



**Nuri v Kombe & 2 others (Petition (Application)
38 of 2018) [2019] KESC 42 (KLR) (29 April 2019) (Ruling)**

Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR

Neutral citation: [2019] KESC 42 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 38 OF 2018
DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
APRIL 29, 2019**

BETWEEN

HAMIDA YAROI SHEK NURI APPELLANT

AND

FAITH TUMAINI KOMBE 1ST RESPONDENT

AMANI NATIONAL CONGRESS 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

(Being an Application to strike out a Notice of Appeal for lack of timely service and a Record of Appeal for lack of proceedings of the Court of Appeal)

Delay in service of notice of appeal and lack of record of proceedings in the record of appeal are not fatal to the appeal

Upon being served with the petition, the 1st respondent filed the instant application seeking the striking out of the appellant's notice of appeal for lack of timely service and the record of appeal for lack of proceedings of the Court of Appeal. The court held that delay in service of notice of appeal and lack of record of proceedings in the record of appeal were not fatal to the appeal.

Reported by Chelimo Eunice

Civil Practice and Procedure - appeals - notice of appeal-filing and service of notice of appeal- time allowed for filing and serving a notice of appeal- what was the import of timely service of a notice of appeal-whether delay in service of a notice of appeal rendered the appeal fatally defective- where it was claimed that service of the notice of appeal would not be effected due to the party's financial constraints-whether the Court had discretion to excuse the delay in serving of the notice of appeal-whether service of a notice of appeal could be tied to the financial disposition of an intended appellant.



Civil Practice and Procedure - appeals-appeals to the Supreme Court-record of appeal-contents of a record of appeal-whether failure to include the record of proceedings of the appellate court in the record of appeal automatically rendered the appeal fatal-whether the Court had discretion to exclude a document from the record of appeal-where failure to file record of proceedings of the Court of Appeal in the record of appeal could not be attributed to the fault of the appellant, but the delay at the Court of Appeal registry in typing the proceedings-whether in the circumstances, the Court would strike out the record of appeal-Supreme Court Rules, 2012, rule 33(4) & (5).

Civil Practice and Procedure - appeals - appeals to the Supreme Court-components of an appeal to the Supreme Court- what constituted a competent appeal before the Supreme Court-whether lack of record of proceedings of the Court of Appeal was fatal to the record of appeal-Supreme Court Rules, 2012, rule 33(1).

Brief facts

On September 21, 2018, the Court of Appeal dismissed the appellant's appeal for lack of jurisdiction. Aggrieved by the dismissal, the appellant moved to the Court on appeal. Her petition of appeal was dated and filed on even date of October 26, 2018. Upon being served with the petition, the 1st respondent filed the instant application seeking the striking out of the appellant's notice of appeal for lack of timely service and the record of appeal for lack of proceedings of the Court of Appeal. The 1st respondent argued, among others, that failure to timely effect service prejudiced her as she was unable to adequately prepare for the hearing of the appeal promptly and that such failure to comply with the mandatory provisions of the Supreme Court Rules, 2012 rendered the notice of appeal fatally defective.

The appellant opposed the application, arguing that the delay in service be excused as the same was occasioned by her financial constraint as she was not certain whether she would file her appeal or not. As regards the record of appeal, the appellant argued that an appeal to the Court was not instituted by service of the notice of appeal on the respondents, but rather by filing a petition of appeal, a record of appeal and payment of the prescribed fees, which she promptly did and blamed the Court of Appeal registry for delaying in typing the proceedings.

Issues

- i. Whether the delay in service of the notice of appeal rendered an appeal Supreme Court fatally defective.
- ii. Whether lack of record of proceedings of the Court of Appeal was fatal to the record of appeal.
- iii. What constituted a competent appeal before the Supreme Court?
- iv. What were the contents of a record of appeal and whether the Supreme Court had discretion to exclude a document from the record of appeal?

Relevant provisions of the Law

Supreme Court Rules, 2012;

Rule 33(1);

"An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- a. a petition of appeal;*
- b. a record of appeal; and*
- c. the prescribed fee"*

Rule 33(5);

"The Court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made orally"

Held

1. While the notice of appeal was timely filed, the same was not served on the respondents until 19 days later, after the lapse of the 7 days provided for service of the same.
2. Notice of appeal, being an important document, the law provided on when it ought to be filed and served. Its service was crucial. It had to be filed and served in accordance with the Supreme Court Rules,



- 2012 (the Rules). If it was to serve its legitimate role as a notice giver to the respondents, then it could not be filed and not served. Thus, the appellant's explanation that she was awaiting the availability of funds before serving the notice of appeal would not stand. With total regard to financial constraints that a party would face, service of a notice of appeal could not be tied to the financial disposition of an intended appellant. In any event, the filing of a notice of appeal was not an affirmation that an appeal had to be filed. One would lodge a notice of appeal but decide not to file the appeal.
3. The 30 days within which to file an appeal after the filing of a notice of appeal were not only meant for the intended appellant to sufficiently prepare his/her appeal, but also to give him/her ample time to consider whether indeed he/she wanted to pursue the appeal or not. It gave time to a party to digest a court's decision and even seek legal advice. However, during that time, the notice of appeal ought to be timely served.
 4. The respondents made no sufficient case for prejudice. It was not true that timely service of a notice of appeal helped the respondents prepare for the case against them. Until an appeal was filed, that was when a party could know or be expected to know the case against him and legitimately prepare. For without an appeal, there could be no case against a party before the Supreme Court. Hence, one could not say that failure to serve him/her with a notice of appeal prejudiced him/her not to prepare for his/her defence for there were as of yet no allegations against him. A notice of appeal was as it were, a statement of intent.
 5. Courts should never provide succor and cover to parties who exhibited scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. However, in enforcing adherence to the Rules, courts had discretion in the interest of justice. The nature of the subject matter before the Court was one of constitutional interpretation. It went to the core of the jurisdiction of the Court of Appeal, the question being whether the Court of Appeal had jurisdiction to hear and determine a second appeal in an election petition concerning the election of a Member of County Assembly. Consequently, the Court excused the delay in serving of the notice of appeal, noting that the appeal was timely filed and served. Failure to serve the notice of appeal within the 7 days required in the matter was not fatal.
 6. As to what constituted a competent appeal before the Supreme Court, the Court referred to rule 33(1) of the Rules. The use of the word shall in the said rule suggested the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of the said rule 33(1) led to the conclusion that an appeal comprised the petition of appeal, the record of appeal, and the prescribed fee.
 7. There was a petition of appeal duly filed upon payment of the prescribed fee and a record of appeal. Hence, *prima facie*, there was an appeal on record. However, the record of appeal lacked the record of proceedings of the Court of Appeal. Under rule 33(4) of the Rules, the contents of a record of appeal from a court or tribunal in its appellate jurisdiction contained the following document; the certificate, if any, certifying that the matter was of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. Under rule 33(6) of the Rules, a document omitted would be filed in a supplementary record without leave of court within fifteen days of filing of the record of appeal and subsequently with leave of court, the same document would be filed.
 8. Failure to include the record of proceedings of the Court of Appeal in the record of appeal did not automatically render the appeal filed before the Court fatal. For if the law contemplated that such an omitted document would be filed later, the same law could not be said to render a record of appeal with that omission out rightly fatal. However, where a required document lacked in the record of appeal, devoid of a sufficient explanation for the omission, was a ground for the striking out of that record of appeal.
 9. There was no evidence of any correspondence between the Court of Appeal registry and the appellant between the time of the first letter requesting for the proceedings and the time of filing the appeal



in the Court. The letter of November 1, 2018 was filed after the lodging of the appeal and the one on November 15, 2018 was filed after being served with the instant application to strike out the record of appeal. Hence, the appellant's efforts and the registry's response(s) between the period of September 27, 2018 and October 26, 2018 were not well explained. Unfortunately, the respondents neither submitted to the lack of that information, nor did they confirm whether the proceedings were ready for collection in the one month' period. Nonetheless, the three letters demonstrated that there was persistent inquiry at the Court of Appeal registry by the appellant for the proceedings.

10. Lack of filing of the record of proceedings of the Court of Appeal in the record of appeal could not be attributed to the fault of the appellant, but the delay at the Court of Appeal registry in typing the proceedings. Further, rule 33(5) of the Rules connoted that the Court would exclude a document from the record. Once a record of appeal had been filed, the Court had discretion to determine whether the matter could sufficiently proceed without particular documents.
11. The absence of the proceedings of the Court of Appeal was not fatal to the hearing and determination of the instant matter. Thus, the respondents' invitation to strike out the record of appeal on that basis was rejected.
12. Since the whole of section 14 of the Supreme Court Act had been declared unconstitutional, section 14(5) of the Supreme Court Act could not be a basis for invoking the Court's inherent powers, as urged by the appellant.

Application dismissed with no order as to costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. On 21st September 2018, the Court of Appeal (Ouko, P, Musinga & Murgor, JJA) delivered a judgement in Election Petition Appeal No. 5 of 2018 as consolidated with Election Petition No. 1 of 2017, in which judgment it dismissed the appellant's appeal for lack of jurisdiction. The judgment aggrieved the appellant and she moved to this Honourable Court on appeal. Her Petition of appeal is dated and filed on the even date of 26th October 2018.
2. Upon being served with the petition, the 1st respondent filed a Notice of Motion application dated 12th November 2018. It is this application that is the subject of this ruling. The application seeks the following orders:
 - (1) That this Honorable Court be pleased to strike out the Notice of Appeal filed on the 27th of September, 2018 and served on the First Respondent on the 24th of October, 2018.
 - (2) That this Honourable Court be pleased to strike out the Record of Appeal filed on the 26th of October, 2018.
 - (3) That the costs of this application be provided for.
3. In her application, the 1st respondent asserts that the Notice of Appeal, which was filed timely on 27th September 2018, was served on her on 24th October, 2018, being nineteen days after the required time of within seven days of its lodging pursuant to Rule 32 of the Supreme Court Rules, and further that the Record of Appeal does not contain the record of proceedings before the Court of Appeal.



- She contends that failure to comply with the mandatory provisions of the Rules renders the Notice of Appeal fatally defective and that there are no valid reasons to justify failure to comply with these mandatory provisions of the law.
4. The application is supported by a Supporting Affidavit, deponed by the 1st respondent in which she avers that failure of the appellant to effect service on her duly appointed firm of Advocates within the statutory timelines prejudiced her as she was unable to adequately prepare for the hearing of the appeal promptly.
 5. The 3rd respondent supports the plea to strike out the Notice of Appeal and Record of Appeal. In its Submissions dated 21st November, 2018, it reiterates that failure to comply with mandatory provisions of the Rules is fatal. It urges that courts in Kenya, and elsewhere, have interpreted electoral laws strictly within the corners and confines of the same in adherence to strict timelines. In this regard, it refers the Court to its decision in Lemanken Aramat v Harun Meitamei Lempaka & 2 others, Petition No. 5 of 2014, [2014] eKLR in which the Court reiterated that “the jurisdiction of the Court to hear and determine the electoral disputes is inherently tied to the issue of time and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court”.
 6. It is the 3rd respondent’s case that no sufficient reason has been given for the appellant’s omission of the record of proceedings from her Record of Appeal. It is submitted that the appellant was not vigilant enough and that she had sufficient time of almost one month to obtain the proceedings. It urges that pursuant to Rule 33(1) and (4), it is mandatory that the Record of Appeal must contain the Record of Proceedings and cites the dissenting decision of Kiage JA in the persuasive Court of Appeal decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR to the effect that Article 159 of the Constitution and the oxygen principles were not meant to aid in the overthrow or destruction of rules of procedure.
 7. In reply to the application, the appellant filed a Replying Affidavit sworn on 16th November 2018 in which she avers that the delay in effecting service of the Notice of Appeal was occasioned by the fact that she was still sourcing for funds to file her Appeal to this Court. She submits that she has been financially drained having had to pay Kshs. 100, 000 and Kshs. 500, 000 as security of costs in the Magistrates Court and the Court of Appeal respectively, and that she was also condemned to pay uncapped costs at the High Court and the Court of Appeal. She pleads that being so financially drained; she was not sure whether she will eventually file this appeal.
 8. The appellant urges the Court to take note that both the Notice of Appeal and the Record of Appeal were timeously filed in the correct court, within the requisite timeframes, were in the prescribed form and they paid the requisite fees; and that the Record of Appeal was timely served.
 9. As regards the Record of Appeal particularly, it is the appellant’s case that under Rule 33(1) of the Court Rules, an appeal to this Court is instituted by filing a Petition of Appeal, a Record of Appeal and Payment of the prescribed fees, which she promptly did. She urges that an appeal to this Court is not instituted by service of the Notice of Appeal on the respondents. She submits that the Court Rules remain subservient to the Constitution and Statutes and that Article 159(2)(d) of the Constitution and section 14(5) of the Supreme Court Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. It is the appellant’s case that the Rules of this Court cannot be used to oust the aforementioned clear provisions of the Constitution and the Supreme Court Act.
 10. It is submitted by the appellant that her advocate wrote to the Court of Appeal on several occasions, to wit, the 27/9/2018, 1/11/2018 and 15/11/2018 requesting for typed proceedings and hence the delay in typing the proceedings at the Court of Appeal should not be visited on her. She contends that any



prejudice to the 1st respondent may suffer can be paid and that striking out the appeal is a draconian and drastic step that amounts to chasing her away from the seat of justice.

11. Having evaluated the application herein and the rival submissions of the parties, two issues crystalizes for determination: whether the delay in service of the Notice of Appeal is fatal; and whether lack of the record of proceedings of the Court of Appeal is fatal to the Record of Appeal.
12. As regards the first issue, it is common ground that while the Notice of Appeal was timely filed, the same was not served on the respondents until 19 days later, after the lapse of the 7 days provided for service of the same. The respondents are in unison that this was fatal to the appeal as they were prejudiced in being denied notice to prepare for the cases against. On the other hand, the appellants urges that the delay in service be excused as the same was occasioned by her financial constraint as she was not certain whether she will file her appeal or not.
13. This Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR underscored the importance of a Notice of Appeal as a jurisdictional prerequisite, citing with approval the dictum from the Supreme Court of California in *Silverbrand vs County of Los Angeles* (2009) 46 Cal. 4th 106, 113 in that regard.
14. Being such an important document, the law provides on when it should be filed and served. We agree with the 3rd respondent that service of a Notice of Appeal is crucial as this Court noted in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR thus:

“(37) Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

(38) We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.”



15. The above holding notwithstanding, the Court in that matter proceeded to consider the unique circumstances of the case. At the core of the application was the allegation that having not been served with the Notice of Appeal, the respondent could not file an Address of Service and as a consequence, the Record of Appeal subsequently filed by the appellant was fatally defective for lack of an Address of Service. In contextualizing this, the Court stated thus:

“(43) Informed by the role that the notice of appeal plays, it is our considered opinion that such a document ought to be filed first before the appeal. However, while the rules require that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service does not warrant striking out of the appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply Article 159 of the Constitution, in order to render substantive justice. It is also our view that Article 163(4) (a) of the Constitution gives the appellant a ‘right’ to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced.”

16. It is on this background that we proceed to consider the issue before us. We reiterate that a Notice of Appeal must be filed and served in accordance with the Rules. If a Notice of Appeal is to serve its legitimate role as a notice giver to the respondents, then it cannot be filed and not served. We therefore disabuse the appellant’s explanation that she was awaiting for availability of funds before serving the Notice of Appeal. With total regard to financial constraints that a party may face, service of a Notice of Appeal cannot be tied to the financial disposition of an Intended Appellant. In any event, the filing of a Notice of Appeal is not an affirmation that an appeal must/will be filed. One may lodge a Notice of Appeal but decide not to file the appeal. The 30 days within which to file an appeal after the filing of a Notice of Appeal are not only meant for the intended appellant to sufficiently prepare his/her appeal, but also to give him/her ample time to consider whether indeed he/she wants to pursue the appeal or not. It gives time to a party to digest the Court’s decision and even seek legal advice. However, during that time, the Notice of Appeal must be timely served.

17. The respondents herein have urged that failure to be served with the Notice of Appeal meant that they did not have adequate time to prepare their cases. While we condemn the appellant for not serving the Notice of Appeal timely, we disagree with the respondents’ prejudice allegations. They make no sufficient case for prejudice. It is not true that timely service of a Notice of Appeal helps the respondents prepare for the case against them. Until an appeal is filed, that is when a party can know or be expected to know the case against him and legitimately prepare. For without an appeal, there can be no case against a party before the Supreme Court. Hence one cannot say that failure to serve him/her with a Notice of Appeal prejudiced him/her not to prepare for his/her defence for there were as of yet no allegations against him. A Notice of Appeal is as it were a statement of intent.

18. We reiterate that the above dictum of *Kiage, JA*, cited with approval by this Court in the *Obado* case, is and remains the law as regards the need to serve the Notice of Appeal. Indeed as the learned appellate Judge stated “this Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. However, in enforcing adherence to the Rules, this Court has discretion in the interest of justice. In the *Obado* case, despite the Notice



of Appeal having not been served at all, the Court considered that no prejudice had been occasioned to the Respondent(s) and excused the same.

19. The case before us is further distinguishable. Unlike in the Obado case where the Notice of Appeal was never served to the Respondent(s) and they only saw it when they were served with the Record of Appeal, here the Notice of Appeal was served way before the Appeal was filed: only that it was served 19 days outside the requisite period. Be that as it may, the nature of the subject matter before the Court is one of constitutional interpretation. It goes to the core of the jurisdiction of the Court of Appeal, the question being; whether the Court of Appeal has jurisdiction to hear and determine a second appeal in an election petition concerning the election of a Member of County Assembly. Consequently, we would excuse the delay in serving of the Notice of Appeal. We note that the appeal was timely filed and served. Hence we find and hold that the failure to serve the Notice of Appeal within the 7 days required in this matter is not fatal.
20. The second issue is whether the Record of Appeal should be struck out for being incomplete for lack of the record of proceedings in the Court of Appeal. As to what constitutes a competent appeal before the Supreme Court, this was settled in the *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR thus:

“Rule 33(1) of the Supreme Court Rules, 2012 thus provides:

“An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- a. a petition of appeal;
- b. a record of appeal; and
- c. the prescribed fee” (Emphasis added).

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition of Appeal, the Record of Appeal, and the prescribed fee.”

21. In the matter before us, there is a petition of appeal duly filed upon payment of the prescribed fee and a Record of Appeal. Hence, prima facie, there is an appeal on record. However, the Record of Appeal lacks the record of proceedings of the Court of Appeal, is that fatal?
22. Under Rule 33(4), the contents of a Record of Appeal (from a court or tribunal in its appellate jurisdiction) contains the following documents from the first appellate court: the certificate, if any, certifying that the matter is of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. This Court has timely reiterated that under Rule 33(6) a document omitted may be filed in a Supplementary Record without leave of the Court with fifteen days of filing of the Record of Appeal; and subsequently with leave of the Court, the same document may be filed.
23. It therefore emerges that failure to include the ‘record of proceedings of the court of Appeal” in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However we hasten to add that where a



required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.

24. In the current matter, the appellant submitted that she promptly requested, for the certified copy of the typed proceedings and the decree on the 27th of September 2018. The appeal before this Court was filed on 26th October 2018, by which time the appellant states that the typed proceedings had not been received. We note that there is no evidence of any correspondence between the Court of Appeal Registry and the appellant between the time of the first letter requesting for the proceedings and the time of filing the Appeal in this Court. The letter of 1/11/2018 was filed after the lodging of the Appeal before this Court and the one on 15/11/2018 was filed after being served with this application, to strike out the Record of Appeal. Hence the appellant's efforts and the Registry's response(s) between the period of 27th September 2018 and 26th October 2018 are not well explained. Unfortunately, the respondents have not submitted to the lack of this information, save to say that the appellant had sufficient time of one month to collect the typed proceedings. They have not confirmed whether the proceedings were ready for collection in that period. Be that as it may, the three letters demonstrate that there was persistent inquiry at the Court of Appeal registry by the appellant for the proceedings.
25. In the matter of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR, this Court buttressed the principles of access to justice in considering an application for extension of time where the delay was occasioned by the delay by the Court of Appeal in typing proceedings thus:

“(27) Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. We note that the last correspondence in the record before us was on 29th January, 2014 and that could cast doubt on the measure of assertion of diligence; but there is nothing to show that the applicant has not made other efforts to inquire about the proceedings, or to show that the proceedings are now ready but remain uncollected. As no respondent has called into question the assertion that the proceedings are not yet available, we would not impugn the applicant's claim of diligence.

(28) Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery?”

26. The upshot is that we find that the lack of filing of the record of proceedings of the Court of Appeal in the Record of Appeal cannot be attributed to the fault of the appellant, but the delay at the Court of Appeal in typing the proceedings.
27. Further, we take note of Rule 33(5) of the Court Rules which states:

“The Court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made orally”

This rule connotes that the Court may exclude a document from the Record. It therefore emerges that once a Record of Appeal has been filed, this Court has discretion to determine whether the matter can sufficiently proceed without particular documents. Recently, in *Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others* [2018] eKLR, this Court was invited to strike out a Record of Appeal for being incompetent for lack of the proceedings of one judge of the Court of Appeal. The Court declined



the invitation holding that in any event, the inclusion of the court proceedings was not a mandatory requirement. It stated thus:

“(28) This takes us back to the 1st Respondent’s application dated 14th September, 2018. The only prayer remaining for consideration is the one seeking the striking out of the Record of Appeal filed on 17th August 2018 for being incomplete for lacking the proceedings by J. Mohammed, JJA. Is the lack of the same fatal? Upon perusal of the Rules, we find that under Rule 33(4) of the Court Rules, the appellate Judge(s)’ notes is not a mandatory requirement in the Record of Appeal. Rule 33(3) deals with a Record of Appeal where one is appealing from a court or tribunal exercising original jurisdiction. In this case, under Rule 33(3)(h), the trial judge’s notes of the hearing, is a mandatory inclusion in the record. The same is however, not a mandatory requirement under Rule 33(4) where it is an appeal from a court or tribunal in its appellate jurisdiction.

...

(29) The upshot is that the lack of the proceedings of J. Mohammed, JJA from the Record of Appeal filed on 17th August, 2018, by itself, is not sufficient to warrant the striking out of the Record of Appeal.”

28. The upshot is that, it is our determination that in the matter before us, the absence of the proceedings of the Court of Appeal is not fatal to the hearing and determination of this matter. We hence decline the respondents’ invitation to struck out the Record of Appeal on that basis.
29. Before concluding, we noted that the appellant in her Replying Affidavit had invoked section 14(5) of the Supreme Court Act in urging that this Court has inherent power to make any order for the ends of justice to be met. We would like to bring to the appellant’s attention that the whole of section 14 of the Supreme Court Act was declared unconstitutional in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. Hence section 14(5) cannot be a basis for invoking this Court’s inherent powers.
30. The upshot is that the 1st respondent’s application is disallowed. However, as the same was not frivolous but anchored on cogent provisions of the law and settled facts, we are inclined to award no costs.

We make the following orders:

- i. The Notice of Motion dated 12th November 2018 is hereby dismissed.
- ii. Each party shall bear its/her own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2019

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT



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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

