



REPUBLIC OF KENYA



**Kaduyu & another v Darford Industries Limited (Civil Appeal E067 & E069 of 2022
(Consolidated)) [2025] KEELRC 1399 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1399 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E067 & E069 OF 2022 (CONSOLIDATED)**

L NDOLO, J

MAY 15, 2025

BETWEEN

AARON MUGESAN KADUYU 1ST APPELLANT

SILAH KHAMASI AMOKOLA 2ND APPELLANT

AND

DARFORD INDUSTRIES LIMITED RESPONDENT

RULING

1. On 23rd January 2025, I delivered a ruling on the Respondent's objection raised by Notice of Motion dated 2nd September 2024, seeking that the Memorandum of Appeal herein as consolidated with ELRCA No. 69 of 2022 be struck out.
2. In its objection, the Respondent accused the Appellants of attempting to steal a match, by omitting critical documents that informed the reasoning of the trial court. The Respondent singled out an attendance register/muster roll produced before the trial court to show the number of days the Appellants had worked.
3. In my ruling, I endeavoured to save the appeal and gave the Appellants a final chance to file a complete Record of Appeal. As at 17th March 2025 when the matter came up for final mention, the Appellants were yet to comply with the directions of the Court.
4. Order 42 Rule 13(4) of the *Civil Procedure Rules* provides as follows:
 - (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
 - a. the memorandum of appeal;



- b. the pleadings;
- c. the notes of the trial magistrate made at the hearing;
- d. the transcript of any official shorthand, typist notes, electronic recording and palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

- i. a translation into English shall be provided of any document in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

5. In its decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya* [2015] eKLR, the Supreme Court of Kenya held that in any appeal, the decree appealed from is a primary document in the Record of Appeal.
6. In *Lawrence Nguthiru Riccardabw v George Ndirangu* [2015] KEHC 771 (KLR) Ngaah I considered the competency of an appeal where the order appealed from was not availed as part of the Record of Appeal. In that case, the learned Judge, who was sitting as a first appellate court, stated the following:

“It must be remembered that whenever this court is called upon to consider an appeal from a decision of the subordinate court, it only does so in exercise of its appellate jurisdiction and I suppose it cannot assume such jurisdiction and determine an appeal on its merits if such an appeal does not exist in the first place. It follows that as long as there is a lingering question of whether an appeal exists or not and thus whether the appellate jurisdiction of this court has been properly invoked, that question must be determined in limine.”

7. In the present appeal, the Appellants have consistently failed to include a critical part of the pleadings being, the attendance register/muster roll which, according to the Respondent, was relied upon by the trial court in reaching its decision. According to Order 42 Rule 13(4), this document ranks among the mandatory documents to be placed before the appellate court.
8. The reason for this is not difficult to discern; as firmly grounded in case law, the duty of a first appellate court is to re-evaluate and re-analyse the evidence on record, and reach its own conclusions, bearing in mind that it has had no opportunity to encounter the witnesses first hand.
9. This duty was restated by the Court of Appeal in its judgment in *The German School Society v Ohany & another* [2023] KECA 894 (KLR) thus:

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court’s conscious application of its mind and record findings supported by reasons, on all the issues arising with the contentions put forth, and pressed by the parties for the decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign



its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is called to a full, fair, and independent consideration of the evidence at the appellate stage.”

10. By failing to file the attendance register/muster roll, even after being reminded by this Court to do so, the Appellants presented an incompetent appeal which is no appeal at all.
11. The only thing left for me to do is to strike out the appeal, which I hereby do.
12. Each party will bear their own costs.
13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngigi for the Appellants

Mr. Kiwinda for the Respondent

