



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 76 OF 2018

BETWEEN

AUTOPORTS FREIGHT TERMINAL LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITY.....RESPONDENT

(An application to strike out a Record of Appeal dated 19th June, 2018 filed in Civil Appeal No. 76 of 2018

RULING OF THE COURT

This matter before us concerns two applications to strike out the respondent's appeal. The first was a Notice of Motion dated 17th July 2018 made under **rule 84** of the *Court of Appeal Rules*, which was brought for orders that –

a) *the respondent's appeal, being Civil Appeal No. 76 of 2018, Kenya Ports Authority vs Autoports Freight Terminal Limited, be struck out; and*

b) *Costs be awarded to the Applicant.*

The application was brought on grounds that under **rule 87 (1)** of the *Court of Appeal rules*, which provides that for purposes of an appeal from a lower court in its original jurisdiction, the record of appeal shall contain copies of *inter alia*, the certified decree or order; that from the record of appeal, the decree included was not certified, and that as a consequence it was defective and rendered the entire appeal to be incompetent. In addition, the record of appeal was lodged in the registry on 19th June 2018, but was not served within the stipulated seven days as required by the rules of this Court, but was served on 28th June 2018, which was a period of 2 days beyond the stipulated period. Consequently, there was no appeal before this Court. The motion was supported by the affidavit of **Paul Buti** sworn on 17th July 2018.

The second application was another Notice of Motion dated 28th September 2018 filed also seeking to strike out the appeal. This one was brought under **rule 88** of this Court's rules seeking orders;

a) *That the Supplementary record of appeal dated 26th September 2018 and filed on 27th September 2018 be struck out; and*

b) *Costs in the application be provided for.*

The application was brought on grounds that the appeal was lodged in the registry on 19th June 2018; that under **rule 88**, if a document referred to under **rule 87 (1)** and **(2)** was omitted, from the record of Appeal, it can be introduced by way of a Supplementary record, within fifteen days of lodging the record of appeal, and after the lapse of fifteen days then any document should be introduced with leave of the deputy Registrar upon an application being made; that the applicant's supplementary record of appeal which sought to include the certified decree that had been omitted was filed after the lapse of fifteen days without a formal application to the deputy Registrar, and without leave having been obtained, and therefore the supplement record of appeal should be struck out. The application was supported by the sworn affidavit of **Hamid Salim Sadru** of 28th September 2018.

In a replying affidavit sworn on 26th July 2018 **Turusha Kinyanjui**, the Head of Litigation and Disputes of the respondent, it was deponed that the advocate in the firm representing the respondent, Mr. Billy Kopere had informed her that, they applied for the typed and certified copies of the proceedings, judgment and decree on 12th February 2018 which were issued, but had mistakenly and inadvertently omitted to certify the decree; that the error was not noticed by the respondent's advocates who remained under the mistaken assumption that the decree

was certified. Indeed, even the Index in the Record of Appeal showed the existence of a decree. It was further deponed that the omission was not detected until 23rd July, 2018 when the Notice of Motion dated 17th July, 2018, was served on the applicant, and upon noticing the error, the respondent's advocates by a letter dated 24th July 2018, requested the deputy Registrar of the High Court to certify the decree so that it could be included in a Supplementary Record of Appeal; that thereafter, the respondent's advocates sought to apply for leave before the deputy Registrar of this Court to file the Supplementary Affidavit when the matter came up for case conference on 26th July 2018.

It was finally deponed that, the failure to include the certified copy of the decree was an innocent error which need not attract the draconian remedy of a striking out especially in light of **Article 159(2)** of the Constitution. With respect to the two days' delay in filing the record of appeal, the respondent asserted that this arose because the deputy Registrar did not sign it on 19th June 2018 but, signed it on 25th June 2018 but backdated it to 19th June 2018 being the date of filing. It was further deponed that the applicant suffered no prejudice on account of the delay of two (2) days.

Learned counsel **Mr. Buti** filed written submissions, and in highlighting his submissions reiterated the contents of the supporting affidavits, but added that the omission to file a certified decree provoked the first notice of motion to strike out the appeal, and that the filing of the supplementary record of appeal on 27th September 2018 without leave of the deputy Registrar when more than fifteen days of service of the record of appeal had lapsed, prompted the filing of the second Notice of Motion contrary to **rule 88** and therefore, the certified decree could not be considered as having been properly filed; that furthermore, **rule 87 (1)** of the Court's rules which specifies the documents necessary for filing an appeal was not complied with, and therefore the appeal was rendered incompetent and liable to be struck out. Counsel relied in the case of ***Silpack Industries Limited vs Kioko, Civil Appeal No. 77 of 2000*** where this Court found that the listed documents which included an uncertified order was defective, it rendered the appeal to be incurably defective, and liable to be struck out.

Also cited was ***Swafiya Abdulla vs Bahati temo & 6 Others, Civil Application No 82 of 2018*** that this Court cannot shut its eyes to the non-observance of the rules. In this case, the flouting was more blatant as the respondents were aware of the procedure required to be followed, and therefore **Article 159** could not come to their aid.

Mr. Kongere, learned counsel for the respondent also filed written submissions and in highlighting them admitted the error in filing a certified decree. It was submitted that the respondent had taken active steps to correct the mistake by requesting the High Court for the certified copy, and that it was filed without leave because in the case of ***Charles Karanja Kiiru vs Charles Githinji Muigwa [2017] eKLR*** it was stated that it was possible to file a document in this Court and thereafter seek leave, and that it was for this reason that the supplementary record was filed. Counsel stated that he appeared before the deputy Registrar and made an oral application for leave on 26th July, 2018, but was informed that the applications to strike out would be argued first, so that what is at issue was to urge this Court not to strike out the appeal but to allow the supplementary record of appeal to be deemed as filed so as to sustain the appeal as intended by the Constitution. Counsel cited the case of ***Truphosa Cheredi Mudembei & another vs John K. Malembi (supra)*** where this court allowed a decree to be filed without leave.

We have considered the pleadings and the submissions, and it is clear that the issue to be determined is whether or not the appeal should be struck out for reasons that the decree was not certified, and that a step in the procedure of filing was omitted when filing the supplementary record of appeal.

Before addressing the gravamen of the applications, we will begin with the complaint that the appeal was served on the applicant two days late. The respondent has explained that the delay was occasioned by shortcomings in the Registry. **Rule 4** of the ***Court of Appeal Rules***, allows the Court unfettered discretion to extend time so that the ends of justice can be served, but it is appreciated that in so doing, such discretion should be exercised judiciously. In addition, **Article 159 (2) (d)** of the Constitution, provides that justice should be administered without undue regard to technicalities of procedure. Considering the explanations provided, and that the delay was not inordinate, we are prepared to accept the reasons proffered for the two days delay, and deem the record of appeal as having been filed within time.

Turning to the applications to strike out the appeal on account of the omission to include a certified decree, and for failure to seek the deputy Registrar's leave to file the supplementary record, it is not in dispute that when the record of appeal was filed on 19th June 2018, a certified copy of the decree was omitted. It is also not in dispute that upon being alerted through the motion to strike out that the decree had not been certified, the respondent immediately obtained a certified copy and filed it by way of a supplementary record of appeal. In so doing, it overlooked obtaining leave of the deputy Registrar to file the supplementary record.

In determining the issue, the question for us to consider is whether the respondent's inadvertence was fatal to the appeal. In the case of ***Truphosa Cheredi Mudembei & another vs John K. Malembi (supra)*** this Court stated;

“As regards, the omission to include a certified copy of the decree, this had been admitted. Much as we do not condone sloppiness on the part of parties, we are of the view that this is an omission that is not fatal. The document can be introduced through a supplementary record of appeal.”

Clearly there was an omission in including the certified decree, which omission cannot be considered fatal. This is because a certified decree can be introduced, as counsel for the applicant has appreciated, through a supplementary record. But the applicant's main complaint is that in order to introduce it after the lapse of fifteen days, the respondent ought to have sought leave of the deputy Registrar, which it did not, and for this reason, the supplementary record cannot be deemed to be properly filed.

Rule 88 of this Court's Rules is clear. It is to the effect that without leave of court an appellant can file a supplementary record of appeal within fifteen (15) days of lodging the initial record of appeal. Beyond that, the appellant requires leave of the deputy Registrar. It is quite apparent that the respondent lodged the supplementary records of appeal outside the stipulated time, and therefore required leave of the deputy Registrar. We do not doubt counsel for the respondent when he says that when he sought to obtain leave from the Deputy Registrar, he was informed that, that should await the disposal of the applications to strike out.

Did failure to seek the leave of the deputy Registrar prior to filing the supplementary record a sufficient reason to strike out the appeal? According to the respondent, after the supplementary record was filed and served on the applicant on 27th September 2018, before it could obtain the necessary leave, the applicant moved the Court to have even the Supplementary Record struck

out. As this is a matter for the full bench's determination, the respondent was left with the only option of which was to apply for leave of this Court to admit the Supplementary Record simultaneously with the application to strike out, so as to have it deemed as duly filed.

In the case of Mukenya Ndunda vs Crater Automobiles Limited [2015] eKLR this Court emphasized that;

“The power to strike out an appeal or a notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

It is clear from the record that the opportunity for the respondent to seek to have the supplementary record filed was disrupted by the motion to strike out having been filed the very next day, and by seeking to obtain leave to file its supplementary record at the next available opportunity, which application the respondent made to this Court during the hearing of the applications to strike out the appeal, we do not think that it flagrantly and willfully disregarded the rules.

As stated by this Court in the case of Mukenya and Crater Automobiles Limited (supra), “...We take the view that the rules of procedure are designed to assist in the administration of justice. They are intended to serve as the hand-maidens of justice, not to defeat it”.

In our view we do not consider that the respondent willfully disregarded the rules of this Court, given that it conscientiously and expeditiously took the necessary steps to obtain a certified decree, have it filed together with a supplementary record of appeal, albeit without leave of the deputy Registrar. Appreciating as we do that the decision as to whether or not to strike out the appeal turns on whether we exercise our discretion to admit the supplementary record, we consider this an appropriate moment within which to exercise our discretion to grant leave to the respondent to file the supplementary record of appeal. In so doing we invoke the Court's inherent jurisdiction under **section 3A and 3B** of the **Appellate Jurisdiction Act** to admit the respondent's supplementary record of appeal dated 26th September 2018. With such admission, the substratum of the Notice of Motions dated 17th July 2018 and 28th September 2018 to strike out the appeal falls away, and as such, they are hereby dismissed. We order each party to bear their own costs.

It is so ordered.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR