



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Appli 509 of 2006
JUDICIAL REVIEW

- **Under Rule 85(3) of the Court of Appeal Superior Court cannot exclude a document from the Record of Appeal after it has been lodged.**
- **Application dismissed for gross incompetency**

ROBERT TOM MARTINS KIBISU PETITIONER

VERSUS

ATTORNEY GENERAL 1ST RESPONDENT

ZACHARY N. MWAURA (PS MINISTRY OF DEFENCE OFFICE OF THE PRESIDENT) 2ND RESPONDENT

GENERAL JEREMIAH MUTINDA KIANGA

(CHIEF OF GENERAL STAFF)..... 3RD RESPONDENT

LEUTINANT COLONEL JEREMIAH MWAURA NG'ANG'A (COMMANDING

OFFICER DOD CAU).....4TH RESPONDENT

RULING

The Chamber Summons dated 16th January 2008 seeks only one substantive order, namely that the Affidavit of one Captain Yvonne Kemboi Kirui dated 16th October 2006 be excluded from the Record of Appeal already lodged in the Court of Appeal Registry. It has not been denied that the Appeal has come at least once for hearing in the Court of Appeal but the appeal could not take off following an objection by the Respondent that the affidavit referred to above is a primary document.

At the outset it is clear to the Court that the applicant is by this application trying to fill in the gap in a record already lodged in the Court of Appeal.

I have taken into account the arguments advanced by the applicant in his written submissions supported by the authorities as highlighted. Principally, the applicant relies on Rule 85(3) of the Court of

Appeal Rules which provides:

“Judge or Registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record. Application for such direction may be made informally.”

The applicant contends that this court has power to exclude a document from the record of appeal by virtue of the above rule. I do not agree. The rule applies to the period prior to the lodging of a Record of Appeal. And it is only a judge or registrar who may exclude documents prior to the filing of the record as held in the Court of Appeal decision in the case of **SEVENTH DAY ADVENTIST CHURCH EAST AFRICA LTD & 20 OTHERS v MASOSA CONSTRUCTION COMPANY LTD [2005] e KLR** (CA 22/2004). A superior court or registrar has no power to exclude or interfere with a Record of Appeal filed in the Court of Appeal.

Consequently I uphold the grounds of opposition by the respondent as follows:-

1. That this court lacks jurisdiction to entertain the application due to the fact that an appeal has been lodged in the Court of Appeal.
2. That rule 85(3) of the Court of Appeal Rules applies only before the filing of a Record of Appeal.
3. That the Applicant having lodged a Record of Appeal is not entitled to move the superior court at all.
4. That the applicant in filing this application failed to disclose to this Court that his appeal has been once listed for hearing in the Court of Appeal but was not heard due to his failure to include the Replying Affidavit in the record. The matter is therefore squarely in the hands of the Court of Appeal.

I have studied the authorities cited by the applicant and with due respect, I find all them irrelevant to the issue before the Court except the **SEVENTH DAY ADVENTIST CASE** cited above, whose holding is against the applicant. Being unrepresented I wish to commend him for citing an authority against his own cause since this is the ethical position.

In conclusion, I find that this application is misconceived, it is an abuse of the Court process, and in practical terms it attempts to subvert the hierarchy and the jurisdiction of the two Courts.

I dismiss the application with costs.

DATED and delivered at Nairobi this 22nd day of February 2008.

J G NYAMU

JUDGE