IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Cockar & Muli JJA)

CIVIL APPEAL NO. 59 OF 1993

BETWEEN

OMEGA ENTERPRISES (KENYA) LTD.....APPELLANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION & 2 OTHERS.....RESPONDENTS

(An appeal from the ruling of the High Court of Kenya at Nairobi (Mr Justice Akiwumi) dated 15th January, 1993

in

HCCC 6776 of 1992)

****

RULING

Kwach, JA. When Mr Lakha, for the appellant, was still on his feet and continuing his submissions in the appeal, we inquired from him what effect, if any, the ruling of Akiwumi J (as he then was) dated 19th March 1993, and contained in a Supplementary Record of Appeal filed by Hamilton, Harrison & Mathews Advocates, on 3rd October, 1994, had on the appeal, as by the said ruling the judge had confirmed his earlier order of 15th January, 1993, after hearing an application brought by the appellant seeking to set aside that order. In this appeal, the appellant is contesting the order of 15th January, 1993.

Mr Lakha then informed us that he had served a Notice of Preliminary Objection on both Hamilton, Harrison & Mathews and Sharpley Barret & Company, Advocates, on record for the respondents, contending that the second and third respondents cannot raise the grounds stated in the notice of grounds for affirming decision or rely upon the Supplementary Record of Appeal, both filed in Court on 3rd October, 1994. Although he had not filed the Notice of Preliminary Objection in Court, Mr Lakha said that it was his understanding that Mr Le Pelley, for the second and third respondents, would not be relying on the Supplementary Record of Appeal. Mr Le Pelley confirmed that he intended to rely on it and he would also raise the grounds contained in his notice of grounds for affirming decision. We allowed Mr Lakha to take the objection on his undertaking to pay the requisite fee and heard submission from counsel on both sides.

The Supplementary Record of Appeal was filed under rule 89 (1) of the Court of Appeal Rules which is in the following terms:

"89(1) If a respondent is of opinion that the Record of Appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a Supplementary Record of Appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."

It was Mr Lakha's submission that the documents that a respondent can include in a Supplementary Record of Appeal are those specified under rule 85(1)(k), being:

"Such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant."

He submitted that the documents which Mr Le Pelley sought to introduce did not form part of the record of the superior court on 15th January, 1993, when the judge made the order which the appellant has appealed against. He admits that the appellant took out a Chamber Summons on 19th February, 1993, seeking an order to set aside the order of 15th January, 1993, and that the judge delivered a ruling on 19th March, 1993, in which he refused to set it aside. His point is that all those documents although, forming part of the superior court's file in the particular case, came into existence after the order of 15th January, 1993, and consequently can only be made part of the record in this appeal by an appropriate application under rule 29 for leave to adduce additional evidence. He submitted that these documents cannot be introduced by way of a Supplementary Record under rule 89(1) of the Court of Appeal Rules, because to allow Mr Le Pelley to do so, would be tantamount to allowing him to introduce additional evidence by the back door.

Mr Le Pelley, on the other hand, was adamant that this material can properly be admitted by way of a Supplementary Record and he emphasized that to exclude them would deprive the Court of an opportunity to do justice in the case.

Mr Lakha's submission is very attractive on the face of it but when subjected to scrutiny reveals a serious flaw. The documents in the Supplementary Record cannot be called additional evidence because they did not exist at the time the application was heard and determined. These documents were in fact created by the appellant after 15th January, 1993. There is a ruling dated 25th February, 1993 which dealt with an application made

orally by Mr Ismail on 25th January, 1993 on behalf of the appellant to be joined as a party to the proceedings. There is also the Chamber Summons dated 19th February 1993 taken out by the appellant's advocates seeking *inter alia* to set aside the order of 15th January, 1993. And then there is the ruling of the judge on this application dated 19th March, 1993. These documents show that apart from filing an appeal against the order of 15th January, 1993, the appellant also took other steps in connection with the same order, including the filing of an application to set it aside, which the judge heard and dismissed. These are really matters of record which this Court is entitled to see and which must be drawn to the attention of the Court, and not concealed from it, if the Court is to do justice to both parties and make intelligible orders. This is particularly important in this case because in the appeal, the appellant is asking the Court to reverse the ruling of 15th January, 1993. How can we do that when there is material in the superior court's file showing that since that order was made, the appellant has taken other steps to have it set aside. This Court would be creating a dangerous precedent if it were to hold this material cannot be made available to the Court under rule 89. I am satisfied that the Supplementary Record of Appeal has been properly filed and it should be admitted. I would overrule the objection.

I would also overrule the objection to the notice of grounds for affirming decision in view of what I have said in connection with the Supplementary Record of Appeal.

As Cockar JA also agrees, the preliminary objection is overruled. The appeal will now be set down for hearing on a date to be fixed in the registry.

Cockar, JA. I have had the benefit of perusing the draft ruling of Kwach, JA. I entirely agree with it and the orders proposed by him.

Mr Lakha for the appellant has urged us to confine ourselves to only those matters and evidence which were before the learned judge at the hearing of the application filed by the 1st respondent (the plaintiff in the suit) on 18th December, 1992, which resulted in the ruling of 15th January, 1993. It is clear that in that event as far as the appellant's case on merits, that is on factual evidence, is concerned there will be very scanty material relating to it before us. In fact it must be admitted that the outcome of this appeal would then virtually be decided on technical issues of which the main one would centre around the question of the appellant having been denied a hearing which offended the Rules of Natural Justice. There will not be enough factual material for this Court to probe effectively into the

validity or otherwise of the real substance of the appeal. Will it be a proper administration of justice for us to ignore in this appeal the material facts which the appellant had subsequently put before the judge through his Chamber Summons of 19th February, 1993 after having first obtained a stay of the ruling of 15th January, 1993, through an oral application made on 25th January, 1993.

Apart from creating a mere technical problem, what other purpose is the exclusion of the material already considered by the learned judge subsequent to this ruling going to serve? Our decision in this appeal, if arrived at after exclusion of this material, is not expected to affect the decision of the High Court dated 19th March, 1993, which the judge gave later after he had heard the appellant and considered the evidence and submissions put before him therein fully. The decision of 15th January, 1993, on application of the appellant, has already been considered more fully and adjudicated upon by the same Court. This appeal arising from the decision of 15th January, 1993 will not be the end of the matter. We have been given to understand that an appeal has also been filed in respect of the decision of 19th March, 1993. Hearing of that appeal would be a fourth adjudication by these two superior courts of record over the same dispute that is to stay the order setting aside the sale by public auction, all arising from the same set of facts. Is that all necessary when a proper and final decision, after giving all the parties full opportunity to be heard on all the relevant evidence that was put before the learned judge, can be arrived at by admitting the Supplementary Record? We have no hesitation in concluding that the admission of the Supplementary Record which contains or is supposed to contain, all the relevant material put before the learned judge and his decision affecting his ruling of 15th January, 1993, are necessary for this Court to give a fair and final decision instead of prolonging a purposeless litigation based on mere technical issues.

The next question that needs consideration is as to how can the Supplementary Record be included, competently and legitimately, in this record. Mr Le-Pelley is of the firm view that under rule 85(1)(k), in which interlocutory proceedings have been particularly referred to and rule 89(1) of the Court of Appeal Rules a Supplementary Record even of this nature can be included in the record. Mr Lakha for the respondent strongly contended that the said Rules did not allow admission of a Supplementary Record made up of evidence which was not before the learned judge when he dealt with the application which resulted in the ruling of 15th January, 1993. In his view the Supplementary Record could only be described as additional evidence which was being attempted to be introduced through the back door instead of being properly applied for inclusion under rule

29 of the Court of Appeal Rules.

I do not agree with Mr Lakha that an application under rule 29 ought to have been made for the inclusion of the "supplementary record" as additional evidence. Under rule 29 which governs all aspects relating to this question it is clear that any needed additional evidence can be taken only on the discretion or direction of the Court of Appeal. The evidence contained in the Supplementary Record was not so taken. It was the appellant who applied for the ruling of 15th January, 1993, to be set aside and in support produced additional evidence before the High Court. The proceedings and decisions by the learned, judge that followed constitute the Supplementary Record. Neither the discretion nor a direction had been sought from nor exercised or given by the Court of Appeal. So the Supplementary Record is not now capable of being produced as additional evidence. In fact it is now a part of the record of further and logical proceedings in which full factual evidence on behalf of the appellant was put before the learned, judge inorder to persuade him to set aside the ruling of 15th January, 1993 which was based solely on evidence produced by the respondent. No opportunity had on that occasion been given to the appellant to be heard.

With regard to Mr Lakha's submission that the record of appeal should contain only that material which was before the judge when he gave his ruling let me analyse the provisions of rule 85(1) of the Court of Appeal Rules. The inclusion of all the material that was put before the judge at the hearing – that is the hearing of the application filed on 18th December, 1992, by the 1st respondent as plaintiff against the 2nd and 3rd respondents as defendants, is covered by sub-paragraphs (c), (d), (e) and (f) of sub rule 1. Sub paragraphs (g), (h), (i) and (j) have nothing to do with the actual proceedings or evidence before the judge. I now come to sub-paragraph (k) which reads as follows:

"Such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant."

If the wording of sub-paragraph (k) is compared with the wording of sub-paragraph (f) which provides for the inclusion in the record of appeal of (quote) "the affidavits read and all documents put in evidence at the hearing, …" it will be noticed that the qualifying expression "put in evidence at the hearing" has been omitted from sub-paragraph (k) and instead the qualifying expression "as may be necessary for the determination of the appeal …" has been used. The intention is clear.

Sub-paragraph (k) is meant to provide for exceptional situations such as the present one which litigants or appellants may face. I am satisfied that the Supplementary Record which is necessary for the proper determination of the appeal is admissible and ought to be admitted now under rule 85(1) (k) and rule 89 (1) of the Court of Appeal Rules. I agree with the order proposed by Kwach, JA that the preliminary objection raised by Mr Lakha on behalf of the appellant be over-ruled and that the appeal shall proceed to hearing.

Muli, JA. (dissenting) I have had the advantage of reading in drafts the rulings prepared by my brothers Kwach and Cockar JJA and I wish to say a few words.

When this appeal was being heard, a point of law was raised as to the contents of the Record of Appeal. Mr Le Pelley intimated that he would rely on the Supplementary Record of Appeal he filed on 3rd October, 1994, containing records of subsequent proceedings to the proceedings culminating to the ruling of Akiwumi J, as he then was, dated 15th January, 1993 and which is the ruling from which this appeal stems.

The proceedings in the Supplementary Record are the subsequent ruling of Akiwumi J dated 5th February, 1993, the Chamber Summons dated 19th February, 1993, and another ruling by Akiwumi J dated the 19th March, 1994. Mr Lakha for the appellant objected to the admission of the Supplementary Record to form part of the Record of Appeal now before the Court for hearing. We allowed Mr Lakha and Mr Le Pelley to argue this objection as a preliminary point of law.

This Court is a creature of the statute and can only take cognisance of matters conferred to it by the statute. Unlike the superior court, which has unlimited jurisdiction, this Court has limited jurisdiction conferred to it by the statute. In so far as the rules governing appeals from the Superior Court to this Court are concerned, Part IV thereof is relevant. In particular rule 85 of the Rules of this Court provide:

"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) an index of all documents in the Record …

(b) statement showing the address for service …

(c) the pleadings

(d) the final judge's notes of the hearing …

(e) the transcript of any shorthand notes …

(f) the affidavit read and all documents put in evidence …

(g) the judgment or order

(h) the certified decrees or order

(i) the order, if any, …

(j) the notice of appeal

(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

> Provided that the copies referred to in the 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.

(3) A judge or registrar of the superior court may, on the application of any part direct which documents or parts of documents should be excluded from the record. Application for such direction may be made informally."

It is mandatory that the contents of the Record of Appeal shall contain copies of the documents listed in sub-paragraphs (a) to (k) of sub-rule (1) of rule 85 of the Rules of this Court in the case of an appeal or appeals from the superior court in its original jurisdiction and in the case of a second appeal or appeals from the superior court in its appellate jurisdiction, the documents listed in sub-paragraphs (i) to (vi) of sub-rule (2) of rule 85 of the Rules. In the case of a third appeal or appeals the Record shall contain the corresponding documents in relation to the second appeal or appeals with a certificate of the superior court that a point of law of general public importance is involved.

I have highlighted the scenario of the law governing appeals to this Court from the superior courts to emphasise the scope and circumstances in relation to the contents of the records of appeals in the three categories I have just mentioned. Indeed the provisions of part IV of the Rules of this Court tailor the procedure, the manner and the scope of the institution of civil appeals to this Court and which must be followed and complied with. Rule 85 of the Rules spell out the documents which must form the Record of Appeal as mandatory requirements. Documents listed in sub-paragraphs (a) to (f) of sub-rule (1) of rule 85 are so detailed and exhaustive as well as explanatory in their description in themselves that they are all

documents which must have been admitted prior to or during the hearing of the matter in controversy. Documents listed in paragraphs (g) to (j) are extracts prepared from documents (a) to (f). Documents referred to in (k) are "such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant." The documents referred to in (k) should be read *ejusdem generis* as referring to those relevant documents or proceedings admitted prior to or during the hearing of the matter in controversy. It follows that the ruling or judgment appealed from must be the judgment prepared from the facts or the basis of those documents or proceedings which existed or came to exist during the hearing and resulting from those documents, pleadings, trial judge's notes, transcripts, affidavits read and all documents put in evidence at the hearing including such other relevant documents including interlocutory proceedings as may be necessary for the proper determination of the appeal. It would be stretching rule 85 beyond its limits if extraneous or subsequent proceedings or documents admitted subsequent to the judgment appealed from were to form part of the record of appeal. The rulings made from subsequent proceedings to the judgments or rulings appealed from may, in themselves, be subject to appeals by an aggrieved party.

If Mr Le Pelley wished to test the admissibility or otherwise of the Supplementary Record to be part of the Record of the present appeal, he should have invoked the provisions of rule 29 of our Rules to adduce it as additional evidence. Any attempt to adduce the Supplementary Record of appeal would be admitting it through the back-door and would amount to violent violation of rule 85 of the Rules. Rule 89 of the

Rules does not, in any way, permit or allow admission of documents which were not before the trial judge to form part of the Record of Appeal.

I would reject the Supplementary Record sought to be relied upon in the present appeal as totally inadmissible.

Dated and Delivered at Nairobi this 15th day of December 1994.

R.O.KWACH

.....

JUDGE OF APPEAL

A.M.COCKAR

.....

JUDGE OF APPEAL

M.G.MULI

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR