**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Civil Application 24 of 2008**

**JAMES NJUGUNA…….. APPLICANT**

**AND**

**FRANCIS NGAMBI RUKOMIA.. …… 1ST RESPONDENT**
**AFRICAN INLAND CHURCH …….. 2ND RESPONDENT**
**COUNTY COUNCIL OF NAKURU ……. 3RD RESPONDENT**
**ATTORNEY GENERAL …… 4TH RESPONDENT**

*(An application for leave to amend memorandum of appeal in Civil Appeal No. 121 of 2007 being an appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J) dated 16th day of November, 2006*

**In**

**H.C.C.C. No. 276 of 1997)**
*****************************

**RULING**

The applicant in the notice of motion dated 31st January, 2008 and lodged in the Court on 1st February, 2008 is **James Njuguna Warukira**. The respondents to that motion are listed as Francis Ngambi Rukomia, the 1st respondent, the African Inland Church, the 2nd respondent, County Council of Nakuru as the 3rd respondent and the Hon. the Attorney General as the 4th respondent. When the motion was argued before me only the applicant, represented by Mr. Kagucia and the 2nd respondent, represented by Mr. Kahiga attended the hearing. Under ***Rules 44*** and ***52*** of the Court's Rules, the applicant is seeking leave of the Court to amend a memorandum of appeal filed in Civil Appeal No. 121 of 2007 wherein the appellant is shown as Francis Ngambi Rukomia, the first respondent herein. The applicant wishes to be cited as the appellant in that appeal. In the superior court, the firm of Mr. Kagucia appeared for both the applicant and the first respondent and in her affidavit in support of the motion to amend, Judith Achieng' Nyagol, the then counsel for the applicant, swears the naming of the 2nd respondent as the appellant in the memorandum of appeal in Civil Appeal No. 121 of 2007 was purely a typographical and human error and Mr. Kagucia submitted before me that the change from the first respondent to the applicant as the appellant will not in any way alter the nature of the appeal itself

or cause any injustice to any of the respondents, in particular the second respondent.

But the second respondent had in fact filed a separate motion to have Civil Appeal No. 121 of 2007 struck out on the very ground upon which the amendment is sought and also on the ground that the record of appeal was lodged in Court out of the prescribed time and without leave of the Court. Mr. Kahiga submitted the present motion was brought expressly to thwart the second respondent's motion to strike out the appeal; that motion was filed earlier than the applicant's present motion and as such ought to have been heard and determined before the motion by the applicant. Mr. Kahiga further told me that even if I were to allow the proposed amendment, it would amount to an exercise in futility because their pending motion complains that the appeal was filed out of time without leave and as such is bound to be struck out. Mr. Kahiga also submitted that the applicant ought to have obtained an affidavit from the first respondent stating that the first respondent is not the appellant in Civil Appeal No. 121 of 2007.

It is common ground that in the superior court, the applicant and the first respondent were represented by one firm of advocates. I must take it that the first respondent is and has always been aware of this motion which was drawn and filed by his [former?] advocates. He has not come forward, and he could have done so, to say that he is in fact the appellant in Civil Appeal No. 121 of 2007. Even in the proposed amendments, the first respondent will still remain a party to the appeal as a respondent and if he wishes to do so, he will be able to raise whatever issues he may wish to raise. I do not think I ought to refuse the proposed amendments on the basis that the first respondent has not sworn and filed an affidavit in this motion.

As to whether I should allow the proposed amendments I must bear in mind the provisions of ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act. Those provisions deal with the over-riding objective in civil litigation and ***section 3A (1)*** provides that:-

> "***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."***

***Subsection (3)*** of the section obliges advocates in an appeal to the Court to assist the Court further the overriding objective and, to that effect, to participate in the process of the Court and orders of the Court.

Mr. Kahiga says that even if I allow the proposed amendments that would not help the applicant because Civil Appeal No. 121 of 2007 is bound to be struck out just as Civil Appeal No. 122 of 2007 was struck out by the Court on 1st October, 2009. That appeal was struck out because the record did not contain a notice of appeal filed by the purported appellant therein, namely Francis Ngambi Rukomia. The notice of appeal in that record was filed by the County Council of Nakuru, not by Francis Ngambi Rukomia. When the motion was argued before me, I did not have Civil Appeal No. 121 of 2007 and also No. 122 of 2007. I called for those records to enable me write this ruling. At page 179 of Civil Appeal No. 121 of 2007 is the notice of appeal upon which that record is based. That notice of appeal was lodged by the County Council of Nakuru, not by James Njuguna Warukira, the applicant herein. So it would appear that the applicant herein has never lodged any notice of appeal in respect of the decision of 16th November, 2006, in which he wants to be

made the appellant. I do not think that even the provisions of ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act can be invoked to assist the applicant in this case. Those provisions can only be invoked to assist a party who has lodged an appeal but which appeal is subsequently found to be defective in some way. A party who has not lodged a notice of appeal cannot be treated as an appellant. As this Court pointed out in **CITY CHEMIST (NRB) & ANOTHER VS. ORIENTAL COMMERCIAL BANK LTD**., Civil Application No. NAI 302 of 2008 (UR. 199/2008 – unreported) the new thinking brought in by ***sections 3A & 3B***, does not:-

> ***"---- totally uproot 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 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. ----------"***

It is a well established principle that only a party who has filed a notice of appeal can appeal to this Court. The new thinking brought in by ***sections 3A*** and ***3B*** cannot and has not overturned that principle. The applicant before me has never filed any notice of appeal, the one contained in Civil Appeal No. 121 of 2007 having been lodged by a party who is not the applicant. I was not asked to and even if I had been asked, I would have refused to delete the name of County Council of Nakuru in the notice of appeal at page 179 and insert the name of the applicant as the person who lodged that notice of appeal.

I accordingly agree with Mr. Kahiga that it would be futile to grant the applicant the amendments it is seeking. He cannot become an appellant when he in fact filed no notice of appeal. That being the view I take of the matter, I order that the notice of motion dated 31st January, 2008 and lodged in the Court on 1st February, 2008 be and is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at Nakuru this 26th day of February, 2010.

**R.S.C. OMOLO**
**…….**
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**