IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 152 OF 2009

DEEPAK CHAMANLAL KAMANI ……..…..... 1ST APPLICANT/RESPONDENT

RASHMI CHAMANLAL KAMANI…….....…. 2ND APPLICANT/RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION ,…..1ST RESPONDENT/APPELANT

PRINCIPAL IMMIGRATION OFFICER …….……..…,….. 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA..…….….. 3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT, NAIROBI ……,,..…… 4TH RESPONDENT

(An application to strike out the Record of Appeal arising from the ruling and orders of the High Court of Kenya at Nairobi (Nyamu, Wendoh & Emukule, JJ) made on 22nd June, 2007

In

High Court Petition No. 199 of 2007

Consolidated with

High Court Petition No. 200 of 2007)

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RULING OF THE COURT

By their notice of motion dated and lodged in this Court on 30th July, 2009, Deepak Chamanlal Kamani, the 1st applicant and Rashmi Chamanlal Kamani, the 2nd applicant, asked the Court under ***Rule 80*** of its rules for an order that:-

"---Civil Appeal No. 152 of 2009 filed by the 1st Respondent, Kenya Anti-Corruption Commission, be struck out with costs to the Applicants."

The only ground upon which that order is sought is stated to be that:-

"--- primary documents including the notes of 2 trial judges have been omitted in the Record of Appeal thereby making the appeal incurably defective."

Civil Appeal No. 152 of 2009 arises from a judgment of the superior court dated 22nd June, 2007. That judgment was the work of three learned Judges of the superior court, namely, Mr. Justice Nyamu, Lady Justice Wendoh and Mr. Justice Emukule. The judgment granted to the applicants certain orders based on certain provisions of the Constitution of Kenya. The orders were made against the Kenya Anti-Corruption Commission, the 1st respondent to the motion before us, and some two other public officers, cited in the motion as the 2nd and 3rd respondents. The appeal sought to be struck out was brought only by the 1st respondent. There can be no doubt that serious principles of law were involved in the judgment. The superior court itself recognized that fact and commented as follows in its judgment which ran into some **110** typed pages:-

"-------. We make no order as to costs due to obvious public law considerations and the novelty of this judgment in 'transiting' from an era of prerogative power to that of constitutional enforcement of rights, and its impact on the constitutional landscape of our great country. ----"

Mr. Ngatia, learned counsel for the applicants submitted before us that we must strike out the appeal because it is incurably defective. Mr. Ngatia said that the hearing of the constitutional petitions in the superior court was before three Judges. That is correct. Mr. Ngatia also stated that during the hearing, each of the three Judges made his or her own notes . That is again correct. In compiling the record of appeal, the 1st respondent, for some reason of its own, chose to include in the record the notes of only one Judge. Again, that is also correct. So Mr. Ngatia submitted that the appeal is incurably defective because under ***rule 85 (1)*** of the Court's rules, among the documents to be included in a record of appeal are:-

"(***a) ----------***

(b) ----------

(c)----------

(d) the trial judge's notes of the hearing.

(e) ----------

(f) ----------

(g) ----------

(h) ----------

(i) ----------

(j) ----------

(k) ----------"

Rule 85 (2A) then provides:-

"***Where a document referred to in paragraph (a), (b)), (e), (i) or (k) of sub-rule (1) is omitted from the record, the appellant may, with leave of the Court, include the document in a supplementary record of appeal filed under rule 89 (3)."***

Paragraph (d) which deals with the trial Judge's notes is not covered by ***rule 85 (2A)*** so that a trial judge's notes of the hearing cannot be brought in with the leave of the Court under ***rule 89 (3)***. That is the

origin of the expression "*primary documents*" and the Court has ruled time without number that the consequence which follows when a primary document is left out of the record is that an appeal is incurably defective and can only be struck out. Mr. Ngatia cited several authorities for that proposition, among them being **PATTNI & ANOTHER VS. REPUBLIC, THROUGH THE HON. THE ATTORNEY GENERAL**, Civil Appeal No. 263 of 1999 (unreported) which was on all fours with the present case.

Professor Githu Muigai, learned counsel for the 1st respondent, sought to draw a distinction between notes of the trial judge which contain oral evidence given at the trial and notes which are made by the trial judge when no witnesses have testified in the matter as was the case here. With respect to Professor Muigai, we can find no basis for drawing such a distinction. If the rule had meant notes of the trial judge containing the evidence of witnesses, the rule-maker would have had no difficulty in stating so. As we have seen the rule simply states:-

"the trial judge's notes of the hearing."

A hearing can and often is conducted without witnesses. The absence of witnesses cannot deprive proceedings of the right to be called a hearing. We would reject this contention by Professor Muigai.

Ought we to strike out the appeal?

Before we do so, we must consider if the new provisions contained in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act, ***Chapter 9*** of the Laws of Kenya, are relevant to the issue at hand. Those provisions contain what is called "*the overriding objective of civil litigation*" and are in these terms:-

"3A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditions, 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 process of the Court and orders of the Court.

(4)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."

The Lord Woolf Report introduced similar provisions in England in 1998, namely the Civil Procedure Rules from which the concept of overriding objective arose. Professor Muigai cited to us the case of **BIGUZZI VS. RANK LEISURE PLC [1999] 1 W.LR 1926** wherein Lord Woolf himself talked about the concept of overriding objective. Lord Woolf explained:-

"Under the CPR the position is fundamentally different. As rule 1.1. makes clear the C.P.R. are '*new proceduralcode with overriding objective of enabling the court, todeal with cases justly'* ***The problem with the position prior to the introduction of the C.P.R. was that often the courts had to take draconian steps, such as striking out the proceedings, in order to stop a general culture of failing to prosecute***

proceedings expeditiously. -----. That led to litigation which was fought furiously on both sides: On behalf of the claimants to preserve their claim, and on behalf of defendants to bring the litigation to an end irrespective of the justice of the case because of failure to comply with the rules of the court."

Here Lord Woolf was dealing with a situation in which a writ had been struck out for failure to comply with rules. But the principle is really the same; here we are being asked to strike out the appeal because the 1st respondent has failed to include the notes made by the other two trial Judges which is said to be in violation of ***rule 85 (1) (d)*** of the Court's rules. Lord Woolf then continues at page 1933 of the Report:-

"Under rule 3. 4 (2) (c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C. P.R. over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

Of course, the Civil Procedure Rules, 1998 of England are an elaborate set of rules which provide solutions to various situations. But in our case the overriding objectives are contained in an Act of Parliament and under section ***3A (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)."

The overriding objective specified in ***subsection (1)*** is :-

to facilitate the just, expeditions, proportionate and

affordable resolution of appeals governed by the

Act."

The rule which we are called upon to interpret is made under the Act and in applying or interpreting the rule, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of an appeal.

What will happen, for example, if we were to strike out the appeal? The common experience of the Court is and has always been that whenever an appeal is struck out, the losing party invariably invokes the jurisdiction of the Court under ***rule 4*** of the rules under which the Court can enlarge time within which to file a fresh notice of appeal and a fresh record of appeal. That invariably increases the costs of the litigation. In addition to increasing the costs, since the parties are starting all over again, the time within which an appeal would take to be eventually determined on merit is unnecessarily lengthened. In a case where the party whose appeal has been struck out does not start afresh his appeal would not have been determined on merit at all, and, therefore, it cannot really be said that a just determination has been made in the case. These are the situations which Parliament must have intended to remedy by incorporating the overriding objective in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. Similar provisions have been incorporated in the Civil Procedure Act to cover litigation in the High Court and in the subordinate courts.

So that as Lord Woolf says in the **BUGIZZI Case**, the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.

But as this Court differently constituted pointed out in the recent decision of **CITY CHEMIST (NRB) & OTHERS VS. ORIENTAL COMMERCIAL BANK LTD**., Civil Application No. NAI. 302 of 2008

(UR 199/2008), unreported, the new approach which the courts must now adopt and operationalise:-

"---------- is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the 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 unambiguous principles and precedents assist 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. ------."

That caution by the Court is well founded and in applying the overriding objective principle, the courts must bear the caution in mind. For instance, under ***rule 4*** of the Court's rules a party who takes say six months before filing a notice of appeal and is asking the Court for enlargement of time, to do so cannot simply tell the Court:-

"I come relying on the overriding objective of litigation contained in sections 3A and 3B of the Appellate Jurisdiction Act. You must extend time for me so that my appeal which in my view is meritorious, can be determined upon the merits."

Such a party would still have to explain to the Court why it took him six months to file the notice of appeal, whether the proposed appeal is meritorious and such like requirements. In such a case the overriding objective principle may well be invoked against such a party by telling him that it would be contrary to the principle to allow him to re- open the litigation after such a long time and for no good reason for the delay. As the Court says in the **CITY CHEMIST (NRB) Case** supra, the amendments enrich that principle and embolden the Court to be guided by a broad sense of justice and fairness as it applies the principles. In dealing with decisions of the Court made before the amendments, litigants and the practicing bar must now bear in mind the existence of the amendments and that the Court will consider previous decisions bearing in mind the existence of the amendments.

We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditions, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under ***rule 89 (3)*** of the Court's rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal. The 1st respondent must file and serve the supplementary record of appeal within twenty-one (21) days of the date hereof. The costs of the motion shall be paid to the applicants by the 1st respondent in any event. Those shall be our orders in the motion.

Dated and delivered at Nairobi this 15th day of January, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

D.K.S. AGANYANYA

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.