



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
CIVIL CASE NO. 589 OF 1999

ISHURU HIGHWAY DEVELOPMENT LTD & OTHERS
..... **PLAINTIFF**

VERSUS

CENTRAL BANK OF KENYA & OTHERS
..... **DEFENDANT**

RULING

This is a ruling on a notice of motion dated December 20, 2001 filed to ask for the courts direction that the documents specified in an exhibit marked "KMDP1" in the affidavit of Kamlesh Mansukhlal Damji Pattni supporting the application and sworn on the same date of the application, be excluded from the record of appeal in the intended appeal of Kamlesh Mansukhlal Damji Pattni who intends to appeal from a decision of this court made on July 19, 2001.

Leave to appeal has already been granted to, and proceedings already received by, the applicant.

Basically the applicant says, for his grounds of this application, that the documents sought to be excluded are wholly irrelevant to the intended appeal, which is solely on the issue of disqualification of an advocate to appear for a party in a suit, and the decision to be challenged in appeal was wholly on the issue of disqualification. It is further said for the applicant that the documents sought to be excluded are voluminous, and if they are not excluded they would disproportionately outnumber the relevant documents, and the appeal would not proceed conveniently and expeditiously.

It is also said for the applicant that all the documents which it is sought to exclude are not only irrelevant but are before the Court of Appeal in other proceedings and that there would be a multiplication of unnecessary documents and unnecessary several volumes. At the hearing of this application the court saw eight large volumes running into 3888 pages of various documents. I have had a chance during the adjournment to write this ruling to physically check each document listed in the annexed schedules to the supporting affidavits, in each volume. I have also looked at the actual documents in the volumes, which are listed in the second schedule, marked "PNA."

This application was opposed. It is said that the application should not be made by the applicant because he is an appellant. It is further said that the documents to be excluded must be exhibited. To exclude these documents, it is said, might affect the form and content of the record of appeal.

This application is made under rule 85(3) of the Court of Appeal Rules, 1972. That rule provides, in so far as it is material here that a judge of the High Court "may, on the application of any party, direct which documents or parts of documents should be excluded from the record"; and such an application way be made informally.

The power of this court under rule 85 (3) is a discretionary power. Like in all other cases in which a power is discretionary, the exercise of such power must be a judicial exercise. To act judicially calls for the court's proper application of its judicial mind to the facts of the given case. In this application, this means that a judge must apply its discerning mind to, inter alia, the nature and effect of the documents sought to be excluded. A judge must consider the relevancy and materiality or lack of it of the documents in the determination of the appeal or intended appeal.

It is clear that sub-rule (3) of rule 85 is intended to exclude such material as may not be required for the determination of the appeal or intended appeal although it may have been produced in evidence or otherwise included somewhere in the course proceedings or other step. But no document should be excluded if it will necessarily be required on a crucial point in appeal. It is a provision covering the power to rectify a record so that justice may be done without delay, unnecessary expense and inconvenience. These vices may be avoided in some cases by excision of dormant or irrelevant or immaterial matter from prolixity, or by preventing a proliferation of unnecessary undergrowths. A record of appeal, which is precise, and to the point, is helpful. Retention of useless matter on a record of appeal may darken and obfuscate the issues and real point for decision.

Nor should matters be viewed from the standpoint of technicality for the mere sake of technicality, unless they are mandatory requirements going to the root of justice.

I am guided on all these propositions by what was said by Sir James Wicks, CJ, in the Court of Appeal of Kenya, in *Murai V. Wainaina* (No2), (1978) Kenya LR 31.

Looking at this application in the light of those principles, after going through each of the documents listed for exclusion, I find in general that they basically relate to applications for an injunction and those by the receiver and related matters, but have no bearing to the application and decision on whether the advocate should be disqualified to act for a party in suit and interlocutory proceedings.

They are very many documents. Their exclusion will certainly substantially cut down the record of appeal to a reasonably manageable size without doing any violence to justice or to the case of any of the parties. The appeal is against a decision on disqualification of an advocate. The enumerated documents for exclusion do not relate to that aspect. It would unnecessarily lengthen this ruling to set out each one of them here. But, example, the chamber summons dated 22nd March, 1999, with affidavits in support deal with an injunction sought against the Central Bank of Kenya, and occupy large portion of the record of appeal in volume 1.

Then there are grounds of opposition and preliminary objection by the central Bank of Kenya and the Deposit Protection Board. The ruling and order of Ojuk J, too, have nothing to do with what is intended to be appealed.

The respondents did not at all attempt to suggest that they would need any of the documents sought to be excluded for the preparation and presentation of their own case in the intended appeal. If, however, they were of opinion that the record of appeal would be defective or insufficient for the purposes of their case, there is provision in rule 89 (1) for lodging a supplementary record of appeal containing copies of documents or parts, which are in their opinion required for the proper determination of the appeal. If this entails extra expense, the usual rule as to costs will suffice.

It would be a strange thing for a party to be compelled to retain irrelevant matter on record.

This application is well grounded, and it is by a person envisaged by rule 85(3), i.e. "any party", whether already an appellant or an intended appellant.

For these reasons, the application is granted as prayed in the notice of mention. All the documents listed in the first and second schedules and any other document specifically mentioned in the application for exclusion, are hereby excluded from the record. It is so ordered.

Signed and dated by me at Nairobi this 28th day of January 2002.

R. Kuloba,

Judge

28.1.2002.