



## **REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Ibrahim, Wanjala, Ndungu, Lenaola & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. E012 OF 2024**

– BETWEEN –

**STANDARD CHARTERED FINANCIAL SERVICES LTD .. APPELLANT**

– AND –

**MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED**

**NOW CALLED KING WOOLEN MILLS LTD ..... 1<sup>ST</sup> RESPONDENT**

**GALOT INDUSTRIES LTD ..... 2<sup>ND</sup> RESPONDENT**

**A.D. GREGORY & C.D. CAHILL ..... 3<sup>RD</sup> RESPONDENT**

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*(Being applications for stay of execution of the Judgment of the Court of Appeal (Okwengu, Laibuta & Mativo, JJ. A.) dated 16<sup>th</sup> December, 2022 in Civil Appeal No. 88 of 2000, striking out the record of appeal in SC Petition No. E012 of 2024, and leave to file a supplementary record of appeal)*

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**Representation:**

Ms. Radhika Arora h/b for Mr. George Oraro, SC for the Appellant  
*(Oraro & Company Advocates)*

Mr. Philip Nyachoti for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
*(Nyachoti & Co. Advocates)*

Mr. Chege for the 3<sup>rd</sup> Respondent  
*(Amolo & Gachoka Advocates)*

### **RULING OF THE COURT**

**[1]** Before this Court are three Motions, two of which have been filed by Standard Chartered Financial Services Limited (the Appellant) and the third by Manchester

Outfitters (Suiting Division) Limited and Galot Industries Limited (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively).

**[2] NOTING** the facts pertaining this matter as established by the superior courts below; that the Standard Chartered Merchant Bank Limited of London (SCMB) advanced 1,300,000 Deutschemarks and 1,050,000 Swiss Francs to the 1<sup>st</sup> Respondent vide a Euro-currency loan dated 22<sup>nd</sup> March 1982; that the 1<sup>st</sup> Respondent executed a debenture dated 5<sup>th</sup> April 1982 in favour of the Appellant who was its guarantor for the said loan; that on 7<sup>th</sup> October 1986, the 1<sup>st</sup> Respondent and Appellant 'localized' the Euro-currency loan to Kshs.9,000,000/= through a facility letter; that the Appellant advanced the Kshs.9,000,000/= to the 1<sup>st</sup> Respondent who in turn offset its dues to SCMB; that the 1<sup>st</sup> Respondent defaulted in repaying this loan to the Appellant and it (the Appellant) sought to recover a total of Kshs.19,024,522.05/= being the amounts owing to the Appellant by the 1<sup>st</sup> Respondent and hence appointed the 3<sup>rd</sup> Respondent as receiver and manager over the 1<sup>st</sup> Respondent's assets; and

**[3] TAKING INTO ACCOUNT** the High Court's decision (*Githinji, J. (as he then was)*) in ***Manchester Outfitters (Suiting Division) Ltd. & Another v Standard Chartered Financial Services Ltd & Others***, HCCC No. 5002 of 1990 wherein it was held that the debenture registered in 1982 was indeed valid for purposes of enforcing the localized agreement; equally, the appointment of the 3<sup>rd</sup> Respondent as receiver and manager of the 1<sup>st</sup> Respondent's assets for the recovery of the amounts owing under the localization agreement was valid; and

**[4] COGNISANT** that the Court of Appeal (*Asike-Makhandia, Kantai & Nyamweya, JJ. A*) in ***Manchester Outfitters (Suiting Division) Limited now called King Woollen Mills Limited & Another v Standard Chartered Financial Services Limited & Another***, Civil Appeal No. 88 of 2000 overturned the High Court's decision (*Githinji, J. (as he then was)*) in *HCCC No. 5002 of 1990*; that the Court of Appeal held that the debenture registered in 1982 between the Appellant and the 1<sup>st</sup> Respondent did not extend to the localization

agreement executed in 1986 between the same parties; that consequently, the appointment of the 3<sup>rd</sup> Respondent as receiver and manager of the 1<sup>st</sup> Respondent's assets was invalid and it was so declared; that the 1<sup>st</sup> Respondent was entitled to damages as sought in the re-amended plaint and the matter was referred to the High Court for assessment of damages. It is important to note at this juncture that in the course of the appeal before the Court of Appeal, the 3<sup>rd</sup> Respondent proceeded to sell the 1<sup>st</sup> Respondent's assets; and

**[5] NOTING** that subsequently, on 24<sup>th</sup> February 2024 vide ***Standard Chartered Financial Services Limited v Manchester Outfitters (Suiting Division) Limited now called King Woollen Mills Limited & 2 Others***, Civil Application No. Sup. E001 of 2023, the Court of Appeal (*Warsame, M'Inoti and Mativo, JJ. A*) certified the following 3 issues as raising matters of general public importance:

- a) *Whether a charge or debenture applies to future advances made between the same parties;*
- b) *The place of a lender in the face of an unsecured loan that has become due; and*
- c) *Whether the Court of Appeal can proceed to determine an appeal where the record is incomplete, illegible, faded and parts of it missing, contrary to the Court of Appeal Rules.*

**[6] FURTHER NOTING** that the parties, specifically, the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, differed on whether the letter agreement dated 27<sup>th</sup> November 1981 formed part of the record before the superior courts below and whether it, in fact, was considered; that the parties continue to advance conflicting arguments as to whether the debenture executed on 5<sup>th</sup> April 1982 was a continuing security between the Appellant and the 1<sup>st</sup> Respondent; and

**[7] UPON** perusing the Notice of Motion dated 5<sup>th</sup> April 2024 brought under Articles 48, 50(1) of the Constitution of Kenya, Sections 3, 21 and 23A of the

Supreme Court Act, Cap 9B of the Laws of Kenya and Rules 17, 31 and 32 of the Supreme Court Rules, 2020, wherein the Appellant seeks the following orders:

- i. *Spent.*
- ii. *THAT pending the hearing and determination of the appeal in Petition No. E012 of 2024, this Honourable Court be pleased to issue an order of stay of execution of the judgment and order of the Court of Appeal dated 16<sup>th</sup> December 2022 in Nairobi Civil Appeal No. 88 of 2000- Manchester Outfitters (Suiting Division) Limited & Another v Standard Chartered Financial Services Limited & Others, together with any other consequential orders arising therefrom.*
- iii. *THAT pending the hearing and determination of the appeal in Petition No. E012 of 2023 (sic), this Honourable Court be pleased to stay any further proceedings (assessment of damages) before the High Court in HCCC No. 340 of 2006- Manchester Outfitters (Suiting Division) Limited now called King Woollen Mills Limited & Another v Standard Chartered Financial Services Limited & Others.*
- iv. *THAT the costs of this application be awarded to the Appellant herein; and*

**[8] UPON PERUSING** the grounds in support of the application, the supporting affidavit and further affidavit sworn on 5<sup>th</sup> April 2024 and 18<sup>th</sup> April 2024 respectively, by Dr. Davidson Mwaisaka, the Head of Legal (Kenya & East Africa) of the Standard Chartered Group which group includes the Appellant, and the Appellant's submissions of even date to the effect that the Appellant has lodged *SC Petition No. E012 of 2024* challenging the Court of Appeal's decision in *Civil Appeal No. 88 of 2000*; that in the meantime, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged *Machakos ELC No. 94 of 2017, Galot Limited & Another v the Honourable the Attorney General & Another*, wherein they seek orders nullifying the sale of L.R. Nos. 12867/1 and 12867/2 and for reversion of the said properties to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also commenced *HCCC No. 340 of 2006 Manchester Outfitters (Suiting Division) now called King Woollen Mills Limited &*

*Another v Standard Chartered Financial Services & Others* for the assessment of damages wherein they seek the total sum of Kshs.33,940,614,490/= as the 1<sup>st</sup> Respondent's asset valuation; that the application has met the 3-pronged test laid out in the case of ***Kombe Harrison Garama v Kenga Stanley Karisa & 3 Others***, SC Application No. E028 of 2023; [2023] KESC 83 (KLR) that is, the appeal or intended appeal is arguable and not frivolous; unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted; that the certification of 3 issues as raising matters of general public importance in *Civil Application No. Sup. E001 of 2023* is testament to the appeal's arguability; that the Appellant is apprehensive that, should the appeal be successful, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents may not be in a position to refund the large sums of money claimed since they have not been a going concern from the year 1990; that they have an active dispute as to their rightful shareholders and directors and further, their assets are unknown; that in the absence of a stay order, the Appellant is likely to suffer a huge loss capable of bringing it to its knees and in this connection, it attached a Bank Supervision report by the Central Bank of Kenya to the effect that only 9 banks out of the 39 banks in Kenya have a capital base close to the damages sought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; and

**[9] UPON CONSIDERING** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' replying affidavit sworn on 12<sup>th</sup> April 2024 by Mohan Galot who describes himself as the principal shareholder, governing director and chairman of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' board of directors and exercising full management and control of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' affairs, and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions of even date to the effect that the Appellant had failed to meet the test for grant of stay orders; that the judgment in *Civil Appeal No. 88 of 2000* is not capable of execution and stay is not effective in the circumstances; that *ELC No. 94 of 2017*, which was previously *Milimani HCCC No. 122 of 2008*, was instituted in 2008 before the delivery of the Court of Appeal judgment and therefore, did not amount to execution; that in

addition, there is a pending application for stay of proceedings in *ELC No. 94 of 2017*; that this Court can only stay further proceedings in the Court of Appeal and not in *Milimani HC Commercial No. 340 of 2006 (formerly Milimani Civil Suit No. 5002 of 1990)*; that having caused the sale of the 1<sup>st</sup> Respondent's assets and business, for which it was yet to render accounts, the Appellant had in effect fully recovered Kshs.19,024,522/= being the monies it claimed in its counter-claim in *HCCC No. 5002 of 1990*; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had since filed *SC Originating Motion No. E011 of 2024 Manchester Outfitters (Suiting Division) Ltd. now called King Woollen Mills Ltd. & Anor. v Standard Chartered Financial Services Ltd. & Anor.* challenging the decision in *Civil Application No. Sup. E001 of 2023* which ruling would affect the instant application; that given that *HCCC No. 340 of 2006* was pending, the Appellant's prayers were largely speculative and there are avenues open to the Appellant to seek recourse in the event of entry of any adverse orders in *HCCC No. 340 of 2006*; that the dispute relating to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' directorship and/or shareholding is inconsequential and in any event, had been settled in *Milimani HCCC No. 55 of 2012 Manchester Outfitters Limited v Pravin Galot & 4 Others*; that the Appellant has not demonstrated that execution is imminent or that it would suffer substantial loss; that whilst citing the case of ***Edwin Harold Dayan Dande & 3 Others v The DPP & 2 Others***, SC Petition 6 (E007), 4(E005) and 8(E010) of 2022 (Consolidated); [2023] KESC 40 (KLR), submitted that this Court does not have the power to halt further proceedings before the High Court; and

**[10] TAKING INTO ACCOUNT** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application dated 11<sup>th</sup> April 2024 brought under Sections 3A, 21(1) and (2) of the Supreme Court Act and Rules 31(6), 40(1)(d), 65(1) and (2) of the Supreme Court Rules, wherein they seek the following orders:

- a) *THAT the Record of Appeal dated 22<sup>nd</sup> March 2024 and filed in court on 25<sup>th</sup> March 2024 be struck out.*
- b) *THAT costs of this application be provided for.*

**[11] FURTHER TAKING INTO ACCOUNT** the grounds on the face of the application and the affidavit in support thereof and the further affidavit sworn on 11<sup>th</sup> April and 26<sup>th</sup> April 2024 respectively, by Mohan Galot, and their primary submissions and supplementary submissions dated 11<sup>th</sup> April and 26<sup>th</sup> April 2024 respectively, wherein they urge that the Appellant contravened Rules 38(2)(b) and 40(1)(d) of the Supreme Court Rules by deliberately omitting the following critical documents in the record of appeal:

- a)** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' supplementary record of appeal dated 24<sup>th</sup> February 2001,
- b)** 5 volumes of the entire High Court file in *HCCC No. 5002 of 1990* filed in the *Civil Appeal 188 of 2000*,
- c)** the orders and directions of the Court of Appeal issued on 9<sup>th</sup> December 2021, 17<sup>th</sup> February 2022, 12<sup>th</sup> May 2022 and 7<sup>th</sup> July 2022,
- d)** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions dated 9<sup>th</sup> December 2020 and the digest of authorities thereto, the Appellant's written submissions dated 12<sup>th</sup> February 2021 and the digest of authorities thereto and lastly, the 3<sup>rd</sup> Respondent's written submissions dated 9<sup>th</sup> July 2021 and the digest of authorities thereto, to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' utter prejudice and cited the case of ***Law Society of Kenya v The Centre for Human Rights Democracy & 12 Others***, SC Petition No. 14 of 2013; [2014] eKLR in support of this position; that the 15-days' statutory timeline for filing a supplementary record of appeal as provided for in Rule 40(4) of the Supreme Court Rules had since lapsed without any application from the Appellant for leave to file a supplementary record of appeal; that the failure to include all the relevant pleadings renders the record of appeal incomplete and incurably defective; that the omission was fatal and could not be saved under Article 159(2) of the Constitution and liable to be struck out and cited this Court's decision in ***Erdemann Property Ltd. v Safaricom Staff Pension Scheme & 3 Others***, SC Petition (Application) No. E013 of 2023; [2023] KESC 76 (KLR) in support; that without the complete record, this Court is

handicapped in determining the appeal; that the appeal cannot stand in the absence of a record of appeal and should equally be struck out; and

**[12] NOTING** the Appellant's replying affidavit sworn on 22<sup>nd</sup> April 2024 by Dr. Davidson Mwaisaka and the submissions of even date urging that some of the documents identified by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as allegedly missing from the record of appeal are either actually part of the record of appeal, and if they are not, they are not relevant to the matters certified as being of general public importance; that in any event, the Appellant discharged its duty by writing to the Deputy Registrar of the Court of Appeal requesting for the proceedings and attaching those proceedings it received to the record of appeal and can therefore, not be faulted/penalized and in support thereof, cited the case of ***Alfred Asidaga Mulima & 2 Others v The Hon. Attorney General & 8 Others***, SC Petition (Application) No. 17 of 2019; while citing this Court's decision in ***Arvind Shah & 7 Others v Mombasa Bricks & Tiles Limited***, SC Petition (Application) No. 18 (E020 of 2022); [2023] KESC 28 (KLR), given that the appeal touches on matters of general public importance, it urged that any missing documentation would only speak to the facts of the case, which would equate to asking this Court to go beyond its jurisdiction and delve into the facts; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not demonstrated any prejudice they are likely to suffer should the appeal proceed on the basis of the record of appeal as filed; that relying on this Court's decision in ***Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 Others***, SC Petition No. 23 of 2018; [2018] KESC 9 (KLR), it would be improper to strike out a record of appeal on account of failure to include non-mandatory documents in the record of appeal; that in any event, and citing the case of ***Hamida Yaro Shek Nuri v Faith Tumaini Kombe & 2 Others***, SC Petition (Application) No. 38 of 2018; [2019] KESC 42 (KLR), Rule 40(4) of the Supreme Court Rules accords a litigant a chance to seek leave to file a supplementary record of leave, which application the Appellant was amenable to filing; that the application was therefore, frivolous, an abuse of court process and meant to defeat the appeal; that Article 159(2)(d) of the

Constitution calls upon this Court to administer justice without undue regard to technicalities; and

**[13] BEARING IN MIND** the Appellant's second application dated 26<sup>th</sup> April 2024 (second application) brought under Articles 48, 50 and 159(2)(d) of the Constitution, Sections 3A and 21(2) of the Supreme Court Act and Rules 31 and 40(4) of the Supreme Court Rules, 2020 wherein it seeks the following principal orders:

- i. *Spent*
- ii. *This Honourable Court be pleased to extend time for the filing of a Record of Appeal and grant leave to the Appellant to file a Supplementary Record of Appeal containing the following documents-*
  - a. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Supplementary Record of Appeal dated 24<sup>th</sup> February 2001 and filed in Civil Appeal No. 88 of 2000;*
  - b. *The five (5) volumes containing copies of the High Court file in Milimani HCCC No. 5002 of 1990; and*
  - c. *The Court of Appeal's directions and transcribed copies of the handwritten notes of the Judges of the Court of Appeal in Civil Appeal No. 88 of 2000 dated 9<sup>th</sup> December 2021, 17<sup>th</sup> February 2022, 12<sup>th</sup> May 2022 and 7<sup>th</sup> July 2022.*
- iii. *The costs of this application be in the appeal.*

**[14] FURTHER BEARING IN MIND** the grounds on the face of the application and the affidavit in support and further affidavit sworn on 26<sup>th</sup> April and 13<sup>th</sup> May 2024 respectively by Dr. Davidson Mwaisaka, and the submissions of even date wherein it is urged that the Appellant had filed a record of appeal that is compliant with Rule 40(1) of the Supreme Court Rules; that the Appellant had indeed deliberately failed to include some of the documents contested to be missing since they do not fall within the ambit of Rule 40(1) of the Supreme Court Rules; that while the omitted documents are not necessary for the determination of the appeal,

nonetheless, the instant application was for purposes of filing a supplementary record of appeal in line with this Court's decision in ***Surya Holdings Limited & 2 Others v CFC Stanbic Limited & Another***, SC Petition No. 8 of 2019; [2020] KESC 2 (KLR), so as to afford the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a chance to rely to the said documents, should they so wish; that no prejudice would be visited upon the Respondents, especially in view of the fact that 1<sup>st</sup> and 2<sup>nd</sup> Respondents were yet to file their submissions to the appeal; that the Appellant was amenable to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filing further and/or supplementary affidavits in view of the imminent supplementary record of appeal; that it was in line with the precepts of justice to allow the application in the terms sought; and

**[15] CONSIDERING** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' replying affidavit sworn on 6<sup>th</sup> May 2024 by Mohan Galot and submissions of even date to the effect that the Appellant's second application is incompetent (the reasons wherefore were not advanced in the affidavit); that the orders sought were discretionary and the Appellant was undeserving since it had deliberately failed to include the contested documents in the record of appeal and cited the ***Law Society of Kenya Case*** in support; that the Appellant's deliberate failure was calculated to paint a picture that the Court of Appeal entered judgment on account of an incompetent record; that, citing the ***Sammy Kemboi Case***, a pending application for striking out an appeal was not ground enough to file an application for leave to file a supplementary record of appeal; that in fact, the 1<sup>st</sup> and Respondents' application to strike out both the petition and record of appeal ideally closed the door on the Appellant filing an application for leave to file a supplementary record of appeal; that in order to properly interrogate whether the Court of Appeal proceeded to render judgment on the basis of an incomplete record, the Appellant was duty-bound to indeed file the entire record of the proceedings in the superior court below; that the application was meant to defeat the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application dated 11<sup>th</sup> April 2024; and

**[16] HAVING CONSIDERED** the totality of the applications, the responses and submissions put forth, **WE NOW OPINE** as follows:

a) Sections 3A and 21 of the Supreme Court Act, empower this Court to grant such orders as are necessary for the administration of justice, including orders of stay of execution of a superior court's judgment. This jurisdiction was restated in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***, SC Application No. 5 of 2014; [2014] eKLR. The parameters for granting stay of execution pending appeal were set also out in ***Board of Governors, Moi High School, Kabarak & Another v Bell Bell & 2 Others***, SC Petition Nos. 6 & 7 of 2013 & Civil Application Nos. 12 & 13 of 2012 (Consolidated); [2013] KESC 12 (KLR), as follows:

***i. The appeal or intended appeal is arguable and not frivolous;***

***ii. Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and***

***iii. It is in the public interest that the order of stay be granted.***

b) We note that the Court of Appeal certified the matter and dispute between the parties herein as raising matters of general public importance. We further note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents separately challenged the certification and by a separate Ruling delivered at the same time as this one, we have found that the matter indeed raises matters of general public importance. In the circumstances, we find that the appeal is indeed not frivolous.

c) On whether the appeal will be rendered nugatory, we note that the Appellant spoke to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' inability to refund the monies sought in the event the appeal is successful. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged that the stalemate on its directorship/shareholding had since been resolved. However, we note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not indicate that they would be able to repay sum claimed by the Appellant should the appeal be successful neither did they advance evidence to this end.

- d) It is uncontested that proceedings for the assessment of damages have commenced in *HCCC No. 340 of 2006*. The damages sought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are indeed colossal and the High Court will ultimately determine whether the same are founded or not. Taking into account that one of the issues before this Court is whether the referral of the matter back to the High Court for assessment was proper, it follows that it would be in the interests of justice and public policy to save precious judicial time and stay those proceedings. In addition, and out of abundance of caution, the proceedings in *ELC No. 94 of 2017* are hereby stayed pending the hearing and determination of *SC Petition No. E012 of 2024* given that the transfer of L.R. Nos. 12867/1 and 12867/2 will be directly affected by the final decision in the appeal before this Court.
- e) With regard to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application wherein they seek to strike out the record of appeal and the appeal, we have considered and appreciated the tenor of Rule 40 of the Supreme Court Rules. Indeed, it behoves the Appellant to ensure that the record of appeal before the Court contains all the relevant pleadings necessary to enable this Court discharge its mandate. The rule specifically provides for the following critical documents: **a)** a certificate certifying the matter as of general public importance, **b)** the judgment or ruling of the Court of Appeal being appealed from, and **c)** a judgment or ruling of the High Court or a court of equal status. Notably, there is no contest that these 3 documents have been filed. The last document according to the Rule 40 is **d)** the relevant pleadings required to determine the appeal. See *The Law Society of Kenya Case*.
- f) A record of appeal that does not comply with these parameters would impede on this Court's mandate to efficiently discharge justice. *The Kenya Revenue Case* is distinguishable from the case herein since in that case, the Appellant was aware that the record of appeal was incomplete but chose not to rectify the anomaly.

- g) Having found as above, are the documents alleged to be missing so vital that the record of appeal ought to be regarded as incomplete? We think not. Black's Law Dictionary, 9<sup>th</sup> Edition defines a pleading as *a formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials or defences*. Submissions support the pleadings and elaborate the facts and evidence. However, they in themselves are not pleadings. In any event, in their judgments, the superior courts below, summarized the proceedings and the parties' submissions. We therefore find and hold that we have sufficient information before us for a judicious consideration of the appeal before us. In any event, we accept and have confirmed the Appellant's explanation that the submissions in question are indeed part of the record of appeal.
- h) As regards the supplementary record of appeal and the 5 volumes in *HCCC No. 5002 of 1990*, in its judgment, the Court of Appeal summarized the relevant events, directions and orders that culminated to its final judgment delivered on 9<sup>th</sup> December 2022. We have considered the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' affidavits containing the said supplementary record of appeal. To our minds, the same constitutes the record before the High Court in *HCCC No. 5002 of 1990*. We have the record of appeal in *Civil Appeal No. 88 of 2000*. Rule 89 of the Court of Appeal Rules 2022 provides for the documents that must form the record of appeal. Among these documents are the pleadings, trial judge's notes, documents put in evidence at the hearing before the superior court below (High Court) among others. There is no contention or indication that there is any document that has been left out and there is no doubt that the record of appeal filed in the Court of Appeal contains the pleadings and evidence adduced before the High Court. We therefore find and hold that the supplementary record of appeal as postulated is not necessary in the circumstances.

- i) Inarguably, the 15-day statutory timeline to file a supplementary record of appeal has lapsed. However, we note that the Appellant has since sought to rectify the situation by seeking leave to file a supplementary record of appeal that includes the documents alleged to be critical but missing from the record, vide an application dated 26<sup>th</sup> April 2024. See ***the Hamida Yuri Case***. To our minds, an existing application for striking out does not in itself bar a litigant from rectifying an anomaly that has come to its attention, especially in a case of general public importance, like the one before us. Such a blanket finding contravenes the dictates of justice. We decline the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' argument on this ground.
- j) However, in view of our finding herein above to the extent that none of the documents alleged to be missing is vital to the determination of the appeal before us, it follows that the Appellant's application for leave to file a supplementary record of appeal must fail.

[17] In line with our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others***, SC Petition Application No. 4 of 2012; [2014] eKLR, that the award of costs is ultimately a question of judicial discretion, the order that commends itself to us is that each party shall bear its own costs.

[18] Accordingly, and for the reasons afore-stated, we make the following Orders:

- i. ***The Appellant's application dated 5<sup>th</sup> April, 2024 is hereby allowed to the extent that the execution of the Court of Appeal's judgment in Civil Appeal No. 88 of 2000 is hereby stayed pending the hearing and determination of SC Petition E012 of 2024. For the avoidance of doubt, the proceedings in Milimani HCCC No. 340 of 2006 and Machakos ELC No. 94 of 2017 are hereby stayed pending the hearing and determination of SC Petition E012 of 2024.***

- ii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application dated 11<sup>th</sup> April, 2024 seeking to strike out the Appellant's record of appeal is hereby dismissed.*
- iii. The Appellant's application dated 26<sup>th</sup> April, 2024 seeking leave to file a supplementary record of appeal is hereby dismissed.*
- iv. Each party shall bear its costs of the applications.*

It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of August, 2024.**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**