



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA, Chesoni & Platt Ag JJA)

CIVIL APPEAL NO 34 OF 1982

KEMFRO AFRICA LIMITED T/A “MERU EXPRESS SERVICES

(1976)” & ANOTHERAPPLICANT

VERSUS

OLIVE LUBIA & ANOTHERRESPONDENT

RULING

When this appeal was called on for hearing, Mr Kwach, appearing on behalf of the two respondents, took the preliminary objection that the mandatory provisions of Rule 85 (1) (f) of rules of this court had not been complied with, in that none of the exhibits which were before the High Court, and which he classified into five categories, had been included in the Record of the Appeal. Whether or not all those documentary exhibits are needed for the proper determination of the appeal was not, Mr Kwach said, material to this issue because the provisions are mandatory and failure to comply with them must result in the appeal being struck out. However, we observe that at least two of those classes of documents would appear to be necessary before a proper conclusion could be reached on the appeal against the award to Olive Lubia, who is the second respondent.

Mr Barasa submitted on behalf of the appellants that the application had not been made formally, and that before taking the drastic step of striking out the appeal he should have had proper notice of the objection and time to prepare for it. The quantum of damages for the loss of an eye was a matter of public importance in view of the widely disparate awards that have so far been given in Kenya, and that he should, at the very least, be given an adjournment to remedy the defect in the record (which he did not deny existed): Mr Barasa referred us in particular to Rules 42, 44, 80 and 89 of the Court of Appeal Rules.

It is well settled that the omission of a basic document in the record cannot be cured by the filing of a supplementary record – see the passage from Law Ag V-P’s judgment in the decision of this court’s predecessor in *Kiboro v Posts and Telecommunications Corporation* [1974] EA at p 156, because to do so would involve the proposition that a supplementary record can contain not only further or additional documents which the appellant considers are necessary for the determination of the appeal, but the basic documents which he should have included in the first place.

Kiboro’s case was followed in the more recent decision of this court in *Commercial Bank of Africa v General Motors Kenya Ltd* Civil Appeal 45 of 1981, in which the omission to include a copy of the plaint

in the record of the appeal due to an oversight (in that case Mr Kwach's oversight), was held not to constitute "sufficient reason" within the term of Rule 4, so as to grant the necessary extension of time to enable the document to be brought on record, and that appeal was struck out.

Without deciding whether, in the instant case, that which could be regarded as an oversight constitutes sufficient reason for extending the time so as to include the documentary exhibits, we consider that the mandatory terms of Rule 85 (1) (f) have not been complied with and that the appeal must be struck out under rule 80, on the ground that an essential step has not been taken within the prescribed time. This is not of course, the same as dismissing an appeal, as was made clear by Law JA in *Belinda Murai and Others v Amos Wainaina*, Civil application Nai 9 of 1978, in which he was later upheld by the full court.

As to the point which was taken that the application to strike out should not have been made informally, there is nothing in Rule 80, or indeed in rule 42, as we see it, to prevent this being done, particularly in a case where the appeal is incompetent, though the court may in a proper case insist that the application be made by motion. However, as appears from *Spry's Notes on Practice and Procedure in the Court of Appeal for East Africa* at page 13, *Raniga v Jivraj* [1965] EA 700 indicates that this may be a factor to be taken into account when ordering costs: see p 704 letter C of the report.

In this case it is ordered that this appeal be struck out with costs to the respondents.

Dated and Delivered at Nairobi this 10th Day of October, 1983

A.R.W. HANCOX

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

H.G PLATT

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Ag. JUDGE OF APPEAL