



IN THE COURT OF APPEAL

AT MAIROBI

(Coram: Madan, Miller & Potter JJ A)

CIVIL APPLICATION NO NAI 3 OF 1979

Between

DICKSON NGIGI NGUGIAPPLICANT

AND

MORRISON NJENGA WAWERU.....RESPONDENT

(Application for leave to appeal against a decision of Nyarangi J in the High Court, Nakuru, on 24th November 1978)

JUDGMENT

This application by motion arises from a ruling of the High Court which refused the applicant leave to appeal against an order made by the same Court on 24th November 1978, whereby possession of the suit premises was directed to be given to the respondent in somewhat unusual circumstances in view of the state of the pleadings in the suit. The application also asks that time to file the appeal be extended by thirty days.

Nyarangi J said in his ruling (although it is headed “judgment”):

To save costs and time and in the interest of justice, I decide that the applicant should seek the leave of the Court of Appeal to appeal to that Court, giving his reasons for seeking to appeal. Any such reasons would, if necessary be considered by the Court of Appeal. As far as this Court is concerned, the application must fail. Costs in the cause.

So the applicant has come to this Court to seek leave to appeal. He has set out his reasons for wanting to appeal in his application, which, even if the judge had not said so in his ruling, would have been considered by us. We allowed counsel for the respondent to argue a preliminary objection (of which he had served previous notice) to the effect that the application is incompetent as there is no formally extracted sealed and certified order attached to the application to comply with rule 43(3) of the Court of Appeal for East Africa Rules 1972, read together with sections 66 (a) and 68(1) and (2) (c) of the Evidence Act. Attached to the motion is the supporting affidavit of the applicant; and also uncertified copies of the plaint, the written statement of defence, the notice of motion filed by the respondent in the High Court asking for an order for vacant possession of the suit premises to be given to him, the affidavit of the respondent in support of his motion, the record of arguments before the High Court on 23rd November 1978 (when the respondent’s motion was heard), the “judgment” of the High Court (as it is termed) on the respondent’s motion delivered on 24th November 1978, the formal order of the court based upon the “judgment”, the applicant’s notice of appeal relating to the “judgment”, the notice of

motion in the High Court for leave to appeal against the “judgment”, the affidavit sworn by the applicant’s advocate in support of the motion for leave to appeal, and, finally, the ruling dismissing the application for leave to appeal.

Rule 43(3) of the Court of Appeal for East Africa Rules 1972 provides:

Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal ...

Rule 85 (5) 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.

Rule 22 provides (*inter alia*) that a party to any proceedings in the Court may appear in person or by an advocate. The practice has grown up in cases in which a party appears by an advocate for the record of appeal to be certified by the advocate to comply with rule 85(5).

Section 64 of the Evidence Act provides that the contents of documents may be proved either by primary or by secondary evidence. Under section 66, secondary evidence includes certified copies given under the provisions of the Act. Section 67 requires that documents must be proved by primary evidence, except in cases mentioned in section 68(1) when secondary evidence may be given of the existence, condition or contents of a document in the following cases, the relevant ones for our present purposes being paragraphs (e) and (f):

(e) when the original is a public document within the meaning of section 79 of the Act:

(f) when the original is a document of which a certified copy is permitted by the Evidence Act or by any written law to be given in evidence.

Section 68(2) (c) provides that in cases mentioned in paragraphs (e) and (f) of section 68(1), a certified copy of a document, but no other kind of secondary evidence, is admissible.

Under section 79(1) (a) (iii) the documents forming the acts or records of acts of “public officers, legislative, judicial or executive, whether of Kenya or of any other country” are public documents.

A certified copy is permitted to be filed under the rules of court (rule 85(5)). Mr Gautama for the applicant said that rule 85(5) only applies to a record of appeal and not to an application, presumably because the expression “record of appeal” only is used in that rule. We do not accept this argument. We are of the opinion that copies of documents which are filed in Court being secondary evidence and which could be certified should be certified as required in the Evidence Act. There is no warrant for placing such a limited interpretation upon rule 85(5). The Court must be satisfied of the authenticity of the copies filed, whether it be a record of appeal or an application. In any event, the legend just above the heading “Notice of Motion” in this application states that it is an appeal from the order dated 24th November 1978, which in effect it is.

Also, in our opinion, a copy of a document which is not certified is inadmissible and the Court may not look at it because of the provisions of sections 67 and 68(1) (e) and (f) and (2) (c) of the Evidence Act.

Mr Gautama made the startling proposition that this matter is governed by the rules of court and not by the provisions of the Evidence Act which do not apply. Section 2(1) of the Evidence Act provides:

This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi’s court but not to proceedings before an arbitrator.

Neither section 64(1) of the Constitution (which brought the Court of Appeal into being) nor any

provision of the Appellate Jurisdiction Act 1977 authorises us to ignore the provisions of the Evidence Act. Indeed, section 3(3) of that Act states that, in the hearing of an appeal in exercise of the jurisdiction conferred by the Appellate Jurisdiction Act 1977, the law to be applied should be the law applicable to the case in the High Court which Court, in our opinion, is bound to observe and follow the provisions of the Evidence Act.

Mr Gautama then made another attempt by saying that he would state from the Bar that all documents filed in Court with the motion were authentic. However much we may be prepared to accept Mr Gautama's integrity in this matter, we cannot overlook the effect of the obvious and express provisions of the law governing this matter to which we have been referred, and which make the documents concerned inadmissible, in particular the provisions of section 68(2) (c) of the Evidence Act which expressly states that only a certified copy of a judicial document (which the documents attached to the applicant's affidavit are) but no other kind of secondary evidence is admissible.

For these reasons this application is incompetent and it is ordered to be struck out with costs to the respondent.

Application dismissed.

Dated and delivered at Nairobi this 30th day of July 1979.

C.B MADAN

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JUDGE OF APPEAL

C.H.E MILLER

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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