



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: GICHERU, AKIWUMI & SHAH, J.J.A.)**  
**CIVIL APPEAL (APPLICATION) NO. 221 OF 1997**  
**BETWEEN**

**KITUI COUNTY**

**COUNCIL.....APPELLANT**

**AND**

**MWAKINI RANCHING (D.A) CO. LTD.....RESPONDENT**

**(An Application in an Appeal from the Ruling and Order of  
the High Court of Kenya at Nairobi (Honourable Mr.  
Justice Aganyanya) dated 27th May, 1997  
in  
H.C.C.C. NO. 5106 OF 1993)**

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**RULING OF THE COURT**

The respondent to this appeal (Mwakini Ranching (D.A) Company Limited) has moved this Court under rules 80 and 85 of the Rules of this Court (the Rules) for orders that this appeal be struck out with costs and that the costs of the application be provided for.

Mr. Ngatia who appeared for the applicant took us through the affidavits of Mr. Frederick N. Musyimi (Sworn on 16th October, 1993 and Mr Elijah M. Mutambuki (sworn on 29th October, 1993).

Mr. Musyimi's said affidavit refers to five (5) annexures thereto none of which form part of the record of appeal, save the annexure marked "FNM2" which appears at page 43 of the record as an annexure to the affidavit of Mr. David N. Nthale, the clerk to the appellant (Kitui County Council). Mr. Mutambuki's said affidavit refers to four annexures thereto none of which form part of the record of appeal.

Relying upon rule 85(1)(f) of the Rules Mr. Ngatia argued that it was a mandatory requirement that all documents put in evidence at the hearing do form part of the record of appeal.

***Rule 85(1) reads:***

**"85(1) for the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3), contain copies**

**of the following documents**

**(a)**

**(b)**

**(c) (d)**

**(e)**

**(f) the affidavits read and all documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof.**

**(g)**

**(h)**

**(i)**

**(j)**

**(k)**

**Provided that the copies referred to in paragraphs**

**(d) (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.**

The above proviso has been set out by us as it becomes relevant when we come to Mr. Mwenesi's arguments in response to Mr. Ngatia's arguments.

Mr. Ngatia relied on a ruling of this Court handed down on 15th January, 1998 in the case of Edith Wagithi Chiira vs. Rebecca Wangai Gichuhi, Civil Appeal No. 218 of 1997, (unreported) where the Court said:

**"Mr. Kamonde, however, submits that the exhibits were not available or relevant or vital. This does not supply any basis for the omission from the record as rule 85(1)(f) is mandatory or makes no exception for such cases. There is no direction made under the provisions of sub-rule (3) of Rule 85 for such documents to be amended."**

There is and can be no doubt that the requirement in rule 85(1)(f) of the Rules is mandatory and for a good reason. This Court must have before it, on appeal, all documents put in evidence at the hearing to enable it to effectually consider the appeal in its totality. That is the purpose of this rule.

Mr. Mwenesi for the appellant (respondent to this application) responded to Mr. Ngatia's arguments by urging that the documents (annexures) in question were not material for the purposes of this appeal as the learned judge in the superior court (Aganyanya J.) did not rely on them and that the learned judge, in the absence of the respondent in that Court (the respondent herein who is the applicant in this application), dismissed his client's application solely on the two following considerations:

**(i) That it was ordered at the time of the hearing of the Summons for Directions taken out on 22nd March, 1994 that the parties set the suit down for hearing and that therefore there ought to be no "intervening application."**

***(ii) That although the respondent had never moved the court speedily to fix the case for hearing as ordered by consent in November, 1993 the appellant was not barred from fixing the suit for hearing.***

It does appear that the learned judge was more motivated by the said considerations when he dismissed the application before him. But does that automatically entitle an appellant to exclude, from the record of appeal, the documents put in evidence? The answer to this question lies in what is sought by way of orders from this Court. The appellant seeks the following reliefs:

***"1. THAT the Civil Appeal do succeed and Ruling and Orders of Honourable Mr. Justice Aganyanya dated 27th May, 1997 do be set aside with costs to the Appellant.***

***2. THAT the Respondent's Complaint dated 16th October, 1993 and Counter Claim dated 10th December, 1993 do be struck out as being scandalous or vexatious and an abuse of the process of the Court***

***. 3. THAT the Respondent's suit do be dismissed with costs.***

***4. THAT the appellant's Counter Claim do proceed for formal proof in the Superior Court.***

***5. THAT the Respondent do vacate the suit premises, failing which the Respondent do be evicted***

***. 6. THAT the Appellant do be awarded costs in the Court of Appeal and the Superior Court."***

By its second prayer the appellant wants this Court to rehear its application which was before the superior Court and strike out the complaint dated 16th October, 1993 on grounds stated in the application before the superior Court. This Court can only consider this appeal if all the documents put by way of affidavit evidence form part of the record and the record therefore is certainly defective.

However, Mr. Mwenesi attempted to go round this issue by urging that it was open to this Court to decide the appeal only on the factors considered by the learned judge and thereafter remit the application for rehearing by the superior Court. That in our view would be a most unsatisfactory way of dealing with the matter and this argument by Mr. Mwenesi is more by way of saving grace rather than a substantial argument.

Mr. Mwenesi urged that the Ruling of this Court in the Edith Wagithi Chiira (supra) was probably per incuriam as the learned judges did not consider the proviso to rule 85(1) which we have set out earlier. It could well be that the proviso may not have been considered by the Court as it was not necessary or that nothing turned on it. In any case the Court said that rule 85(1)(f) makes no exception for such cases. The Court was obviously referring to exhibits tendered in evidence at the trial which are always vital for the determination of an appeal.

No less than three supplementary records of appeal have been filed. Yet none of these contain the annexures to the affidavits in question.

Mr. Mwenesi in an articulate argument urged further that those annexures were not necessary for the purposes of this appeal as the affidavit of Mr. Fredrick N. Musyimi sworn on 16th February, 1997 in answer to the appellant's application for striking out the complaint states the following in paragraph 5 thereof:

***"I crave leave to refer to my affidavit in the injunction application and adopt the contents therein."***

No leave had yet been given by the superior Court, urged Mr. Mwenesi, to refer to that application and as such that affidavit in support of the injunction application was not before the learned judge.

This argument is, in our view, untenable. When one craves leave to refer to a previous affidavit on

record in the suit, he is simply avoiding a rehash of that affidavit. There is nothing to stop one from relying on any affidavit on record and the Court is also bound to look at all affidavits and pleadings.

As regards the proviso to rule 85(1) of the Rules we would want to sound a warning to counsel. Counsel or parties should not take upon themselves the onus of omitting an exhibit or annexure from the record lest they face the situation such as has arisen in this case. The best course is to put in all exhibits (save those which are too bulky to be put in or which are lost) and let the Court decide on the desirability or otherwise of such inclusion.

The upshot of all this is that the appeal before us is incompetent and is therefore ordered struck out. The respondent applicant will have the costs of the application and the appeal.

**Dated and delivered at Nairobi this 13th day of February,**

**1998.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**