



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 42 OF 2014

BETWEEN

DINAH WAIRIMU NJOGU APPLICANT

AND

NGUGI NJURUMBE RESPONDENT

(An application to strike out the appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 21st February, 2014

in

H.C.C.A No. 107 of 2009)

RULING OF THE COURT

1. The applicant has filed the current application pursuant to **Rules 42 & 84** of the **Court of Appeal Rules** (the Rules) seeking *inter alia*:
 - ***That the appeal lodged in this Court on 26th August, 2014 be struck out.***
2. The grounds in support of the application are that pursuant to leave granted by this Court, the respondent filed the Record of Appeal on 26th August, 2014. The said Record has omitted primary documents from Kigumo SRMCC No. 143 of 2008 and H.C.C.A No. 107 of 2009; the Record has not been certified as correct by the respondent's counsel contrary to **Rule 87(5)** of the Rules. Consequently, the said Record does not constitute a proper Record of Appeal. Hence no appeal has been filed by the respondent pursuant to the leave granted. At the hearing of the application Mr. Mbuthia, learned counsel for the applicant, reiterated the aforementioned grounds and urged us to allow the application. On the other hand, Mr. Njoroge, learned counsel for the respondent,

sought leave to file a reply to the application. He admitted that he was served with the current application in September, 2014 and stated that he had been experiencing difficulty in contacting his client to seek instructions on the same. This Court declined to grant leave sought on the grounds that Mr. Njoroge had been served with the application three months prior to the hearing date and the explanation given for failure to file the reply was not reasonable.

3. We have considered the application before us, the grounds in support of the application and the law. **Rule 84** of the Rules provides:-

“A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.”

4. As hereinabove stated the Record of Appeal was filed on 26th August, 2014; however, we are unable to determine when the same was served upon the applicant. The current application was filed on 23rd September, 2014. Assuming that the said Record was served upon the applicant on 26th August, 2014 or at a later date, the current application has been filed within the requisite period, and is properly before us.
5. **Rule 87** of the Rules provides in part as follows:-

87(1) For the purpose of an appeal from a superior court...., the record of appeal shall subject to sub-rule (3) contain copies of the following documents-

- a.
- b.
- c. ***The pleadings;***
- d. ***The Judge’s notes of the hearing;***
- e. ***The transcript of any shorthand notes taken at the trial;***
- f. ***The affidavits read and all documents put in evidence at the hearing.....***

(5) Each copy of the record of appeal shall be certified to be correct by the appellant or by any other person entitled under Rule 22 to appear on his behalf.”

6. It is the applicant’s case that the Record does not contain the pleadings, typed and handwritten proceedings, the decree, exhibits, the memorandum of appeal and submissions by parties in the High Court and subordinate court. The applicant further contends that the respondent’s advocate failed to certify the Record as being correct. We have perused the Record and note that the aforementioned documents have been omitted and the Record has not been certified as correct. We cannot help but note that the respondent did not file a reply to the application and neither did his counsel in his address to us submit on the application.
7. Therefore, what is the consequence of the said omissions in the Record? In respect of the omission of the primary documents **Rule 88** of the Rules provides:-

“Where a document referred to in rule 87(1) & (2) is omitted from the Record of Appeal the appellant may within 15 days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the Deputy Registrar on application.”

In this case the respondent neither filed a supplementary Record of Appeal containing the omitted documents within the requisite period nor did he file an application seeking leave to lodge the said documents. We find that the Record in question has omitted primary documents which are essential to the determination of the appeal. We also find that certification of a Record is essential in determining the accuracy of the Record. Consequently, we are of the considered view that the Record as filed is defective and the same cannot be cured by the overriding objective of this Court. The law and procedure of instituting an appeal and lodging omitted documents from the Record is clear and settled as herein above stated. We are of the considered view that to hold otherwise would upset the established clear principles of institution of an appeal in this Court. In **City Chemist (NRB) & Others –vs- Oriental Commercial Bank Ltd- Civil Application No. Nai. 302 of 2008** this Court in discussing the overriding objective of the Court stated:-

“That however is not to say that the new thinking totally uproots well established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

8. The upshot of the foregoing is that we allow the application and hereby strike out the appeal. The applicant shall have the costs of this application.

Dated and delivered at Nyeri this 3rd day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR