



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 91 OF 2019

NATIONAL BANK OF KENYA LTD.....APPELLANT

VERSUS

CHRISTIAN COMMUNITY LIFE CHURCH.....RESPONDENT

RULING

1. This is a ruling on the Motion dated 10/2/2020 brought under **order 45 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act**. The applicants sought an order for the review and the setting aside of the judgment of this court made on 30/01/2020 and to reinstate the appeal for hearing and determination on merit. They also sought leave to file a supplementary record of appeal incorporating the order of the trial court.
2. The grounds upon which the application was based were set out in the body of the application and the supporting affidavit of **Earnest Kimaita**, Advocate sworn on 10/2/2020. It was contended that the appeal was struck out on the basis that no order was incorporated in the record of appeal and that none was extracted in the lower court file.
3. It was contended that after the ruling in the trial Court was delivered on 25/7/2019, the appeal was lodged on the following day, to wit, 26/7/2019. That the record of appeal was subsequently filed on 29/7/2019. That the record of the lower Court was called for on 2/8/2019 and the matter was placed before the Presiding Judge on 7/8/20219.
4. That due to the strict timelines for the filing of the Record of Appeal and the inaccessibility of the court file, the applicant's firm of Advocates filed the record of appeal without a copy of the formal order. That there is sufficient cause to review the judgment and reinstate the appeal for hearing on merit.
5. The applicant further contended that no prejudice will be suffered by the respondent. That the applicant had since obtained the certified order and can file the same at the shortest time possible. In conclusion, it was contended that none of the parties had raised the issue of the non-availability of the certified copy of the order.
6. The application was opposed vide the replying affidavit of Pastor **Paul Mwangi**, sworn on 10/03/2020. He deposed that the application has no merit as the applicant had filed a record of appeal devoid of the certified copy of the order appealed against. That in view thereof, the court was right in striking out the appeal for being incompetent. He concluded that, the applicant should have sought leave to file a fresh appeal instead of making the present application.
7. Although the parties were on 9/3/2020 directed to file their respective submissions within 14 days, as at the time of writing this ruling, no one had filed any. The Court has carefully considered the affidavits on record.
8. The issue for determination is **whether this court should review and set aside its judgment made on 30/01/2020**.
9. **Order 45 Rule 1 of the Civil Procedure Rules** provides for the grounds upon which a decree or an order of the court may be reviewed. These are; when there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record; or for any other sufficient reason.
10. Before making a determination on the application, the court observes that although the decision of this Court which is sought to be reviewed was intitled 'judgment', strictly speaking, it should have been intitled 'ruling'. This is so because the decision did not make any final determination on the dispute between the parties. A judgment is a final determination of a dispute between litigants, whilst a ruling is not. **See Section 2 of the Civil Procedure Act**.
11. *Strictu sensu*, there is no requirement in both **sections 79, 79 A and 79 B of the Civil Procedure Act and Order 42 of the Civil Procedure Rules** for the filing of a Record of Appeal in an appeal to the High Court. The filing of such records has been out of practice and

convenience. It will be a requirement however, if the Court directs as such when giving directions under **Order 42 Rule 3 of the Civil Procedure Rules**.

12. For the foregoing reason, once the Court makes directions under that rule that a record be prepared and served, it is only then, in my view that a party is required to file and serve a record of appeal.

13. This position is completely different from the position obtaining in the Court of Appeal and the Supreme Court. In those Courts, their Rules expressly provide for the filing of the Record of Appeal when appealing to those Courts. In this regard, I am of the view that the practice and procedure in those courts regarding the filing and service of Records of Appeal do not strictly apply to appeals before this court. In this regard, the pronouncements in those courts regarding the failure to include a certified copy of the decree or order in the Record of Appeal are not applicable.

14. Having said so, the applicants in the present case should not have filed an application for review. The practice and procedure in the Court of Appeal as well as the Supreme Court is that once an appeal is struck out, all that an appellant has to do is to make a fresh application for leave to lodge a fresh appeal out of time. But as I have already stated, the practice and procedure in those Courts is not contemplated in appeals to this Court.

15. If we were to apply the procedure in those two Courts, we shall be defeating the letter and spirit of both **section 1A of the Civil Procedure Act** as to the overriding objective of the Act as well as **Article 159 of the Constitution** as there will be delay and increase in costs.

16. In this regard, my view is that once this Court finds that a certified copy of the decree or order has not been included in the record of appeal that has been directed under **Order 42 Rule 3 of the Civil Procedure Rules**, the best procedure is to decline to hear the matter and to direct the appellant to comply with **Order 42 Rule 2 of the Civil Procedure Rules**.

17. I am aware of the decisions emanating from this Court, that failure to include a certified copy of the decree or order in a record of appeal to this Court is fatal and leads to the striking out of an appeal. However, for the foregoing reasons I think I am not bound by those decisions as they are only persuasive. I am not persuaded by them.

18. Coming back to the application at hand, it was alleged that this Court struck out the appeal on the basis that there was no certified copy of the order in the lower Court record that was before the Court. The applicant contended that there could be no certified copy of the order in the lower court record because the original record of the trial Court had been transmitted to this Court because of strict timelines set by this Court. That the same has since been obtained. Indeed, a copy was annexed to the present application.

19. Under **Order 42 of the Civil Procedure Rules**, this Court should not have considered the appeal for admission under **section 78 of the Civil Procedure Act** if the certified copy of the order was not before it. The record shows that the lower Court record was forwarded to this Court without the certified copy of the order.

20. In the case of James **Kinja M'Thaimuta (Suing as the legal representative of the estate of David Murangiri deceased) v Cyrus Mwenda (2019) eKLR**, the Court held: -

*“I note that the appellant did not attach the decree of the trial Court. That may have been a fatal mistake or oversight but for reason that it is but a mere technicality. In **South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro (2010) eKLR**, it was held:-*

“In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweni when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.”

21. Further, in **Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 Others [2011] eKLR**, the Court of Appeal held:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice....In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act. Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010 changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh 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 if the court strikes out its documents. The court in that regard exercise judicial discretion”.

22. For the foregoing reasons, I am of the view that requiring the filing of a fresh appeal would be to subject the parties to further unnecessary costs and delay. I find the application to be meritorious. I allow the application on the following terms: -

a) the judgment made on 30/01/2020 is hereby reviewed whereby the order of striking out of the appeal is set aside and the appeal reinstated for hearing on merit.

b) the applicants are granted leave to file a supplementary record of appeal within 14 days to incorporate a certified copy of the order.

c) the applicants shall pay the respondent costs assessed at Kshs.10,000/- payable within 30 days in default the appeal shall stand dismissed.

DATED and DELIVERED electronically at Meru this 5th day of May, 2020.

A. MABEYA

JUDGE