



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Miller, Madan & Potter JJA)

CIVIL APPEAL NO. 45 OF 1981

BETWEEN

COMMERCIAL BANK OF AFRICA LTDAPPELLANT

AND

GENERAL MOTORS KENYA LTD.....RESPONDENT

JUDGMENT

Miller JA This appeal with the Commercial Bank of Africa Limited as appellant and General Motors Kenya Limited as respondent, was lodged in this Court's Registry on the September 4, 1981.

Mr Sandhu for the respondent, has raised a preliminary objection that the appeal is incompetent in that it does not comply with rule 85 of this Court's Rules. Rule 85 mandatorily prescribes the contents of a Record of Appeal such as this and it is patent that at lodgment, the bound Record of Appeal as stood, fell foul of rule 85(1)(c) in that it did not contain a copy of the pleadings before the superior court.

The said bound record of appeal was nevertheless certified in compliance with the further mandatory provisions of subrule (5) of rule 85 in these terms:

“Certified correct and prepared in accordance with copies furnished by the High Court of Kenya Nairobi.”

Subrule (5) of rule 85 provides:

“Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 22 to appear on his behalf.”

I must forthwith pause to observe that the phrase “the record of appeal” in subrule (5) is directly referable to the record of appeal in rule 85 and that the only conditions for exemption from mandatory provisions of rule 85, and prescribed as discretionary, are to be found in subrule (3) of the rule itself ie

“A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally.”

On November 27, 1981 advocate for the respondent company lodged notice of preliminary objection to the above mentioned patent procedural breach on the part of the appellant company; and subsequent to

the notice of objection ie on December 2, 1981 a supplementary record of appeal was lodged on behalf of the appellant.

The supplementary record of appeal was designed as having been lodged under rule 89(3) of this Court's Rules, apparently in rectification of the aforesaid breach, plus the fact that it was being challenged by the objection lodged.

It is my view that the provisions of rule 89(3) must be carefully evaluated; not only as to the context of this subrule, but also with respect to what has been lodged by way of supplementary record of appeal in the instant case.

Rule 89(3) provides:

“An appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal and shall as soon as practicable thereafter serve copies of it on every respondent who has complied with requirements of rule 78.”

As I see it, this subrule (rule 89(3)) is mainly for the purpose of obviating inability and delay in the path of a respondent as to knowledge of the appellate contentions he is being called upon to contest. In the present case, the supplementary Record of Appeal is entirely comprised of a plaint, the “material and pleading” the absence of which in the original lodged Record of Appeal, is the subject of the respondent's objection, which was properly lodged before this hearing.

My major concern is whether or not, as a matter of common sense and logical procedural expectations, there is a conflict between the relevant mandatory provisions of rule 85 and the optional cohesive latitude apparently granted to the appellant in rule 89(3).

Putting the problem in its simplest terms, and on the principle of there being perhaps no cognisable record of appeal for purposes of this Court until lodgment thereof, how can an appellant be firmly and conclusively directed to strictly observe the dictates of rule 85 with a certificate of correct compliance appended thereto upon lodgment, if he can nevertheless and “at any time” supply one or more of the compulsory necessities demanded for lodgment? I am firmly of the opinion that compliance with the requirements of rule 85 constitutes a condition precedent to the propriety of the record of appeal at lodgment. This very point was adequately pronounced upon by Law JA in *Kiboro v Posts and Telecommunications Corporation* [1974] EA at page 156, the Court being in complete agreement with his ruling on producing a supplementary Memorandum of Appeal to heal a breach of rule 85(1)(h).

Mr Kwach in reply to the arguments of Mr Sandhu, admitted that he was personally at fault for the omission, by reason of an oversight. My main concern however, is the question of the interpretation to be applied to the relevant rules. I am of opinion that to treat non-compliance with one of the compulsory components of rule 85(1) with deterrent consequences and allow non-compliance with another of those mandatory items to go un-supplanted, is incompatible with proper interpretation of the rule as it stands and causes me to reflect upon the observations of Lord Greene MR in *Monk v Redwing Aircraft Company Limited* [1942] 1 KB at page 189 as he contrasted Rules of Court with rules of practice where discretion of the judge is to be exercised. Said he: “Rules of Court when they confer a discretion on a judge give it in accordance with their language.”

Mr Kwach finally asked the court to exercise its discretion under rule 4, but I do not consider that the reason “oversight” is sufficient reason to attempt to move me from the principle of construction which I consider paramount to the exercise of discretion whatever. For these reasons I have given, I rule that the objection succeeds; and that the appeal is incompetent. I would therefore order that the appeal be struck out with costs to the objecting respondent.

Potter JA. The appellant in this appeal was a defendant in a civil suit brought by the respondent to this appeal. The respondent obtained summary judgment against the appellant under Order IXA rule 3(2) for failure to file a defence within time. Subsequently the appellant applied to set aside the judgment, and

obtained an order setting aside the judgment upon terms that the appellant make a payment into court of a substantial sum. The appellant now appeals against that order, seeking unconditional leave to defend the suit. The respondent has lodged a preliminary objection that this appeal is incompetent in that the Record of Appeal does not include a copy of the plaint in the suit. After receipt of that objection the appellant filed a supplementary Record of Appeal containing a copy of the plaint.

Rule 85(1)(c) of the Rules of this Court has not been complied with by the appellant, in that the Record of Appeal does not contain a copy of the pleadings in the suit, namely the plaint. I do not accept the submission of Mr Kwach, who appeared for the appellant, that the plaint was not a part of the pleadings for the purposes of rule 85(1)(c) or a necessary document for the purposes of this appeal. The lodging of the supplementary record by the appellant has not cured that defect in the record. The right of an appellant under rule 89(3) to lodge at any time a supplementary record is a right to file “further documents or any additional parts of documents which are ... required for the proper determination of the appeal” and is not a right to lodge at any time documents which should have been lodged within the stipulated time as part of the Record of Appeal. See *Kiboro v Posts and Telecommunications Corporation* [1974] EA 155.

The record was lodged within sixty days of the date of the lodging of the notice of appeal, as required by rule 81(1), but the supplementary record was not lodged within that time. Thus the appellant could not argue that the record and supplementary record together formed a record which complied with rule 85(1) as to its contents, and with rule 81(1) as to being lodged within the stipulated time.

During the hearing today Mr Kwach has made application to this Court under rule 4 for an extension of the time for lodging a complete record. He has to show sufficient reason for the omission of the plaint from the record. Mr Kwach has frankly told the court that the omission was due to an oversight on his part. This explanation could not in my opinion be accepted by this Court as a sufficient reason without departing radically from the numerous decisions of this Court and its predecessor as to what constitutes a sufficient reason.

Accordingly I would strike out the appeal as incompetent, with costs.

Madan JA. I have had the advantage of listening to the ruling of both Miller and Potter JJA, delivered in Court. I agree with the conclusion reached and the order proposed by them.

The failure to comply, due to an oversight on the part of an advocate, with the Rules of Court, in particular when the rule in question is of a mandatory nature as rule 85(1) in this case, the irregularity cannot be cured by filing a supplementary record, but, notwithstanding that oversight on the part of an advocate does not normally constitute sufficient reason, the court has the power to allow it to be done under rule 4.

The notice of preliminary objection was served on the appellant’s advocate on November 27, 1981. No application under rule 4 was made until it was done orally in court this morning, the appellant’s advocate having in the meantime adopted, as stated in his letter dated December 1, 1981, with respect, the untenable attitude that he was entitled to bring the omitted document on to the Record of Appeal by means of a supplementary record under rule 89(3). There was a lapse and also another error.

The appeal is ordered to be struck out as incompetent, with costs.

Dated and delivered at Nairobi this 14th day of January, 1982.

C.H.E MILLER

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JUDGE OF APPEAL

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JUDGE OF APPEAL

C.B MADAN

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR