IN THE COURT OF APPEAL
AT MOMBASA

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

CIVIL APPEAL (APPLICATION) NO. 114 OF 2008

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION …….. APPELLANT/RESPONDENT

AND

AHMED MWIDANI ……..…….. 1ST RESPONDENT/1ST APPLICANT
JUMA SWALEH ……..…..…….. 2ND RESPONDENT/2ND APPLICANT
KIUN COMMUNICATIONS LIMITED …….....……...… 3RD RESPONDENT
VECTORCON PEST CONTROL & SUPPLIES LIMITED ….....… 4TH RESPONDENT
IMPERIAL BANK LIMITED …….……..……..…….. 5TH RESPONDENT

(An application to strike out record of appeal against the ruling and decree issued by the High Court of Kenya at Mombasa (Sergon, J.) dated 19th day of February 2008,

in

H.C.C.C.NO.203 OF 2007)
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RULING OF THE COURT

The application before the Court is to strike out the appeal and is expressed to be grounded on ***Rules 85(1)***, ***80*** and ***42(1)*** and ***2*** of the Court of Appeal Rules.

The grounds upon which the application is based are:-

i. That the appeal is against the Ruling and Order of the superior court made on 19th February 2008.

ii. That the Order appealed from has not been extracted and is not part of the record of appeal.

iii. That the order is a primary document and the failure to annex it is fatal to the appeal.

At the hearing the 1st applicant/respondents' counsel Mr Khatib highlighted the above grounds but added that what should have been extracted and made part of the record of appeal was an order and not a decree and as the ruling is dated 20th February 2008 the decree should have borne the same date instead of 19th February 2008 as stated in the extracted decree and in view of these two defects, he submitted that the appeal was incompetent.

Mr Okongo, learned counsel for the 4th respondent/applicant in supporting the application, submitted that ***rule 85(1) (h)*** of the Court's Rules does not contemplate a decree but he was quick to add that as a matter of fact the ruling was delivered on 19th February 2008 as mentioned in the challenged decree. He further added that as the matter was not finally determined what was extracted should have been an order and not a decree and therefore the decree did not tally with the ruling.

On his part, Mr Kamundi learned counsel for the 5th respondent/applicant drew the Court's attention to ***Article 159(d)*** of the Constitution which deals with procedural technicalities and also the overriding objective in terms of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. In his view, any procedural defect touching on the decree should not result in the striking out of the appeal in view of the two provisions. The Court he stressed should in view of the above provisions lean towards saving the record of appeal.

Mr Kaguchia, learned counsel for the respondent/appellant contended that the decree as extracted was competent because firstly the matter was terminated in the superior court following an application to strike out the plaint and according to the definition of a decree in section 2 of the Civil Procedure Act, a decree results in the event of striking out of a plaint as happened here and in addition there was a specific finding that there was no reasonable cause of action which again is a final conclusion consistent with a decree being extracted instead of an order since all issues were conclusively determined. In addition, counsel contended that even if the Court were to find that the record of appeal was not complete, this was a fit case to give leave for a supplementary record to be filed incorporating a certified order or decree instead of taking the drastic step of striking out the entire record. As authority for this suggestion he drew this Court's attention to the decision of this Court in the case ***of Indombi Wasike v Benson Wamalwa Khisa & another Nai Civil Application Number 87 of 2004*** (unreported), where a certified copy of the decree was omitted from the record but the Court all the same gave leave for a supplementary record to be filed incorporating the omitted document in the spirit of the overriding objective. In further support of his submissions Mr Kaguchia urged this Court to take a broad view of the situation before it, in order to act fairly and in this regard cited, a long list of recent authorities of this Court, most of which touch on the application of the overriding objective and urged us to follow them.

We have considered the submissions of counsel and also looked at the decree incorporated in the record of appeal, and have further taken into account the twin challenges against it, namely its date, and that it should have been extracted as an order. In answer to the first challenge we note that it has been conceded by counsel that the ruling the subject matter of the appeal was given on 19th February 2008 and not on 20th February 2008. There is nothing we can usefully add to the first challenge since the decree as extracted was therefore correctly dated. Concerning the second challenge, which touched on the formal name of the final decision reached, we agree with the submissions of Mr Kaguchia, learned counsel for the appellant/respondent that the finality of the decision had the effect of converting the ruling given by the Judge as a decree following the striking out. In this connection the position we have taken is fortified by the definition of "decree" in ***section 2*** of the Civil Procedure Act which is as follows:-

"Decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint …"

The above notwithstanding, we fully endorse the ***Indombi*** case ***supra*** and reiterate that even if we were to find that there was no proper decree this Court would still have been at liberty to give leave to the parties to file a proper decree or order so that the appeal is finally heard on merit. This approach has the high authority of ***Article 159(2)(d)*** of the Constitution which states:-

(d) "justice shall be administered without undue regard to procedural technicalities.

(e) the purpose and principles of this Constitution shall be protected and promoted."

Long before the promulgation of the Constitution we were happy to observe that the winds of change against undue regard to technicalities of procedure had blown towards the shores of substantive justice as is clearly set out in the long line of cases of this Court as cited by Mr Kaguchia on ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act.

Concerning submissions made on ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act we consider that we are under a statutory duty to apply the overriding objective in every situation before us because it is the whole object of the Act, its provisions and rules. To add another building block to the ***Indombi*** case it is the basis and the reason for the exercise of our power under the Act, provision or rule. It is the length, width and depth of our interpretation of the Act, provision or rule and nothing whatsoever can prevent the Court in civil cases from acting fairly and justly in every situation in the face of the objective. Thus in the circumstances of the case before us the demands of the objective in our view will be met by dismissing the application in order to pave way for a speedy hearing of the appeal on merit.

On the other hand the cited ***Article 159(2)(d)*** of the Constitution, in our view, operates on a higher plane against reliance on technicalities of procedure in all cases where judicial power is to be exercised. Granted that in determining this application we are exercising judicial power the technical points raised must in the same way give way to the hearing of the appeal on merit.

The upshot is that the application is dismissed with costs to the appellant/respondent.

It is so ordered.

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

E.O. O'KUBASU
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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