REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO.35 OF 2019

CHRIS MWIRIGI.....1ST APPELLANT

JOSEPHAT MCHOMBA.....2ND APPELLANT

VERSUS

NYAGA NTHIA.....RESPONDENT

RULING

A. Introduction

1. The appellants/applicants moved this court vide a notice of motion dated 7/10/2020 filed in court on 14/10/2020 wherein they seek the following orders;-

1) *That the directions issued by this Honourable Court on 9/09/2020 be set aside*

2) *That this Honourable Court be pleased to grant the applicants leave to file a supplementary record of appeal*

3) *That the supplementary record of appeal attached herein be deemed as duly filed and served*

4) *Costs be provided for*

2. The application is premised on the grounds on its face and further, on the supporting affidavit by Betty W. Kiai – advocate. In a nutshell, it is the applicants' case that on 9/09/2020 this court gave direction that the appeal herein do proceed by way of written submissions but on that date the appeal herein was not ready for hearing as they had not provided a copy of the order against which they are appealing. That the said error was noted by their advocates on record after the directions were given and they would wish to rectify the same by filing a supplementary record of appeal. Further, that the said failure was an oversight on the part of the advocates on record which error is inadvertent and excusable and that if the instant application is not allowed, the applicants' appeal stands to be dismissed on a procedural technicality. It was further deposed that mistakes of an advocate ought not to be visited on the appellants and that the respondents would not suffer any prejudice if the orders sought herein are granted.

3. The said application is opposed by way of a replying affidavit sworn by Morris M. Karigi and essentially he deposed that the appeal had already been admitted for hearing and directions as to the disposal thereof already given and complied with, by the parties. The applicants having sought leave to file further submissions, it is unprocedural and uncalled for, for the applicants to turn around and file the instant application as opposed to the said submissions as ordered and further that the applicants' advocates ought to know the documents which ought to accompany an appeal and they can't turn around and feign ignorance citing procedural technicalities. Further that the Civil Procedure rules do not allow filing of a supplementary record of appeal after directions as to hearing thereof have been given as giving of directions marks closure of pleadings. Further that the respondent cannot enjoy the fruits of his judgment due to the instant appeal and thus it is in the interest of justice that the appeal herein be determined on the basis of the submissions already on record and the application herein be struck out.

4. The applicants, with leave of the court filed a further affidavit wherein they reiterated the depositions in the affidavit in support of the application herein.

5. The application was canvassed by way of written submissions wherein each of the parties herein supported their rival positions in the pleadings the subject of this ruling.

6. I have considered the pleadings herein and the written submissions together with the authorities annexed thereto and it is my opinion that the main issue for determination is **whether the same ought to be allowed**.

7. The p*rocedure of appeal to this court is provided for under Order 42 of the Civil Procedure Rules and in a nutshell an appeal to this court ought to be instituted by way of memorandum of appeal. Under order 42 Rule 2 of the Rules, where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed. Further under order 42 rule 13(4), before allowing the appeal to go for hearing, the court should be satisfied that the record of appeal contains, amongst other documents, the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.*

8. It is not in dispute that the applicants herein have already filed their record of appeal and which record does not include the certified copy of the order appealed from. It is that mistake or error which the applicants seek to rectify and which it was deposed that it was inadvertent and excusable. On the other hand, the respondents deposed that the said application has come too late in the day and after taking of directions as to the hearing of the said appeal and filing of the submissions.

9. Section 1A of the Civil Procedure Rules obligates this court to give effect to the overriding objectives in exercise of its powers. Section 1B on the other hand provides that for the purposes of furthering the overriding objectives, this court shall handle the matters presented before it for the purpose of attaining the following aims to wit;- (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources; (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable bythe respective parties; and (e) the use of suitable technology. Section 3A further gives this court inherent power to make such orders **as may be necessary for the ends of justice** or to prevent abuse of the process of the court.

10. I note and appreciate that the instant appeal is at an advanced stage of the hearing. However, in my view, the question which should govern this court in determining whether to allow the instant application is as to the prejudice which the parties might suffer in allowing the same *viz a viz* the duty by this court to administer justice and further the overriding objectives. As it was held in **Abdirahaman Abdi –vs- Safi Petroleum Products Ltd. & 6 Others [2011] eKLR,** the court in doing justice **without undue regard to technicalities of procedure had a duty to weight the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party.**

11. In my view, despite the application having been made at a late stage, the respondent herein won't suffer any prejudice in if the same is allowed. The parties have already filed their written submissions. I note that the document forming the supplementary record is a mere order and which has no effect as to the substance of the appeal so as to have the effect of introducing new issues which would require further submissions. The appeal relates to a ruling wherein the trial court declined to issue orders staying execution of a decree and setting aside ex-parte judgment. The said issues have well been articulated in the submissions by the parties. It is my view that allowing the application herein will not be prejudicial to the respondent herein.

12. Further, despite the respondent having deposed that he had raised a preliminary issue as to the incompetency of the appeal herein for failure by the appellants to file a copy of the order and that the applicant seeks to cure that defect so as to avoid the appeal being dismissed, I nonetheless opine without preempting on the appeal, that the said preliminary issue might fail to see the light of the day. I have perused the record of appeal and I note that the certified copies of the ruling and the proceedings are included therein. In **David Mutuku Silu v. Kyana Thuka (2012) eKLR** Makhandia J held as follows:-

> ***"... in an appeal, as long as a copy of judgment is part of the record of appeal, the same will be deemed to be a decree, and the same is appealable notwithstanding that a formal decree in pursuance of such judgment may not have been drawn up and issued or may in fact not be capable of being drawn up."***

(See also **Emmanuel Ngade Nyoka –vs- KithekaMutisya Ngata [2017] eKLR).**

13. It is my view that even if I do not allow the instant application, the respondent's preliminary issue in the appeal might as well fall based on the above authorities. Further there is no prejudice which the respondent will suffer as the said appeal can still proceed and be determined even in the absence of the said order. However, since the rules of procedure requires a record of appeal to be complete and include all the documents as listed under order 42 rule 13 and bearing in mind that having the applicants include the said order is not prejudicial to the respondents it is my view that it is in the interest of justice and in observing the procedure of the court that the instant application ought to be allowed.

14. In view of the foregoing, the application is allowed with costs to the respondent.

It is so ordered.

Delivered, dated and signed at Embu this 24th day of February 2021.

L. NJUGUNA

JUDGE

……..……for the Applicants

……..……..for the Respondent