



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, HANNAH OKWENGU, &**

**J. MOHAMMED, JJA.)**

**CIVIL APPEAL (APPLICATION) NO. 8 OF 2017**

**BETWEEN**

**PETER OBWOGO O. ....1<sup>ST</sup> APPLICANT**

**THE SECRETARY, BOARD OF MANAGEMENT**

**ST. J BOYS HIGH SCHOOL .....2<sup>ND</sup> APPLICANT**

**THE BOARD OF MANAGEMENT,**

**ST. J BOYS HIGH SCHOOL .....3<sup>RD</sup> APPLICANT**

**AND**

**H O**

**Suing As Next Friend of P O (Minor) .....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.2<sup>ND</sup> RESPONDENT**

**(An application to strike out an Appeal and Record of Appeal in Eldoret Court of Appeal, Civil Appeal No. 8 of 2017 arising from the Judgment and decree of the High Court of Kenya at Kitale,**

**(Chemitei, J.) dated 5<sup>th</sup> October, 2016**

**in**

**HIGH COURT PETITION NO. 15 OF 2015)**

**\*\*\*\*\***

**RULING OF THE COURT**

[1] This is an application by the respondents in **Civil Appeal No. 8 of 2017** for an order that the Appeal and the Record of Appeal be struck out with costs. The application which is filed within the appeal is made under **Rule 84** of the **Court of Appeal Rules**.

[2] The application is based on two grounds namely:-

(a) the decree contained in the record of appeal and dated 23<sup>rd</sup> January, 2017 contravenes Rule 87(1) (h) of the Court of Appeal Rules 2010 for being uncertified.

(b) the entire record has been drawn and filed by the 1<sup>st</sup> respondent (*appellant*) without leave of the superior court to be allowed to act in person notwithstanding the fact that the Notice of Appeal was filed by the 1<sup>st</sup> respondent's advocates on record.

[3] The application is supported by the affidavit of **Aggrey Lucas Kidiavai**, the applicants' advocates. The application opposed on the grounds contained in the replying affidavit sworn by **Ochang' John Ajigo**, the 1<sup>st</sup> respondent's advocate.

[4] The appeal arises from the decision of the High Court, (*Chemitei, J.*) which dismissed a constitutional petition filed by **H O** as the father and next friend of **P O**. The petitioner, now the appellant; had alleged that the constitutional rights of his son who was a form three student at **St. J High School** had been breached by the decision to suspend him and to deny him re-admission. Upon the dismissal of the petition, the appellants former advocates **M/S Kaosa & Co. Advocates** filed a Notice of Appeal. Thereafter, the aggrieved petitioner filed a Record of Appeal and a Memorandum of Appeal in person. The documents filed in the Record of Appeal includes a signed copy of the judgment which is also certified as a true copy of the original and copy of a decree signed by the Deputy Registrar of the High Court which is not signed as a true copy of the original.

[5] **Rule 87(1)** of the Court of Appeal Rules stipulates the documents which should be included in a record of appeal for purpose of an appeal from a superior court in its original jurisdiction. They include a judgment or order and the certified decree or order (**Rule 87(1) (g) and 87(1) (h) respectively**). If any documents specified in **Rule 87(1)** are omitted from the record of Appeal, **Rule 88** permits an appellant to include them in a supplementary record of appeal to be filed without leave within 15 days of the lodging of the Record of Appeal and thereafter with leave of the Deputy Registrar on application. The appellant did not file a supplementary record of appeal within the stipulated time or at all.

[6] However, the appellant has now instructed M/S Ochang' Ajigo & Co. Advocates who have filed a notice of change of Advocates. Mr. Ochang' John Ajigo deposes in the replying affidavit that the omission has been rectified and a certified decree obtained which is annexed to the replying affidavit. He submitted that a supplementary record containing the omitted certified decree can be filed within seven days.

[7] We have considered the written and oral submissions of the applicants' advocates and the submissions of the respondents' advocates. We have also considered the authorities relied on by the respective counsel. Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the administration of substantial justice. **Article 159(2) (d)** of the Constitution of Kenya 2010, now requires that: "*justice shall be administered without undue regard to procedural technicalities.*" The Court has a discretion under **Rule 84** to strike out a notice of appeal or appeal where an essential step has not been taken in the proceeding or has not been taken within a prescribed time. However, the discretion should be exercised judicially having regard to all the circumstances of the case.

[8] In the instant case, the appellant filed the record of appeal in person. He has included in the record of appeal a copy of the decree bearing the signature of the Deputy Registrar. The decision of the High Court was not complicated. The court merely dismissed the petition with an order that each party bears its own costs of the petition. It is not contended that the copy of the decree incorporated in the record of the appeal does not conform with the judgment or that it is difficult to decipher the decision of the High Court from the copy of the decree or that the appellate court will be handicapped in effectually determining the appeal. In the premises, the fact that the copy of the decree is not certified as a true copy is a procedural technicality which does not in any way impede the efficacious determination of the appeal.

[9] As regards the second ground of the application, **Rule 75(1)** allows any person who desires to appeal to file a notice of appeal. The Rules do not prohibit a person who was represented by an advocate in the court below from filing an appeal in person or through a different advocate. The only requirement, as stipulated by **Rule 23(1)**, is that, a party to an application or appeal who changes advocate, or having been represented by an advocate, decides to act in person, or having acted in person, engages an advocate, should lodge and serve a notice of change. Those factors do not apply in the present application for the reason that until the memorandum of appeal was filed, there were no proceedings on which a notice to act in person or a notice of change of advocates could have been pegged.

[10] Although **Rule 2** defines an “*appeal*” as including an “*intended appeal*”, that definition is intended to give jurisdiction to the Court to entertain interlocutory applications such as an application for stay of execution under **Rule 5(2) (b)** before the record of appeal and memorandum are filed. The filing of a record of appeal and the memorandum of appeal by a person who did not file the notice of appeal would only affect the address of service. By **Rule 75(3)**, the person filing the notice of appeal is required to state the address of service of the appellant. However, by **Rule 18**, a person who has given an address of service may at any time file a change of address of service without the leave of the court. The record of appeal filed by the appellant contained the changed address of service.

[11] The contention by the applicants that the appellant required leave of the court to file the record of appeal in person the notice of appeal having been filed by an advocate is not valid. Firstly, there is no provision in the rules for making such an application. Secondly, if an appellant were to file a notice to act in person between the interval of filing a notice of appeal and the record of appeal, such a notice to act in person would hang in the air or, alternatively, the appellant would be required to file a fresh notice of appeal in person which is not the intendment of the rules. For those reasons, we have come to the conclusion that the fact that the record of appeal was filed by the appellant in person does not render the record of appeal defective.

[12] The omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs.

[13] For above reasons, the application is dismissed. The appellant is given leave to file a supplementary record of appeal within **ten** days from the date hereof. The costs of this application shall be taxed and paid forthwith to the respondents by the appellant.

**Dated and delivered at Eldoret this 15<sup>th</sup> day of June, 2017.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original

**DEPUTY REGISTRAR**