted that a Certificate of Delay has always been relied upon unless salient and cogent reasons are set out to challenge it.
23. The 1st respondent submits further that in Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR, the Court held that an appellant is afforded some reprieve in so far as computation of time is concerned, if there was a delay in preparation of the proceedings upon making a written request for the proceedings. Also, that in the case of C.B Gor Advocates v Oriental Commercial Bank Limited (2022), the Court stated that in order for the court to strike out a notice of appeal, it must be shown that the intended appellant has, since filing the notice, taken no steps in the matter as prescribed by the rules.
24. The 1st respondent is therefore, asking the Court to dismiss the application dated 18th February 2021 seeking to strike out the Memorandum of Appeal and the Record of Appeal and the one dated 21st January 2023, (There is no application of this date on record and we suspect that this was intended to be 27th January 2023), seeking to strike out the Supplementary Record of Appeal, and grant leave for the appeal to proceed.
25. The two applications came up for hearing on 26th March 2025. Mr. Omino learned counsel, appeared for the applicant and confirmed that he was prosecuting both applications and had been served with the 1st respondent's submissions in both applications. Mr. Masheti learned counsel held brief for Kilonzo Kethi, learned counsel for the 1st respondent. There was no appearance for the 2nd respondent the Hon. Attorney General, although they were duly served with the hearing notice.

This, Mr. Masheti informed the Court, was because the two applications are between ICIPE the applicant and Nancy McNally the 1st respondent only and do not involve the 2nd respondent.

Analysis and determination

26. Upon considering the grounds in the two applications, the affidavits in support and in reply, and the rival submissions by the parties, we collapsed the issues that emerge for our determination into two as follows:
 - i. Whether the Supplementary Record of Appeal is improperly on record and ought to be struck out; and



- ii. Whether the Record of Appeal is fatally defective so that the entire appeal ought to be struck out.
27. We first consider whether the Supplementary Record of Appeal is improperly on record and ought to be struck out. The missing documents which the Supplementary Record of Appeal herein seeks to introduce into the Record of Appeal are the certified copies of the proceedings, the Decree and the Certificate of Delay issued by the Deputy Registrar.
28. Rule 90 permits the inclusion of documents omitted from the initial Record of Appeal within fifteen days of lodging the Record of Appeal, without leave in the following terms:

“90. . Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 9.4 (3) and, thereafter, with leave of the deputy registrar on application.

Any further inclusions to be made after the 15 days’ timeline require the leave of the Deputy Registrar to be obtained.

29. In the instant application, it is not disputed that the Supplementary Record of Appeal was filed long after the 15 day period had lapsed. The central question therefore, is whether failure to seek leave renders the Supplementary Record of Appeal inadmissible, and whether by implication the entire appeal is rendered incurably incompetent for lacking essential documents and should be struck out.
30. This Court has consistently held that rule 90 is couched in mandatory terms. Faced with circumstances akin to those obtaining in the applications before us, in *Mukenya Ndunda v Crater Automobiles Limited* [2015] KECA 252 (KLR) the Court stated as follows:

“It is conceded that the record of appeal did not contain the decree or the certificate of delay. Rule 87 of the Rules of this Court sets out the copies of documents which the record of appeal to this Court as the first appellate court must contain. Rule 87(1)(h) shows that a decree must be included as a primary document in such appeal. It was not included in the record filed on 6th May 2014. However, if the appellant had duly filed the record of appeal on 6th May 2014, he could have taken advantage of rule 88 which allows filing of a supplementary record without leave within 15 days of filing the record. The supplementary record was filed outside the period of 15 days donated by rule 88, without leave of the Deputy Registrar.”

The Court proceeded to strike out the Supplementary Record of Appeal, since it was filed outside the prescribed 15 day window without the leave of Court.

31. Similarly, in *Kipkeu v Kangogo & 2 Others (Petition 23 of 2018)*, the Supreme Court upheld the requirement for strict compliance with timelines and procedural requirements and stated as follows:

“...the Appellant could file a Supplementary Record with the missing document without leave of the Court within fifteen days of filing the Record of Appeal. The 15 days lapsed on 2nd September 2018 without a Supplementary Record of Appeal being filed. This meant that any subsequent filing of a Supplementary Record of Appeal required leave of the Court. No such leave was ever sought and/or granted. Hence, we find and hold that the Supplementary Record of Appeal having been filed on 13th September 2018, without leave of the Court, the



same is fatally defective. Be that as it may, we are in agreement with the 1st Respondent that there is no application and/or prayer by the Appellant before this Court seeking extension of time to file a Supplementary Record of Appeal or to ‘deem’ the one filed, as duly filed. The upshot is that we hereby strike out the Supplementary Record of Appeal filed on 13th September 2018.”

32. Indeed, as stated by the Court in *Mistry Premji Ganji (supra)*, an appellant is afforded some reprieve in so far as computation of time is concerned, if there was a delay in preparation of the proceedings upon making a written request for the proceedings. The chronology of events in this matter however, reveals that the delay herein is attributable to the 1st respondent herself and cannot therefore avail her a reprieve.
33. The impugned judgment was delivered on 5th April 2019 and via an email dated 21st November 2019, the 1st respondent’s counsel was notified that copies of the proceedings and judgment that had been applied for, were ready for collection upon payment of the requisite court fees. The necessary court fees was not paid until 7th June 2022, two years and seven months later.
34. Therefore, the record bears witness that the 1st respondent was tardy in taking action to obtain the Record of appeal. Thereafter, she did not avail herself of the aid reposed in the rules of the Court, to seek enlargement of time to file and serve the Supplementary Record of Appeal if she had a good reason for the delay. She did not do so and she failed to offer any plausible explanation why she did not. Thus, the impugned Supplementary Record of Appeal dated 7th December 2022 is clearly incompetent having been filed out of time and without leave of the Court. It is improperly on record and is for striking out.
35. The Supplementary Record of Appeal having fallen by the way side, we now consider whether the Record of Appeal is fatally defective and ought to be struck out, or it can still stand.
36. Rule 89 (1) which provides for the contents of the record of appeal stipulates in mandatory terms as follows:

“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.

37. Rule 89(1) mandates that the Record of Appeal must contain the foregoing bundle of documents, which are necessary for a proper determination of the appeal. If the Record of Appeal is incomplete, or lacks documents with the necessary information required for the Court to properly review the decision of the superior court, it is considered incompetent and is for striking out, unless an application is made for expansion of time to include them.
38. As stated above, the missing documents which were intended to be introduced into the Record of Appeal by the Supplementary Record of Appeal are the certified copies of the proceedings, the Decree and the Certificate of Delay issued by the Deputy Registrar. These are primary documents in the bundle of documents that comprise the Record of Appeal and without them the appeal cannot stand.
39. Without a complete Record of Appeal a Court cannot determine the appeal before it. Thus, if a primary bundle of documents is omitted, the appeal is considered to be incompetent and defective for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law, or *the Constitution* where an appeal is incompetent. An incompetent appeal divests the Court of the jurisdiction to consider factual, or legal controversies embodied in the relevant issues. (See- the Supreme Court decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR.
40. Consequently, the Notices of Motion dated 18th February, 2021 and 27th January 2023 are found to have merit and are allowed with the following orders:
- i. The Supplementary Record of Appeal dated 7th December 2022 be and is hereby struck out.
 - ii. Civil Appeal No. 165 of 2020, be and is hereby struck out.
 - iii. Costs shall be borne by the 1st respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL



I certify that this is a true copy of the original Signed
Deputy Registrar

