REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 275 OF 2010

JOSEPH KINYANJUI MWAI T/A

SANDWORTH PRINTING & PACKAGING..…..... APPELLANT

VERSUS

THE KENYA POWER & LIGHTING CO. LTD ……RESPONDENT

R U L I N G

By a notice of motion dated 2nd July 2014 and filed in court on 3rd July 2014, the respondents have brought the application under the provisions of Section 1A and 1B of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, 2010.

They seek orders that,

1. The memorandum of appeal and supplementary record of appeal be struck out; alternatively that paragraphs 56 to 60; 73 to 76, 95 t0 98 and 118 to 125 of the memorandum of appeal be struck out;

2. That costs of the application be provided for.

The grounds relied upon are that the documents that have been included in the memorandum and supplementary records of appeal were not produced before the Energy Regulatory Commission or the Energy Tribunal. The said application is further supported by the affidavit of Esther Gathoni Kariuki Advocate. In support of the application, Mr. Fraser Advocate for the respondent applicant submitted that a similar application had been made on 18th February 2011 but **Hon. Justice Dulu** in his ruling delivered on 23rd June 2011 held that the application was premature then as the record of the Energy Tribunal had not been availed. Further, that **Hon. Justice Mary Angawa** did direct on 15th October 2012 that the file of the Energy Tribunal be produced for the purpose of giving directions on the contents of the memorandum of appeal and supplementary record of appeal. That a similar order was made by **Hon. Justice Waweru** on 24th March 2014 and the said file from the Energy Tribunal was availed to court on 30th May 2014 and that upon the respondent's counsel perusing the said record of the Energy Tribunal, she discovered that in it were some documents which were never produced before the Tribunal as evidence and which had been included in the memorandum and supplementary record of appeal herein by the appellant. In addition, it is contended that the file from the Energy Tribunal contains some documents authored after judgment had been delivered. They were therefore not part of the record and should be expunged therefrom.

The appellant opposed the respondent's application and filed a replying affidavit "affidavit" (as it is not headed as such) on 22nd October 2014 and sworn on 15th October 2014. Mr. Bonface Njiru Advocte the deponent thereof deposes that the respondent is fond of filing similar applications including one dated 8th December 2010 and therefore this application is *res judicata* the earlier one which had been determined on 23rd June 2011. He further deposes and argues that the respondent having raised a similar objection on 8th December 2010 **Hon. Maraga J** directed that the respondent do file their own Supplementary Record of Appeal and include documents they considered relevant which they did on 21st December 2010.

In his view, the documents complained of do not affect the appeal in any away especially those on pages 56 – 60; 73 – 76; 95 – 98; 118 – 125; which latter the appellant says is also contained in the respondent's own Supplementary Record of Appeal and documents at pages 1 – 28 which are mere rulings of the High Court and Notice of Motion in **Misc. HCC 11/2010** relating to application for leave to appeal out of time under Order 42 rule 13 (4) of the Civil Procedure Rules to satisfy this court that leave to appeal was sought and granted. He further submitted that the Energy Regulatory Commission and the Energy Tribunal are not regular courts and the manner in which they maintain their records is not strictly governed by the Civil Procedure Rules but are governed by the Energy Act and relevant regulations thereto and that they are authorized to call for expert advise and make their findings without undue regard to technicalities.

The Applicable Law

Order 42 Rule 4 of the Civil Procedure Rules provide that

> ***"The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:***
>
> ***Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."***

The above provision sets out grounds which may be taken in appeal meaning that if a party urges the court to rely on any other ground other than those set out in the memorandum of appeal, the court may permit although the court is not bound to the grounds as long as the adverse party is given an opportunity to contest.

Order 42 rule 13 (4) of the Civil Procedure Rules sets out that before an appeal is allowed to go for hearing, the court must be satisfied that the following documents are on record and served upon the respondent

a) The Memorandum of Appeal

b) The pleadings

c) The notes of the trial magistrate made at the hearing

d) The transcript of any official shorthand, typist notes, electronic recording or palantypis notes made at the hearing

e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate

f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal:

Provided that:

i) A translation into English shall be provided of any document not in that language;

ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)

The above provisions are clear on what documents shall be included in the record of appeal.

And should any party wish to produce additional evidence in the appellate court, the relevant provisions are Order 42 rule 27 which provides that

> ***"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –***
>
> ***a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or***
>
> ***b) The court to which the appeal is preferred requires any documents to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause;***
>
> ***The court to which the appeal is preferred may allow such evidence or document to be produced, or witnesses to be examined."***

Rule 28 thereof provides for the mode of taking additional evidence and under Rule 29, the court to which an appeal is preferred shall specify the limits to which the additional evidence is to be confirmed and record on its proceedings, the points so specified.

From the applicable law, therefore, it is clear that on appeal, parties are restricted on what documents should be contained in the record of appeal and how additional evidence – whether documentary can be admitted. It therefore follows that a party cannot be allowed to introduce extraneous documents which were not produced at the hearing in the lower court and or tribunal from whose decision an appeal is preferred and if such parties wish to rely on any other evidence which was not adduced, then they must seek leave of the court.

In this case, the respondent complains that the record of appeal as well as the supplementary record of appeal filed herein contain strange documents which did not form part of the record when the matter subject of this appeal was heard before the Energy Tribunal. It contends that the documents go beyond leave to appeal order as granted and maintain that their presence is an attempt to bring to court extraneous documents which should be expunged from the record.

The appellant, while admitting that some documents as filed, especially the auditor's report may be extraneous, but that the same is relevant to the appeal.

He maintains that a similar application was rejected by **Hon. Justice G. Dulu** as premature. Further, that the tribunal did not regularly maintain a proper record of proceedings hence it is difficult to say which documents should be on the record and which ones should not. He submits that in any event, the documents complained mean little and that some are relevant. In his view, this application is a waste of judicial time.

From the above exposition of the law and submission, it is clear that the records of appeal introduce some new proceedings and untested averments which were never before the Energy Tribunal. Nonetheless, at this stage, it has not been submitted as to how prejudicial those documents are to the respondent with the appellant maintaining that the documents are either relevant as the tribunal did not maintain a proper record of documents produced or harmless.

As I have stated in the relevant provisions of the law, the documents to be contained in the record of appeal are clearly stated, and any other document introduced on appeal can only be admissible with leave of the court. If such documents are relevant to the matters in controversy in the appeal.

It was therefore incumbent upon the appellant to meticulously peruse the Tribunal record to appreciate what documents were produced therein and which ones were not, to avoid a situation where, admitttednly, some documents are being introduced on appeal, but which were never referrd to in the Tribunal and neither is their inclusion in the record of appeal done with leave of court.

However, noting that it is not contested that the record of the Energy Tribunal is jumbled up, it will be the court hearing this appeal on merit that is best suited to decide whether the notes or documents, other than those admittedly irrelevant, were part of the proceedings in the Energy Tribunal or whether they should be excluded. To determine which documents were produced and which ones were not at this stage requires a full examination of the entire appeal on merits on evidence and legal issues on the relevance of the matters in controversy.

Since the law is clear that at the hearing of an appeal, a party cannot without leave of the court argue any ground not specified in the memorandum of appeal, and as this court cannot admit additional evidence whether oral or documentary without leave, the complaints as raised are in my view, premature as they can be properly and fully be addressed in the context of the appeal at the hearing and if found to be valid, the court will make appropriate orders. I am fortified on this point by the Court of Appeal decision in the case of **Zacharia Okoth Obado – Vs – Edward Akongo Oyugi & 2 Others [2014] eKLR** when a similar complaint arose concerning documents allegedly included in the supplementary record of appeal, which documents did not form part of the record at the hearing in the elections court.

The Court of Appeal held that it is the court hearing the appeal during a full hearing that is best suited to decide whether the notes of the Deputy Registrar of the High Court were part of the election petition proceedings or whether they were excluded by the election court from the proceedings, and further that it was the court hearing the appeal on merits which was best suited to decide whether the supplementary records introduce new evidence; whether they raise legal issues and whether they are relevant to the matters in controversy in appeal. Accordingly, the Court of Appeal dismissed the application for striking out of supplementary records of appeal filed by the appellant. I have no reason to depart from the above holding of the Court of Appeal on a similar issue and as recent as 7th February 2014.

For those reasons, the respondent's application dated 2nd July 2014 is hereby dismissed.

I make no orders as to costs and direct the parties to fast track the process of setting down the appeal herein for hearing and disposal.

Dated, signed and delivered at Nairobi this 4th Day of December, 2014.

R.E. ABURILI

JUDGE