



REPUBLIC OF KENYA



**Teachers Service Commission v Kamau & 19 others (Civil Application  
E003 of 2021) [2023] KECA 990 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 990 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E003 OF 2021  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
JULY 28, 2023**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPLICANT**

**AND**

**SIMON P KAMAU & 19 OTHERS ..... RESPONDENT**

*(Being an application to strike out the Record of Appeal dated 19th January 2020, the appeal and in the alternative to strike out prayer b in the memorandum of appeal arising from the ruling of the High Court at Nakuru (J. Mulwa, J.) dated 17th October, 2019 in HC Judicial Review Appl. No. 18 of 2012)*

**RULING**

1. The Applicants through their advocate Mr Karanja herein moved the Court vide a notice of motion dated January 26, 2021 which was brought under section 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 42, 43, 45, 84 and 87(1) of the [Court of Appeal Rules, 2010](#). The applicant prays that the respondent's Record of Appeal dated January 19, 2020 filed at the Nakuru Sub-registry and serialized as No. Nakuru 3 of 2020, Simon P. Kamau & 19 others vs Teachers Service Commission be struck out for failure to include a certified copy of the order being appealed against; that the court be pleased to strike out the respondent's appeal filed vide the record of appeal dated January 19, 2020 filed at the Nakuru sub-registry and serialized as No. Nakuru 3 of 2020, Simon P. Kamau & 19 others vs Teachers Service Commission since the respondents have already preferred a review of the orders issued in the ruling dated October 17, 2019 and which is the subject of the appeal; that the court be pleased to strike out prayer (b) in the memorandum of appeal dated January 19, 2020 which prayer was that this honorable court should find the salary component as per Legal Notice 534 of 1997 and TSC Circular 13 of 1997 was pleaded and awarded by the trial court and hence payable by TSC so as to enable the director of pensions compute and pay the accruing pension.



2. The gist of the application is that the respondents being dissatisfied with the ruling of Lady Justice J. Mulwa dated October 17, 2019 filed an appeal to this Court and thereafter filed a record of appeal dated January 19, 2020.
3. The applicant pointed out that the respondents had deliberately ignored, failed and neglected to include in the record a certified copy of the order being appealed against as mandatorily required under rule 87(1) of the *Court of Appeal Rules*, 2010. They contend that as matters currently stand there is no competent record of appeal filed by the respondents as required by rule 87(1) of the *Court of Appeal Rules*, 2010.
4. The applicant submitted that the respondent's record of appeal dated 19<sup>th</sup> January, 2020 is incurably defective, incompetent and bad in law. The applicants argue that the certified copy of the order being appealed against is a crucial document, which cannot be introduced through a supplementary record.
5. This application was heard in plenary on May 16, 2023 with Mr. Karanja appearing for the applicants and Mr. Ikuu for the respondents. The applicants filed their submissions dated November 1, 2022 while the respondent's counsel sought and was allowed to make oral submissions as he had just taken over from advocate Kimatta who is deceased.
6. The applicant's counsel submitted that the appeal did not comply with rule 87(1) of the *Court of Appeal Rules*, 2010 as the record of appeal is without the certified order or decree appealed from. Counsel relied on the case of *Tropicana Hotels Limited vs SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd)* [2020] eKLR to buttress this submission. He said that the respondents were served with the record of appeal after the lapse of over a month. He also pointed out that the respondents had filed this appeal while the application for review was still pending before the trial court.
7. Counsel noted that the respondents had since withdrawn the application for review.
8. Counsel for the respondents submitted that the error could be cured by seeking leave of the court to file a supplementary record of appeal and that if given time, he would file the application for leave. He said that although he was served with the record of appeal a month ago, he had difficulties getting instructions from his clients all of whom are over 80 years old each.
9. We have accorded due consideration to the notice of motion, the supporting affidavit, submissions by counsel, the authorities cited, and the law. The issue for determination is whether the intended appeal is defective for failure to include the decree being appeal against.
10. The sole issue for determination in this appeal is:
  - i. Whether this appeal is defective for failure to include the decree appealed from, in the Record of Appeal.
11. Rule 87(h) of the *Court of Appeal Rules* 2010, stipulates that:

“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."

12. This Court considered the effect of lack of a certified copy of the decree or order appealed from as required by rule 87(h) of the *Court of Appeal Rules* 2010, in *Floris Pierro vs Giancarlo Falasconi*, CA No. 145 of 2012. The Court concluded that an appeal can only be against a decree or an order, and that failure to include the order or decree appealed against renders the appeal fatally defective and incurable notwithstanding the overriding objective as follows;

"Failure to include in the record of appeal a primary document or to formally apply to court for leave to file a supplementary record to include the same cannot be wished away as a procedural technicality. Otherwise there will be no orderly conduct of business in this Court. Nor was that article in *the Constitution* meant to be a panacea for advocates negligence or casual approach in dealing with appeals to this Court." (Emphasis added)

13. The Court of Appeal (Kneller, Hancox JJA & Platt Ag as they then were) in Civil Appeal No. 7 of 1983, *Municipal Council of Kitale vs Fedha* [1983] eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent. The Judges went further to state that the omission could not even be cured by including the decree in a supplementary record because, in their view, a supplementary record cannot comprise the documents which ought to have been included in the original record in the first place.
14. Similarly, the Supreme Court decision in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* [2015] eKLR stated that failure to attach the decree from which the appellant was appealing, goes to the root of the appeal. The court expressed itself thus, at paragraph 41 of its said decision:

"Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is 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 a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."



15. In the case of *Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, this Court pronounced itself on the issue of an incomplete record of appeal as follows:

“Whereas we underscore the importance of a party filling a complete Record of Appeal, we are of the view that the respondents too could have filed the documents that were left out; but more importantly the respondents could have applied to strike out the appeal. Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities.”

16. In our considered opinion, the omission of the decree from the record of appeal does not, of itself, obstruct the course of justice. Secondly, the said defect is curable, if an appropriate application was made and was thereafter canvassed successfully.

17. The respondents herein are all retirees. They are persons who are senior citizens. Their advocate has informed the court that the respondents had retreated to their respective homes, and were therefore neither easy to get instructions from, nor were they able to put their heads together, in order to be able to agree on the instructions which they would give to their advocates.

18. In our considered opinion, the explanation given by the respondents, for the delay in moving the court appropriately, is plausible and reasonable in the prevailing circumstances. We therefore find that justice demands that the respondents be accorded an opportunity to take steps to try and remedy the omission herein. Therefore, we reject the application.

19. We order that the costs of the said application shall abide the outcome of the appeal. If for any reason, the appeal is not successful, the respondents to this application will also pay the costs thereof to the applicant. But if the appeal should ultimately succeed, the respondents to this application shall also stand awarded the costs of this application.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

