



**Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others  
(Civil Appeal (Application) 293 of 2016) [2021] KECA 44 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 44 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 293 OF 2016  
W KARANJA, DK MUSINGA & SG KAIRU, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**INTERCOUNTIES IMPORTERS AND EXPORTERS ..... APPLICANT**

**AND**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES 1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUBILEE INSURANCE COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**PARK AVENUE INVESTMENTS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**TRUST BANK LIMITED (IN LIQUIDATION) ..... 6<sup>TH</sup> RESPONDENT**

*(An application to strike out the Appeal filed by the Appellant as contained  
in the Record of Appeal dated 13th December 2016 and to set aside the  
Consent Order dated 27th September 2016 in E.L.C Case No. 12 of 2015)*

**RULING**

1 By a plaint dated 23rd December, 2004 subsequently amended on 10th February, 2005 and 20th May, 2005 TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES, the first respondent herein moved the High Court for, orders, inter alia, as follows;

“(a). A declaration that the purported ownership by the 1st defendant of the property known as Land Reference Number 209/13238 (formerly 209/2397) and subsequent charge by the 4th defendant is fraudulent, illegal, wrongful, null and void.



(b) An order directing the Commissioner of Lands to cancel the grant issued in favour of the 1st Defendant and issue of a new grant in favour of the Plaintiff; or in the alternative to (b) and (bi).

(bi) An order directing the 4th Defendant to execute a discharge of charge over the suit property and in default thereof the Deputy Registrar of High Court to execute the same on their behalf.

(bii) An order that the Commissioner of Lands (2nd Defendant) compensates the Plaintiff by paying to it a sum commensurate to the market value of the property at the time of judgment.

(c) Vacant possession of the suit property.

(d) A permanent injunction restraining the Defendants whether by themselves or their agents and/or servants or otherwise from doing the following acts or any of them that is to say from interfering with rights of possession, advertising for sale disposing of selling by public auction or otherwise however at any time or by completing by treaty, leasing, letting otherwise however interfering with ownership of title to and/or interest in all that piece of land known as L.R. No. 209/13238 (formerly 209/2397).

(e) Damages for fraud and trespass.”

2 In a judgment delivered on 27th July, 2016, the court found that INTERCOUNTIES IMPORTERS AND EXPORTERS (the applicant herein) was the lawful owner of Land Reference Number 209/13238 (formerly 209/2397) (the suit land) as the fraud allegations made against it had not been proved to warrant the Court’s intervention to cancel the title as prayed.

3 The 1st respondent herein being aggrieved by the said judgement and consequent orders lodged a Notice of appeal on 29th July, 2016.

Thereafter, the Record of appeal dated 13th December, 2016 was served upon the respondents’ advocate on 12th January, 2017.

4 It is this appeal that the applicant challenges as being fatally defective as it was missing a raft of documents. Also, as far as the applicant is concerned, the Record of appeal was filed out of time without leave of the Court. It is the applicant’s position that judgment was given on 27th July, 2016 and the Notice of appeal filed on 29th July, 2016 but its advocates were not served with any copy of the request to the High Court for proceedings.

5 The applicant contends that the Record of appeal ought to have been filed within 60 days of 27th July, 2016 and the failure to serve a copy of the proceedings from the High Court on the applicant limited the 1st respondent to a period of not more than 60 days within which to file the Record of appeal, which it failed to do.

6 In response, the 1st respondent was steadfast that the documents missing in the Record of Appeal were not included because they are neither in the court file nor are they in the 1st respondent’s office files and that the stated documents do not go to the root of the Record of Appeal as some are derived from interlocutory applications such that their omission would not render the Record of Appeal fatally defective.

7 According to the 1st respondent, Rule 88 of the [Court of Appeal Rules, 2010](#) allowed a party to file a supplementary Record of Appeal within 15 days of filing the Record of Appeal without leave and with leave applied to the Deputy Registrar after the lapse of the said days.



8 Further, that Article 159 (2)(d) of the *Constitution of Kenya, 2010* and Sections 1A and 1B of the *Civil Procedure Act* provides that in the spirit of expedient administration of justice, the courts shall discharge the same without undue technicalities. Also, the discretionary power of the court to strike out pleadings was one that should be exercised in the most exceptional of circumstances.

9 The 1st respondent averred that the appellant was abusing the court process as the instant prayer as sought, had been sought earlier by the applicant in Civil Application No. Nai No. 246 of 2016 which was yet to be heard. Additionally, that the parties herein had recorded a consent which was duly endorsed and adopted as an Order of the Court on 27th September, 2016 under Civil Application No. Nai 203 of 2016 (UR 157 of 2016) with the third term being;

“The Applicant will file its Appeal within 6 months from 27th September, 2016.”

10 In its submissions filed in support of this application, the applicant submitted that the documents missing from the record are primary documents as they consist of pleadings and documents put in evidence at the hearing, they consist of rulings on interlocutory applications that are relevant to the proceedings, there is no evidence of a request made to the High Court for any of these documents, and the application having been filed on 10th February, 2017 the 1st respondent is guilty of unreasonable delay for failing to take any corrective action.

11 The 1st respondent also filed its submissions. It submitted that the Record of appeal as filed was proper and sufficient for the just determination of the appeal, that it had perused the trial court record in HCCC No. 140 of 2004 but there was no trace of the documents reportedly missing from the record of appeal; that it immediately invoked the assistance of the Deputy Registrar in tracing the documents listed as missing; that the failure to include the said documents was not deliberate or intentional as it had no sight of the documents at the time of compiling and filing the Record of Appeal.

12 According to the 1st respondent, Rule 92 (1) of the Court of Appeal rules, 2010 obligates a respondent who deems the record incomplete to file a supplementary record of appeal for the proper determination of the appeal. The 1st respondent posits that the fact that the applicant has listed the full details of the missing documents is a clear indication that the applicant has possession of the said documents and it is in the interest of justice that the applicant files the same through a supplementary Record of appeal.

The 1st respondent submitted that the subject matter of the appeal related to land ownership which is of great importance to the parties and as such it would not be in the best interests of justice to strike out the appeal on grounds that certain documents are missing.

14 The 1st Respondent placed heavy reliance on *Daniel Musinga t/a Musinga & Company Advocates vs Nation Newspapers Limited* (2011) eKLR and on *Sacco Societies Regulatory Authority vs Biashara Sacco Society Limited* (2013) eKLR.

15 That the 1st respondent has filed an application seeking leave of the Court as per the provisions of Rule 88 of the Court of Appeal Rules to introduce some of the documents listed in the present application as missing.

16 On its part, the 6th respondent filed its submissions in which it supports the position taken by the applicant herein. The 6th respondent has submitted that the documents missing from the 1st respondent’s Record of appeal are primary documents whose omission not only offends the law but denies the Court of Appeal the opportunity to appraise itself of the matters of fact and law. It further submitted that the net effect of the foregoing was that, it stood to be prejudiced during the proceedings of the appeal.



17 It relied on the case of *Mohammed Aden Abdi vs Abdi Nuru Omar & 2 Others* (2007) eKLR referred to in *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associates Advocates & 4 Others* (2016) eKLR to submit that a decision on which documents are to be excluded in a Record of appeal is a preserve of the superior court and that the court has the inherent power to strike out the appeal where a Record of Appeal fails to contain one or more of the primary documents.

18 We have carefully considered the application along with the rival affidavits and submissions of the parties. Having done so, we discern the issues arising for determination as whether the record of appeal as filed is incompetent and whether the appeal was filed out of time.

19 On whether an appeal before the Court which is deemed incompetent faces automatic striking out, the Court in *Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission and 3 Others*, Civil Appeal (Application) No. 152 of 2009 (unreported) faced with a similar dilemma as to whether or not to strike out an appeal on account of incompleteness of the record for failure to include a primary document, while salvaging the appeal expressed itself as follows:-

“We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under rule 89 (3) of the Court’s rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal.”

20 Also, in the case of *Peter Obwogo O & 2 others vs H O Suing as Next Friend of P O (Minor) & Another* [2017] eKLR, Eldoret Civil Appeal (Application) No. 8 of 2017 the Court held;

“Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the administration of substantial justice. Article 159(2) (d) of the Constitution of Kenya 2010, now requires that:

“justice shall be administered without undue regard to procedural technicalities.” The Court has a discretion under Rule 84 to strike out a notice of appeal or appeal where an essential step has not been taken in the proceeding or has not been taken within a prescribed time. However, the discretion should be exercised judicially having regard to all the circumstances of the case.

The omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs.”

(Emphasis ours).

Each case will therefore be considered within its own peculiar circumstances.

21 The above notwithstanding, this Court has time and again reiterated that Article 159(2)(d) of the Constitution and Sections 3A and 3B of the Appellate jurisdiction Act are not a panacea to cure all manner of breach or violation of statutory rules that have been enacted to ensure predictability and good order in moving the Court for orders. Addressing this issue, this Court in *Patricia Cherotich Sawe vs IEBC & 4 Others* [2015] eKLR stated that Article 159(2)(d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it. The position was



more succinctly expressed in *Jaldesa Tuke Debelo versus IEBC and Another* [2015] eKLR wherein, the Court held inter alia that:

“Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should be strictly followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action.”

- 22 Simply put, neither Article 159(2)(d) of the Constitution, nor sections 3A and 3B of the [Appellate jurisdiction Act](#) was intended to lessen the duty of the parties, particularly advocates, to draft proceedings or move the Court in the manner provided by Statute. Furthermore, the statutory timelines cannot be said to be procedural technicalities.
- 23 From the body of the application and the rival affidavits and submissions of the parties, it is evident that the striking out of the application is premised on two prisms. Firstly, that the record of appeal was filed and served late, and secondly that the record as filed is deficient as it omits several primary documents which are necessary for a fair determination of the appeal.
- 24 On whether the appeal was filed out of time, the appellant submitted that following the consent entered into by the parties herein and adopted as an Order of the Court on 27th September, 2016 under Civil Application No. 203 of 2016 (UR 157 of 2016), they were allowed to file their appeal within 6 months from 27th September, 2016.
- 25 It is noteworthy that this averment was not controverted by the applicant or the 6th respondent, neither does it feature in their submissions. The consent is annexed to the 1st respondent’s replying affidavit. We have perused the said consent and we have confirmed that it was duly endorsed as an order of this Court on 27th September, 2016 and we are satisfied that the order is authentic.
- 26 The respondents therefore had up to 27th March, 2017 to file their appeal and they did the needful by filing a Record of appeal dated 13th December, 2016 and served it on the respondents’ advocates on 12th January, 2017.
- In the circumstances, our finding is that the appeal was filed within time and that ground therefore falls on its face.
- 27 On the second issue of striking out the appeal for incompleteness of the record, we agree with the respondents that the applicant too is enjoined by Rule 97 of the Court of Appeal Rules to file a supplementary record, if in its view the record was incomplete but the applicant did not seize that opportunity do so. Either party is still at liberty to file a supplementary record of appeal with leave of the Court.
- 28 The 1st respondent has explained to the satisfaction of this Court that the reason they were unable to include the documents in question into the record of appeal is because the documents cannot be found in the original record before the High Court. The 1st respondent has also informed the Court that it has filed an application for leave to file a supplementary record of appeal to bring on board the few documents it has been able to get.
- 29 In our view, striking out this appeal on grounds that the record of appeal as filed is incomplete, while the reason for the incompleteness is the unavailability of the records will not serve the ends of justice. Accordingly, we dismiss this application and order that the applicant has 45 days within which to file and serve a supplementary record of appeal to bring on board any relevant documents it may have in its possession omitted from the record which may assist in the just and fair disposal of this appeal. If no



supplementary record is filed and served as ordered, the appeal to proceed for hearing with the record as filed.

30 Costs of the application to abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

