Kipkeu v Kangogo & 2 others (Petition 23 of 2018)
[2018] KESC 9 (KLR) (26 November 2018) (Ruling)

Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others [2018] eKLR

Neutral citation: [2018] KESC 9 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 23 OF 2018

MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

NOVEMBER 26, 2018

BETWEEN

SAMMY KEMBOI KIPKEU ..... APPELLANT

AND

BOWEN DAVID KANGOGO ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

MARTIN KITUYI WEKESA, RETURNING OFFICER MARAKWET EAST CONSTITUENCY ..... 3RD RESPONDENT

Failure to include the proceedings of an appellate court judge in a record of appeal is not sufficient to warrant the striking out of the record of appeal.

The main issue for determination was whether failure to include the proceedings of an appellate court judge in a record of appeal was sufficient to warrant the striking out of the record of appeal. The Supreme Court held that under rule 33(4) of the Supreme Court Rules (the Rules), the appellate court's notes were not a mandatory requirement in the record of appeal. Rule 33(3) dealt with a record of appeal where one was appealing from a court or tribunal exercising original jurisdiction. In the instant case, under rule 33(3)(h), the trial court's notes of the hearing, was a mandatory inclusion in the record. The same was however, not a mandatory requirement under rule 33(4) where it was an appeal from a court or tribunal in its appellate jurisdiction. The lack of the proceedings of one of the appellate court judges from the record of appeal by itself, was not sufficient to warrant the striking out of the record of appeal.

Reported by Kakai Toili and John Ribia

Civil Practice and Procedure *- appeals - record of appeal-supplementary record of appeal - time for filing supplementary record of appeal in the Supreme Court - what was the effect of filing a supplementary record of appeal in the Supreme Court without leave of the Court after 15 days of filing the record of appeal-whether an*

application to strike out a record of appeal by a respondent could be a ground for an application to file a fresh record of appeal by an appellant - whether a record of appeal filed at the Supreme Court could be amended-Supreme Court Rules, rule 33

***Civil Practice and Procedure** - appeals-record of appeal -components of a record of appeal - proceedings of an appellate court judge - failure to include the proceedings of an appellate court judge in a record of appeal - whether the failure to include the proceedings of an appellate court judge in a record of appeal was sufficient to warrant the striking out of the record of appeal - Supreme Court Rules, rule 33*

Brief facts

The 1st respondent was declared the duly elected Member of the National Assembly for Marakwet East Constituency in the August 2017 general elections. Aggrieved by the declaration, the applicant challenged the election results in the Trial Court citing several infractions, illegalities and irregularities. The Trial Court allowed the petition, annulling the results and ordered for a fresh election. Aggrieved by the decision, the 1st respondent filed an appeal to the Appellate Court seeking to set aside the Trial Court's decision. The 2nd and 3rd respondents filed cross appeals. The Appellate Court allowed both the appeal and the cross appeal with costs. Aggrieved by the decision, the applicant filed an appeal seeking to set aside the Appellate Court's judgment and reinstatement of the Trial Court's judgment.

The applicant filed a record of appeal which did not contain the proceedings of one of the Appellate Court judges; he subsequently filed a supplementary record of appeal. During the pendency of the appeal the 1st respondent filed a notice of motion application seeking to strike out the record of appeal and to expunge the Supplementary Record of Appeal. That application was mentioned before the Deputy Registrar of the Court and directions were given to the effect that the respondents and the applicant file their responses within 14 days. While the 1st respondent's application was still pending before the Court, the applicant filed his own notice of motion application seeking leave to file and serve a fresh record of appeal out of time and in the alternative, leave be granted to amend his record of appeal among other orders.

Issues

i. Whether the failure to include the proceedings of an appellate court judge in a record of appeal was sufficient to warrant the striking out of the record of appeal.
ii. What was the effect of filing a supplementary record of appeal in the Supreme Court without leave of the Court after 15 days of filing the record of appeal?
iii. Whether an application to strike out a record of appeal by a respondent could be a ground for an application to file a fresh record of appeal by an appellant.
iv. Whether a record of appeal filed at the Supreme Court could be amended.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 33

(4) For the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court-

1. *the certificate, if any, certifying that the matter is of general public importance;*
2. *the memorandum of appeal;*
3. *the record of proceedings; and*
4. *the certified decree or order***.**

Held

1. The Court would not entertain maneuvers from counsel and/or litigants meant to steal a match over others. Litigants had to pragmatically follow the prescribed rules, procedures and practices in litigation.

That onus was more paramount to counsel since as officers of the Court, a higher standard was expected of them.

2. Under the Supreme Court Rules (Rules), rule 33(6), the appellant could file a supplementary record of appeal with the missing document without leave of the Court within 15 days of filing the record of appeal. The 15 days lapsed on September 2, 2018 without a supplementary record of appeal being filed, that meant that any subsequent filing of a supplementary record of appeal required leave of the Court. No such leave was ever sought and/or granted. The Supplementary Record of Appeal having been filed on September 13, 2018, without leave of the Court, the same was fatally defective. There was no application and/or prayer by the applicant seeking extension of time to file a supplementary record of appeal or to deem the one filed, as duly filed.
3. The applicant's application was cunningly filed alongside his replying affidavit to the 1st respondent's application. Having been served with the 1st respondent's application, the applicant was under a duty to duly respond to it. The applicant did not abide by the Deputy Registrar's directions timeously and when he chose to, he filed alongside his replying affidavit, an application under certificate of urgency, which sought to frustrate the 1st respondent's application. If the applicant's application was heard and the Court was inclined to grant the prayers sought, the 1st respondent's application would be rendered superfluous despite the fact that the 1st respondent's application was filed first.
4. The applicant's application was an equitable application that sought the Court to exercise its discretion to grant an equitable remedy. As such, such an application was bound by the equitable principle that he who sought equity had to do equity. One had to come with clean hands before the Court when seeking such an equitable remedy. Unfortunately, there was no such cleanliness in the applicant's application. Its motive reeked of *mala fides* and stealing a match over the 1st respondent. The first equity in time prevailed, hence, the applicant could not frustrate the 1st respondent's application.
5. In seeking leave to file a fresh record of appeal, the applicant sought to muddle the Court's record. No explanation was given on what would happen to the record of appeal filed on September 17, 2018 if the Court found on merit and were inclined to grant leave to file a fresh record of appeal. In essence, the Court would be faced with two records of appeal. The fact that there was an application by the 1st respondent to strike out the applicant's record of appeal was not a sufficient ground for grant of leave to file a fresh record of appeal.
6. A record of appeal, filed under rule 33 of the Rules was not capable of amendment. A record of appeal contained documents emanating from the trial court(s) such as judgments, rulings, notices, proceedings and documents like the pleadings, affidavits, interlocutory applications, that were subject of proceedings in the trial court(s) which were not alive to be capable of amendment. The much one could do was to seek to expunge a document and/or file an additional document.
7. Under rule 33(4) of the Rules, the appellate court's notes were not a mandatory requirement in the record of appeal. Rule 33(3) dealt with a record of appeal where one was appealing from a court or tribunal exercising original jurisdiction. In the instant case, under rule 33(3)(h), the Trial Court's notes of the hearing, was a mandatory inclusion in the record. The same was however, not a mandatory requirement under rule 33(4) where it was an appeal from a court or tribunal in its appellate jurisdiction. The lack of the proceedings of one of the Appellate Court judges from the record of appeal filed on August 17, 2018, by itself, was not sufficient to warrant the striking out of the record of appeal.

1st respondent's application dismissed.

Orders

i. *The Supplementary Record of Appeal dated September 12, 2018 and filed on September 13, 2018 was struck out from the Record.*
ii. *The 1st respondent's Notice of Motion application dated September 14, 2018 disallowed.*
iii. *The appellant's Notice of Motion application dated October 4, 2018 was dismissed.*

iv. *Each party to bear its own costs.*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. Following the 8th August, 2017 General Elections, the 1st Respondent was declared the duly elected Member of the National Assembly for Marakwet East Constituency. The Appellant/Applicant, a registered voter within the constituency, was aggrieved by that declaration and challenged the election results by filing an Election Petition in the High Court citing several infractions, illegalities and irregularities.

2. In a judgment delivered on 27th February, 2018, the High Court, Kimondo J, allowed the Petition, annulling the results and ordering for a fresh election. The 1st Respondent was aggrieved by the nullification and filed an appeal to the Court of Appeal seeking to set aside the High Court decision. The 2nd and 3rd Respondents cross appealed. In a decision delivered on 12th July, 2018, the Court of Appeal allowed both the appeal and the cross appeal with costs, hence confirming the election of the 1st Respondent as Member of the National Assembly for Marakwet East Constituency.

3. The Applicant was aggrieved by the Court of Appeal decision and filed a Notice of Appeal on 23rd July 2018. He subsequently filed a Petition of Appeal dated 14th August, 2018 on 17th August, 2018 seeking to set aside that Judgment of Court of Appeal and reinstatement of the Judgment of the Election Court. Notably, on 13th September, 2018 a Supplementary Record of Appeal was filed in this matter. (This Supplementary Record also lies at the core of this Ruling and will be addressed later on in this Ruling).

4. During the pendency of the Petition, on 14th September 2018, the 1st Respondent filed a Notice of Motion Application dated even date seeking to: strike out the Record of Appeal dated 14th August 2018 and filed on 17th August 2018; and to expunge the Supplementary Record of Appeal dated 12th September, 2018 and filed on 13th September 2018. This application was mentioned before the Deputy Registrar of the Court on 21st September 2018 where directions to the effect that the Respondents (the Applicant herein included) were given fourteen days to file their responses. The matter was to be mentioned after those fourteen days, on 5th October 2018. A perusal of the Court record reveals that these directions were not implemented and during the mention on 5th October 2018 the Applicant indicated that he will file his Reply on that day.

5. While the 1st Respondent's application was still pending before the Court, on that same day, 5th October, 2018, the Applicant filed his own Notice of Motion Application dated 4th October, 2018 seeking the following orders, reproduced verbatim:

    1. That this application be certified as urgent for purposes of granting prayers 2 herein;

    2. That this Honourable Court be pleased to grant leave to the Applicant to file and serve fresh record of appeal out of time and serve the same to the Respondent within 7 working days.

3. That in the alternative to prayer 2 above, the Honourable Court be pleased to grant leave to the Applicant to amend his Record of appeal and serve the same to the Respondent within 7 Working days.

6. This application is based on grounds, interalia that: the Record of Appeal and the Petition herein are in danger of being struck out for mistakes of counsel; that if the application is not granted, the Petition will be dead on arrival absent fault of the client (sic) (Applicant) which is an injustice; and that Article 159 of the Constitution that vests the Judiciary with judicial authority emphasis on pursuing justice and not focusing on technicalities. The Applicant urges that the Supreme Court Act and Rules sanctions this Court to make any order to protect the ends of justice and the Rules do not limit the inherent discretionary powers of this Honourable Court to make such orders.

7. The Applicant avers that the firm of M/S Magare Musindi & Company Advocates was initially on record and filed the Appeal and the Record of Appeal. That the firm of Prof. Tom Ojienda & Associates came on record on 21st September, 2018 having been instructed on 20th September 2018. That it was upon perusal of the Record of Appeal that it discovered that there had not been attached the entire proceedings of the Court of Appeal; and that the index had not been properly numbered. He urges that these are not fatal mistakes to render the Record of Appeal and the Petition being struck out and that it is trite law that the mistakes of an advocate should not be visited upon the client. He cites the case of Harrison Wanjohi Wambugu v Felista Wairimu Chege & another [2013] eKLR in support of this limb of argument.

8. The Application is supported by an Affidavit sworn by the Applicant on 4th October, 2018 in which he reiterates the grounds in support of the application, which grounds are further elaborated in his Written Submissions filed on 12th October 2018.

9. In reply to the Applicant's application, the 1st Respondent filed a Replying Affidavit dated 11th October, 2018 on 12th October 2018 together with a List of Authorities. In the affidavit, it is deponed that during a mention of the substantive appeal before the Deputy Registrar on 7th September 2018, the errors in the Record of Appeal were brought to the attention of the Appellant and parties were allowed to seek a solution urgently. That the 1st Respondent's advocate wrote to the Applicant's counsel on record on 10th September 2018 pointing out the fatalities but got a Reply not owning up. On this background the 1st Respondent filed an application dated 14th September 2018 to strike out the Record of Appeal. He thus depones that the current application by the Applicant will occasion an injustice to the 1st Respondent as he already filed submissions to his application as directed. That this application is intended to defeat his application, hence it will grossly violate his right to a fair hearing under Articles 27(1) and 50 of the Constitution.

10. [10] The 1st Respondent also filed his Submissions dated 22nd October 2018 on 22nd October 2018. The crux of his response is that the Supplementary Record of Appeal was filed 27 days after the Original Record was filed and leave of this Court was neither sought nor granted. Despite that, the current application is silent on the status of that supplementary Record of Appeal. That the Applicant casual approach to this Court propelled him, the 1st Respondent, to file his Notice of Motion application dated 14th September 2018 seeking to strike out the Record of Appeal and the Supplementary Record of Appeal. Instead of responding to that application, the Applicant filed this application.

11. It is further urged that currently, there is no appeal before the Court since no proper Record of Appeal was lodged, containing all the mandatory documents. He relies on the case of Patricia Cherotich Sawe v Independnet Electoral & Boundaries Commission & 4 others, [2015] eKLR where it was held that: "[f]or a competent appeal to lie before this Court, it must comply with the terms of rule 33(1) of the

Supreme Court Rules, 2012 ...” He submits that the Applicant admits having omitted a document from his Record of Appeal, hence not complied with the mandatory rules. That despite that, he did not even utilize the 15 days period provided by Rule 33(6) to rectify the omission; and no leave was granted thereafter, hence there is no appeal before the Court in the context of Rule 33(7) of the Court Rules.

12. The 1st Respondent further submits that while the Applicant seeks leave to file a ‘fresh’ Record of Appeal’ there is no indication on what will happen to the current Record. Hence there will be two Records of Appeal on record. Secondly, it is urged that a fresh Record of Appeal presupposes that the Original Record of Appeal is technically in existence. He submits that the proper way was to first seek to withdraw the Record, where upon the appeal has no legs to stand and collapses, hence no appeal. Hence he urges that to cure that malady, the Applicant should have sought leave for extension of time to file a Fresh Appeal.

13. It is submitted that while the Applicant seeks to amend the Record, such amendment cannot be done by way of introduction of a new document, as an amendment is done on a text. It is only written documents that can be amended. Hence the Court has no powers to order amendment of the Record of Appeal to introduce new documents left out in the current Record. In any event, it is submitted, one cannot amend a nullity. The 1st Respondent further urges that by practice, if one seeks to amend a document, he/she must provide a draft of the amendment for the perusal of the Court and the other parties. This has not been done. Hence, without a draft, it is submitted that the Applicant may introduce matters outside the jurisdiction of the Court in the Record.

14. The 1st Respondent also urges that under Rule 37, a timely filed Notice of Appeal is deemed withdrawn if no appeal is instituted within the stipulated time. Hence the Applicant should have first sought to reinstate his Notice of Appeal, which is deemed withdrawn.

15. Lastly, it is urged that the Applicant has not meet the principles in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and boundaries Commission & 7 others [2014] eKLR for extension of time. In this regard it was submitted that from 2nd September, 2018 (when the 15 days lapsed within which a Supplementary Record could be filed without leave) to 5th October, 2018 (when this application was filed) is a period of 32 days, which delay has not been explained. That even if the argument about the new advocate on record was to be accepted, it has not been explained why the new advocate took 15 days from date of instruction (20th September 2018) to the date of filing this application (5th October, 2018) yet the Applicant had been aware of the incompetent of the Record since 7th September 2018 when the matter (Appeal) was first mentioned before the Deputy Registrar.

16. In any event, it is so submitted, there is no explanation, by way of affidavit or otherwise, why proceedings of Hon. J. Mohammed, JA were missing in the Record of Appeal that has been given by the Applicant. The 1st Respondent cites the case of Raila Odinga & others v IEBC & Others, Petition No. 5 of 2013, [2013]eKLR and urges that the Court’s discretion under Article 159 and the Rules should be exercised cautiously and where valid reasons are given not in this matter where the Applicant is not serious about the matter.

17. During the mention of the application before the Deputy Registrar on 22nd October, 2018, Counsel Mr. Patrick Barasa holding brief for Mr. Nyamodi for the 2nd and 3rd Respondents indicated that they were not opposed to the application hence filed no document on this issue.

18. We have considered the rival submissions of all the parties. From the onset, we would like to point out that this matter is a classic example of legal gymnastics yet seen before this Supreme Court. We categorically state that this Court as the apex Court will not entertain maneuvers from Counsel and/or litigants meant to steal a match over others. Litigants have to pragmatically follow the prescribed Rules,

Procedures and practices in litigation before the Court. This onus is more paramount to Counsel since as officers of the Court, a higher standard is expected of them. In the Matter of the National Gender and Equality Commission [2014] eKLR, this Court disabused this 'unholy' practice thus:

> "(27) Though not forming part of the issues for determination, a matter arose in the course of filing the pleadings that caught our attention. Upon the institution of the reference, the Interested Party (IEBC) filed a notice of preliminary objection. Upon being served with the notice, the applicant proceeded to file what it termed as "a notice of preliminary objection to the notice of preliminary objection". Ordinarily, a party files grounds of opposition in response to a preliminary objection. However, counsel for the applicant argued that he was justified in filing a parallel notice of preliminary objection: because the preliminary objection as filed by the IEBC was "bad in law", as it did not seek to raise a pure point of law.
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> (28) It is our position that parties should not endeavour, in their pursuit of creativity, to introduce 'new pleadings' unknown to the law. The rules of procedure are a handmaid to the course of justice, and should be followed with fidelity.
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> (29) The Court decided, however, to exercise its discretion on the basis of Article 159 of the Constitution, and to consider the essence of both sets of preliminary objection, in a holistic framework."

19. It is with this precedential background that we consider this matter. It is unfortunate that in determining this matter, the Supreme Court is engaging in issues of housekeeping and cleansing of the Record: matter ordinarily left for the Registrar. The Court takes an exception in the manner in which pleadings in this matter have been filed. There are two applications on record; a Notice of Motion dated 14th September 2018, filed by the 1st Respondent, and a Notice of Motion dated 4th October, filed by the Appellant. Having studied the two motions, it is our resolution that the justice of this matter requires that the two applications be determined together and we hereby do.

20. In this case, the Notice of Appeal was duly filed and subsequently a Record of Appeal and the Petition timeously filed. However, it is common ground that the Record of Appeal was not complete. It missed the proceedings by Justice J. Mohammed, JA. At the core of this matter is how the Appellant proceeded to remedy this omission and/or how he ought to have remedied the same.

21. Under the Rules: Rule 33(6), the Appellant could file a Supplementary Record with the missing document without leave of the Court within fifteen days of filing the Record of Appeal. The 15 days lapsed on 2nd September 2018 without a Supplementary Record of Appeal being filed. This meant that any subsequent filing of a Supplementary Record of Appeal required leave of the Court. No such leave was ever sought and/or granted. Hence, we find and hold that the Supplementary Record of Appeal having been filed on 13th September 2018, without leave of the Court, the same is fatally defective. Be that as it may, we are in agreement with the 1st Respondent that there is no application and/or prayer by the Appellant before this Court seeking extension time to file a Supplementary Record of Appeal or to 'deem' the one filed, as duly filed. The upshot is that we hereby strike out the Supplementary Record of Appeal filed on 13th September 2018.

22. As already noted, the Record of Appeal missed the Court of Appeal proceedings of J. Mohammed, JJA. This omission forms the crux of the 1st Respondent's application seeking to strike out the Record of Appeal for being incompetent and to expunge the Supplementary Record of Appeal (which we have

already struck out). This application was duly filed and mentioned before the Deputy Registrar on 21st September 2018 who gave directions that the Respondents had fourteen (14) days within which to file their responses. Thereafter, there was to be a mention on 5th October 2018. This was a day after the lapse of the fourteen days, ostensibly to confirm compliance. Unfortunately, these directions marked the start of the legal gymnastics we have alluded to.

23. The Appellant did not comply with those directions. When the matter was mentioned on 5th October, 2018, he informed the Deputy Registrar that he will file his Response that particular day. Interestingly, when the Court rose after the mention, the Appellant not only filed a Replying Affidavit to the application but also filed his own Notice of Motion application dated 4th October 2018 seeking extension of time to file a 'fresh' Record of Appeal or in the alternative, extension of time to amend his Record of Appeal. For pragmatism, we will first dispose of this Appellant's application dated 4th October, 2018.

24. Before considering its merit, we would like to observe that this Appellant's application was cunningly filed alongside his Replying Affidavit to the 1st Respondent's application. Having been served with the 1st Respondent's application, the Appellant was under a duty to duly response to it. Unfortunately, he did not abide by the directions of the Deputy Registrar timeously and when he chose to, he filed alongside his Replying Affidavit, an application, under certificate of urgency, which for all purposes and intend seek to frustrate the 1st Respondent's application. It is certain that if the Appellant's application is heard and the Court in exercise of its discretion is inclined to grant the prayers sought; the 1st Respondent's application will be rendered superfluous despite the fact that the 1st Respondent's application was filed first on record and directions given.

25. Drawing from the Nicholas Arap Salat case, an application such as the Appellant's, is an equitable application that seeks the Court to exercise its discretion to grant an equitable remedy. As such, such a motion is bound by the equitable principle that he who seeks equity must do equity. One must come with clean hands before the Court when seeking such an equitable remedy. Unfortunately, we see no such cleanliness in the Appellant's application. Its motive reeks of mali fides and stealing a match over the 1st Respondent. Secondly, the first equity in time prevails. Hence, the Appellant cannot frustrate the 1st Respondent's application which was filed first before this Court at the guise of filing his application under a certificate of urgency: hence our earlier resolution that these two applications be decided together.

26. On its merit, we find that the Appellant's motion is for dismissal. First in seeking leave to file a fresh Record of Appeal, we are in agreement with the 1st Respondent that the Appellant seeks to muddle the Court's record more. No explanation is given on what will happen to the current Record of Appeal filed in this Court on 17th September 2018, if we find merit and are inclined to grant leave to file a fresh Record of Appeal. In essence, the Court will be faced with two Records of Appeal. Perusing the grounds in support of the application, we find that the fact that there is an application by the 1st Respondent to strike out the Appellant's Record of Appeal is not a sufficient ground for grant of leave to file a fresh Record of Appeal.

27. As regards the alternative prayer for leave to amend the Record of Appeal, we agree with the 1st Respondent's submissions that a Record of Appeal, filed under Rule 33 of the Court Rules is not capable of amendment. A Record of Appeal contain documents emanating from the Court(s) below such Judgments, Rulings, Notices, Proceedings e.t.c; and also documents like the pleadings, affidavits, interlocutory applications, that were subject of proceedings in the Lower Court(s) which are not alive to be capable of amendment. The much one can do is to seek to expunge a document and/or file an

additional document. Hence the Appellant's prayer cannot be granted. The upshot is that the Notice of Motion application dated 4th October, 2018 is without merit.

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. Rule 33(4) provides:

> (4) For the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court-
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> (a) the certificate, if any, certifying that the matter is of general public importance;
>
> (b) the memorandum of appeal;
>
> (c) the record of proceedings; and
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> (d) the certified decree or order.

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. Hence the 1st Respondent's application is dismissed.

30. In the ultimate, we make the following orders:

i. The Supplementary Record of Appeal dated 12th September, 2018 and filed on 13th September, 2018 is struck out from the Record.

ii. The 1st Respondent's Notice of Motion application dated 14th September, 2018 is hereby disallowed.

iii. The Appellant's Notice of Motion application dated 4th October, 2018 is hereby dismissed.

iv. Each party shall bear its own costs.

Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2018

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

N. NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT