



**IN THE COURT OF APPEAL
AT MOMBASA**

CORAM: TUNOI, BOSIRE & VISRAM, J.J.A.

CIVIL APPEAL (APPLICATION) NO. 120 OF 2008

BETWEEN

DANIEL MUSINGA T/A

MUSINGA & COMPANY ADVOCATES APPLICANT/ RESPONDENT

AND

NATION NEWSPAPERS LIMITED RESPONDENT/APPELLANT

(An application to strike out the record of appeal from the judgment and decree of the High Court of Kenya at Mombasa [Khaminwa, J] dated 6th May, 2005

in

HCCS NO. 102 OF 2000)

RULING OF THE COURT

By this application lodged in the Court on 24th June, 2008, the applicant **Daniel Musinga T/A Musinga and Company Advocates**, who is the respondent in the appeal, seeks an order that the appeal lodged by Nation Newspapers Limited, the appellant in the appeal and respondent in the application, be struck out for being incurably defective on the ground that the record does not contain primary documents, to wit, the entire proceedings of the superior court and that the proceedings produced are incomplete and contain gaps, missing words and/or sentences which are incomprehensible.

While the respondent's learned counsel does not dispute the fact that some pages of the proceedings of the superior court are missing from the record, he explains the cause of the omission as follows: Judgment the subject matter of the appeal was delivered on 6th May, 2005. On the instructions of the respondent, he filed a notice of appeal on 10th May, 2005 and duly served it on the applicant within the period prescribed by the Rules. On 13th May, 2005, he applied for typed copies of proceedings. On 28th May, 2008, the Deputy Registrar informed his firm of advocates that the proceedings sought were ready for collection on payment of the requisite fees. Upon making payment he was provided with the proceedings now contained in the Record of Appeal from pages 56 to 129.

The respondent subsequently lodged the appeal on 20th May, 2008, but was surprised to be served with the application now before us. An attempt by the respondent's counsel to solicit from the applicant what documents were missing from the record of appeal elicited no reply.

It is plain that the record of appeal is incomplete in that several pages of the proceedings are missing. We accept that the omission was first noted by the applicant's counsel. But the respondent's counsel did not.

It is also true that the appeal cannot be properly and effectively heard with the record of appeal as it is. It would prejudice both parties in that vital parts of the proceedings are missing while the incorporated portions cannot be deciphered.

Who is to blame? Certainly the respondent is not entirely to blame nor its counsel. They compiled the record of appeal from the documents and proceedings supplied by the Deputy Registrar.

The applicant on realizing the omission which rendered the record defective and insufficient could have lodged a supplementary record of appeal containing the missing copies as is provided for by **rule 92 of the Rules of the Court 2010 (formerly rule 89)**. If it had done this, this application would have been superfluous and the appeal would have been fixed for hearing on merit and thereby saving much time and expenses.

Litigants and their advocates are mandated to observe the rules of the Court and its process in order to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. See **Section 3A and 3B of the Appellate Jurisdiction Act Cap 9** and **Sections 1A and 1B of the Civil Procedure Act Cap 21**. However, where there is an innocent digression, as in the matter before us, the interests of justice must prevail which in this case is that the missing copies of proceedings and documents be put in the record of appeal under **rule 92** aforesaid so that the appeal may be heard and determined on merit rather than striking it out on a technicality.

In the result, we order the respondent to file and serve a supplementary record of appeal containing all the missing copies of proceedings and documents within 21 days hereof.

It must follow, therefore, that the application fails and is accordingly dismissed. Costs shall be in the appeal.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR