REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal (Application) 329 of 2009

BETWEEN

KENYA COMMERCIAL FINANCE COMPANY LIMITED .... APPLICANT

AND

RICHARD AKWESERA ONDITI .... RESPONDENT

(Application to strike out Civil Appeal No. 42 of 2009 from the judgment and decree of the High Court of Kenya at Kakamega (Tanui J.) dated 18th September, 2001

in

H.C.C.C. NO. 65 OF 1993)
****

RULING OF THE COURT

For a long time, the appellant **Richard Akwesera Onditi,** has laboured to file a valid record of appeal in this Court. His last effort ended by his filing *Civil Appeal No. 329 of 2009* which he lodged in the Registry of the Court at Kisumu on 31st December, 2009. But as soon as the respondent **Kenya Commercial Finance Corporation** was served with the record of appeal, it lodged a notice of motion dated 25th January, 2010 seeking an order that the appellant's latest appeal be struck out on the ground that:

"(i) the certified copy of the decree contained in the record of appeal does not agree with the judgment and the pleadings in the superior court;

(ii) the appellant has omitted some primary documents from the record of appeal, and in law, that omission cannot be cured by filing a supplementary record of appeal.

(iii) the omission of primary documents was done without the requisite leave of the Deputy Registrar of the superior court; and

(iv) the prayers in the memorandum of appeal *'do not abide the pleadings in the superior court'***."**

Arguing the motion to strike out, Mr. Wanjala, learned counsel for the applicant told us that in the superior court it was the appellant who had sued the respondent who is the applicant herein. The applicant had in turn filed a defence and a counter-claim. The

respondent's suit was dismissed by the superior court while the applicant's counter-claim was allowed. The certified copy of the decree in the record of appeal only cites the part of the superior court judgment allowing the counter-claim but is silent on the part that dismissed the respondent's suit in the superior court. The notice of appeal that the appellant had lodged stated that he intended to appeal against the whole judgment delivered by Tanui, J. as he then was, on 18th September, 2001. It was Mr. Wanjala's submission that since the certified copy of the decree in the record omitted the portion of the superior court's judgment dismissing the appellant's appeal and as a decree is a primary document which cannot be brought in the record by way of a supplementary record, the appeal itself is incurably defective and can only be struck out. The appellant's answer to this was that his appeal ought not to be struck out because of the stated omission.

On the issue of primary documents being omitted from the record, Mr. Wanjala says the omitted documents were produced in the superior court as exhibits and therefore, had to be included in the record as primary documents. There was no order either of a judge or a deputy registrar authorizing the omission. In the view of Mr. Wanjala, as the omitted documents cannot be brought in by way of a supplementary record, the appeal can only be struck out. The appellant's answer to this contention was that the record of appeal contains all the documents which were produced in the superior court.

There is no doubt that if Mr. Wanjala's submissions were made in this Court before the enactment of **Sections 3A** and **3B** of the *Appellate Jurisdiction Act*, there would have been no valid answer to them. Since the enactment of the said provisions, which brought in the principle or concept of overriding objective in litigation, there can be no automatic striking out of an appeal or a notice of appeal unless there is no alternative to that course. The Court has fully dealt with such issues in various decisions such as **CITY CHEMIST (NRB) & OTHERS VS. ORIENTAL COMMERCIAL BANK LTD**, *Civil Application No. Nai. 302 of 2008 (UR. 199/2008)*, (unreported), **DEEPAK CHAMNLAL KAMANI & ANOTHER VS. KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS** [2010] e KLR and numerous other cases. In **KAMANI'S** case the Court cited and approved the remarks of Lord Woolf in **BIGUZZI VS. RANK LEISURES PLC** [1999] 1 W.L.R. 1926. Lord Woolf's Committee had introduced in the English legal system the concept of overriding objective of litigation and his remarks in the **BIGUZZI** case can bear repeating in the matter before us. He said:

> **"Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR are** *'are new procedural code with overriding objective of enabling the court to deal with cases justly'*. **The problem with the position prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out 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".**

The learned Lord Justice continued:

> **"Under rule 3.4 (2) 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 the case. The advantage of the CPR 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 the draconian step of striking the case out. ....".

In **<u>KAMANI's</u>** case, the Court had been asked to strike out the record of appeal on the basis that primary documents, namely, the judges' notes of the hearing had been omitted from the record. While accepting that a judge's notes of the hearing were primary documents, the Court, nevertheless, refused to strike out the record of appeal and held:

"We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, 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. ....".

We must stress here that in applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the Court the provisions of **Sections 3A** and **3B** of the *Appellate Jurisdiction Act*. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives. It is also not to be forgotten that while the English position is, on the face of it, buttressed by rules, the courts' position in Kenya is buttressed by statute.

In the appeal we are asked to strike out, the judgment appealed against was delivered on 18th September, 2001; that is nearly nine years ago and we suspect that in between there must have been some striking out. Even Mr. Wanjala agreed that if the record of appeal is struck out, it is certain that the appellant will return to the court with an application for extension of time. That would result in further delay of the final disposal of the case and will inevitably result in further increase in costs. We think if would not be right for us to strike out the appeal which the Hon. the Chief Justice certified urgent on 28th January, 2010 on the application of the appellant. There are other alternatives available. Accordingly, we disallow the notice of motion seeking to strike out the appeal and dismiss it. We, however, order that the appellant shall, within twenty-one days of the date hereof, file a supplementary record of appeal containing an amended certified copy of the decree which must include the portion of the judgment dismissing his plaint with costs. Mr. Wanjala says the appellant has left out of the record certain exhibits which he did not precisely identify to us. We grant to Mr. Wanjala leave, under **Rule 89 (1)** of the Court's Rules to file within twenty one days of the date hereof a supplementary record of appeal containing the missing documents. Upon the two supplementary records being filed, each side shall serve the other side with his or its documents, within seven days of the filing. The costs of the motion shall be in the appeal. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 19th day of March, 2010.

R. S. C. OMOLO

....
JUDGE OF APPEAL

P. N. WAKI

....
JUDGE OF APPEAL

J. G. NYAMU

....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR