



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 9 OF 1994**

**SHABBIR ESMAIL.....APPELLANT**

**AND**

**KENYA DUTY FREE COMPLEX.....RESPONDENT**

**(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Justice Mbiti)**

**dated 11<sup>th</sup> February, 1993**

**in**

**H.C.C.C. NO. 3187 OF 1992)**

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**RULING OF THE COURT**

By this Notice of motion the Respondent has sought that the appeal be struck out on the ground that the Appellant did not comply with 0.20 r.7 of the Civil procedure Rule as the draft order attached to the record was not approved by the Respondent's counsel. According to the affidavit sworn by Mrs. Esmail the draft order was received by her for approval on 24<sup>th</sup> or 25<sup>th</sup> January, 1993 not giving her mandatory 7 days for approval of the draft. The order was signed by the Deputy Registrar on 26<sup>th</sup> January, 1993. Mr. Esmail for the Applicant has argued that 0.20 r.7 is mandatory and any order signed in contravention of that order is not a proper order. However he conceded that the respondent could not say that it has suffered any prejudice. He cited a ruling of this court where it was held that as the Applicant was gravely prejudiced by not having a proper opportunity to approve the draft, the breach of the rule rendered the appeal incompetent.

Unless the Applicant has been prejudiced by the non compliance of the rule, the Respondent should not be shut out from having the matter determined on merits. We do not therefore agree with Mr. Esmail that the appeal should be struck out on this ground of non-compliance with 0.20 r. 7.

The other ground which Mr. Esmail has taken is that the record is not complete. Mr. Gautama has conceded that certain annexures to the affidavit in support of the application for injunction the subject matter of this appeal were not attached to the affidavit. Apart from that there are some documents which should have been before the court to enable it to better understand the history of this appeal. However under r. 89 Mr. Esmail could have files supplementary record which he has not done. We therefore dismiss Mr. Esmail's application.

We give leave to the Appellant to file supplementary record of appeal including all the proceedings and affidavits within 30 days. The appeal is consequently stood over generally. Costs of the notice of motion shall be costs in the appeal.

Dated and delivered at Nairobi this 29<sup>th</sup> day of October, 1996.

**R.O. KWACH**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**G.S. PALL**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**