



**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: O'KUBASU, ONYANGO OTIENO & NYAMU, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 83 OF 2008

**BETWEEN
HOUSING FINANCE COMPANY OF KENYA RESPONDENT/APPLICANT**

AND

ROSE WANGARI NDEGWAR APPELLANT/RESPONDENT

(Application to strike out the appeal being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Sergon, J.) dated 20th day November, 2007

in

H.C.C.C. NO. 8 OF 2007)

RULING OF THE COURT

This is an application brought under **Rules 42(1) and 80** of the Court of Appeal Rules. The applicant, **HOUSING FINANCE COMPANY OF KENYA** seeks orders that the appeal filed on **2nd May, 2008** by the appellant/respondent **ROSE WANGARI NDEGWA** be struck out with costs to the applicant.

The application which is supported by the sworn affidavit of **MANSUR MUATHE ISSA** is brought on the following grounds:-

“(a) The appellant has not filed her Appeal within the prescribed time limited by Rules 81 of the Court of Appeal Rules.

(b) The appellant cannot rely on the proviso to Rule 81 of the Court of Appeal Rules as the letter requesting for typed proceedings has never been served on the Respondent/Applicant or its Advocates firm on record, the firm of Issa & Company Advocates.

(c) The Appellant has not served the Notice of Appeal on the 2nd, 3rd and 4th defendants within the prescribed period.

(d) The order subject matter of the Appeal does not conform to the Ruling of the learned judge of the superior court. The appeal is therefore incompetent as the order extracted by the appellant is invalid.

(e) The Record of appeal does not have a valid order as the order was extracted by the appellant without any compliance with Order XX Rule 7 of the Civil Procedure Rules.

(f) The Record of Appeal does not contain the replying affidavit sworn and filed in court on 28th August, 2007 on behalf of the 2nd and 3rd Defendants. No leave was obtained to exclude the affidavit from the Record of Appeal.

(g) The Record of Appeal does not have the Certificate required under Rule 85(5) of the Court of Appeal Rules.”

When this application came up for hearing on 21st January, 2011, Mr. M.M. Issa, the learned counsel for the applicant, relied on the grounds set out above and a list of authorities in asking us to strike out the appeal.

In response, Mr. Kinyua Kamundi, the learned counsel for the appellant/respondent, informed us that his office took upon itself to take the record and have it typed in their office.

As regards the order which was challenged by Mr. Issa, it was Mr. Kamundi’s submission that the order reflected what was in the record of appeal and hence it could not be declared a nullity.

Mr. Kamundi informed us that there was another application in the superior court in which a ruling was yet to be delivered and that in the event that the application in the High Court is allowed, then the appeal, the subject of this application shall be rendered unnecessary. On this issue of a pending application, Mr. Issa’s response was that there was indeed an application for injunction which was, however, dismissed, and that there was a subsequent suit which was filed in which an injunction is being sought.

Mr. Kamundi, conceded that there might have been procedural lapses but it was his view that these were merely technicalities which should not be used to defeat the ends of justice. He sought to rely on **Article 159(2)(d)** of the Constitution.

We have considered the rival submissions presented in this application and having set out the grounds in support of the application, it would appear that there were indeed some procedural lapses but in our view, these lapses are excusable especially in view of the explanation given by Mr. Kamundi.

Article 159(2)(e) of the Constitution provides:-

“justice shall be administered without undue regard to procedural technicalities.”

We would add that indeed **Article 159** of the Constitution deals with judicial authority but of particular relevance to this application is **sections 3A** and **3B** of the Appellate Jurisdiction Act which provide:-

“3A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

“3B (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.”

In view of the foregoing and bearing in mind special circumstances of this case, we are satisfied that the minor procedural lapses in preparation of the record of appeal are capable of being rectified and are sufficiently cured by the provisions of the Appellate Jurisdiction Act cited above. We direct that either party has leave to file a supplementary record within 7 days incorporating any of the essential documents not previously incorporated in the record. In the circumstances, we are of the view that the application cannot be granted. Consequently, we order that the application to strike out the appeal be and is hereby dismissed but with no orders for costs.

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

E.O.O’KUBASU

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR