



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO 49 OF 2006**

**Hassan v Githaiga & 2 others**

**Court of Appeal, at Mombasa July 21, 2006 Tunoi, Githinji & Waki JJ A Civil Appeal No 49 of 2006 (Appeal from judgment and decree of the High Court of Kenya at Mombasa (Khaminwa J) dated 10/2/2006 in High Court Election Petition No 6 of 2003)** Election Petitions-record of appeal- where a primary document was omitted from the Record of Appeal- whether there was a primary document and whether its omission could render the appeal incompetent.

Counsel for the appellant applied for the adjournment of the appeal respondent omitted from the record of appeal was part of the evidence could be introduced in the record of appeal by a supplementary record. Counsel for the respondents opposed the application for adjournment. It respondent had been document. He argued further that even if the hearing of the appeal is adjourned, the Appellate Court could not cure a nullity.

Held: of appeal was a primary document which could not be introduced by a supplementary record of appeal. record of appeal. That undoubtedly rendered the appeal incompetent. Application dismissed. Cases [1982]KLR 185 Statutes Court of Appeal Rules (cap 9 Sub Leg) rules 85(1)(f); 101(b) Hassan v Githaiga & 2 others (Tunoi, Githinji & Waki JJ A) 267

Advocates for the Appellant for the 1st and 3rd Respondent for the 2nd Respondent. July 21, 2006, the following Order of the Court was delivered. Mr Mutula Kilonzo (Junior) learned counsel for the appellant has applied for the adjournment of the appeal on the grounds that he wants to verify whether some documents omitted from the record of appeal were part of the evidence can be introduced in the record of the appeal by a supplementary rule 85(i)(f) of Rules of this Court. It is also conceded by Mr Mutula Kilonzo (Junior) that there are also other irregularities in the record of appeal. Both Mr Asige, learned counsel for 1st and 3rd respondents and Mr Gikandi, learned counsel for the 2nd respondent oppose the application for a primary document. He is of the view that even if the hearing of appeal is adjourned the Appellate Court will not be able to cure a nullity. Mr of Rules of this Court to raise a preliminary objection to the competence

the record of appeal and parts of other proceedings in record of appeal. He cited the case of [1982] KLR 185 for the proposition that failure to include a primary document in the record of appeal is an incurable defect which renders the appeal incompetent.

respondent in his evidence (see pages 540-547 of the record of appeal). omitted from the record of appeal is a primary document which cannot be introduced by a supplementary record of appeal. The adjournment of the appeal would not therefore assist the appellant. The adjournment would merely postpone the day of reckoning. Kenya Law Reports (Election Petitions) (2008) 3 KLR (EP)

in the election petition and read in Court is omitted from the record of appeal. That undoubtedly renders the appeal incompetent. The law on the omission of primary documents from the record of appeal is now well settled and we do not think that it is necessary to hear Mr Gikandi further on this issue.

In the result, the application for adjournment is dismissed. Accordingly we strike out the appeal as incompetent with costs to the respondents