REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal (Application) 226 of 2008

ABDI NASSIR NUH …….……..….. APPLICANT/ 1ST RESPONDENT

AND

ABDUREHEMAN HASSAN HALKANO ….. RESPONDENT/APPELLANT
JOEL G. MWAMBURI (RETURNING OFFICER) ……. 2ND RESPONDENT
THE ELECTORAL COMMISSION OF KENYA ……... 3RD RESPONDENT

(An application to strike out Record of Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Azangalala, J) dated 29th September, 2008

in

H. C. Election Petition No. 6 of 2008
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RULING OF THE COURT

There are two almost identical applications before this Court, both seeking an order that the record of appeal filed by Abdureheman Hassan Halkano(appellant) on 24th October, 2008 be struck out. The first application is by Abdi Nassir Nuh, the successful candidate in the last general elections held in Kenya on 27th December, 2007 ("the general elections"). He was the first respondent in an election petition No. 6 of 2008 (Mombasa) filed by the appellant. The second application is by Joel G. Mwamburi and The Electoral Commission of Kenya who were 2nd and 3rd respondents respectively in the aforesaid election petition.

Both the applications are filed pursuant to ***rules 4, 13, 80 and 85 (1) (d)*** of the Court of Appeal Rules, and are based on the following grounds:

"(a) The Record of Appeal does not comply with Rule 85 (1) (d), of the Court of Appeal Rules.

(b) The Record of Appeal, particularly volume (2) are the handwritten proceedings of the Deputy Registrar contrary to Rule 13 (1) of the Court of Appeal Rules.

(c) The Record of Appeal has omitted Proceedings conducted on 25th & 26th August, 2008 before Justice Festus Azangalala wherein all the parties herein, gave submissions orally.

(d) The omission is fatal and incurable.

(e) The Decree and determination in the record is not dated as required by law."

The respondent in these applications was a voter in the Bura Parliamentary Constituency in the general elections. Following the announcement that Abdi Nassir Nuh had won the said Bura Parliamentary seat, the respondent filed a petition in the superior court challenging the same. The petition was heard by Azangalala, J who, in a judgment handed down on 29th September, 2008, dismissed the same. The respondent promptly filed a notice of appeal dated 20th September, 2008, and on 24th October, 2008 lodged the record of appeal, within the time stipulated in the National Assembly and Presidential Elections Act, Cap 7.

The complaint giving rise to the two applications before us is that the record of appeal contravenes ***rule 85 (1) (d)*** of this Court's Rules, in that a primary document, namely the trial judge's notes of proceedings conducted on 25th and 26th August, 2008 has not been included in the record of appeal. Essentially, these missing proceedings relate to submissions made by counsel before the trial judge. There is no dispute that the relevant proceedings are not part of the record. What is in dispute is whether "submissions" made by counsel, written or oral, can be classified "proceedings"; and whether the new sections 3A and 3B of the Appellate Jurisdiction Act could be invoked to remedy the situation.

Mr. Mutula Kilonzo, Junior, learned counsel for the applicant, argued that submissions by counsel were part of "the trial judge's notes of the hearing" as stipulated in ***rule 85 (1) (d)*** of this Court's Rules, and its omission rendered the appeal incompetent. He argued further that the defect could not be cured by filing a supplementary record, and relied on the cases of ***Uhuru Highway Development Ltd vs Central Bank of Kenya [2001] 1 EA***, ***Commercial Bank of Africa Ltd vs Ndirangu [2001] 1 EA*** and ***Lorna Chepkemoi Laboso vs Antony Kipkoskei Kimeto & 2 Others, Civil Appeal No. 172 of 2005***.

Mr. Lumatete Muchai, learned counsel for the 2nd and 3rd respondents, associated himself with the submissions made by Mr. Kilonzo.

Mr. Gikandi Ngibuini, learned counsel for the 1st respondent argued that submissions by counsel could not be construed as the trial judge's notes, and its omission was not incurably defective. In any event, he blamed the omission on the part of the Court, as the proceedings incorporated in the record were certified as correct by the Court. He asked the Court to invoke the new sections 3A and 3B of the Appellate Jurisdiction Act to cure the defect.

As we observed before, there is no dispute that the record of appeal omitted the trial judge's notes of proceedings in relation to the submissions made by counsel at the conclusion of the hearing of the case. The record shows that on 30th July, 2008 the learned Judge ordered that "the Petition be listed for submissions on 25th and 26th August, 2008". Thereafter, the record as presently filed, shows that Judgment was delivered on 29th September, 2008. Both parties acknowledge that written submissions were filed, and that the proceedings of 25th and 26th August, 2008 are not included in the record. ***Rule 85 (1)*** of this Court's Rules enumerates documents to be included in a record of a first appeal to this Court. The documents are of two categories, primary and secondary. The omission of any or parts of a document in the primary category renders an appeal incurably defective and therefore incompetent. (see ***Commercial Bank of Africa vs Ndirangu – supra*** and ***Uhuru Highway Development Ltd vs Central Bank of Kenya*** – **supra**).

In ***Commercial Bank of Africa vs Ndirangu – supra***, this Court, differently constituted, stated:
"The trial court's notes, whether or not either party considers them relevant and essential to the determination of the appeal, provided they were made before the decision appealed from, are primary documents and unless specifically excluded by a judge's discretion given under rule 85 (3) aforesaid, their omission from the record, as is the case here, render the appeal incompetent."

In the above case, Commercial Bank of Africa had urged the view that if the applicant, who sought to strike out the appeal, considered the missing documents to be essential, he, the applicant, was at liberty to file a supplementary record of appeal pursuant to the provisions of ***rule 89*** of this Court's Rules. This is how the Court rendered itself in its ruling:
"… the enactment of Rule 89 does not confer on this Court the power to excuse the exclusion of any

document from a record of appeal, but merely creates an opening for bringing on record, with the leave of the court, certain essential documents which, by an oversight or inadvertence, were excluded."

Mr. Gikandi, learned counsel for the respondent argued that submissions of counsel were not "proceedings" within the meaning of ***rule 85 (1) (d)*** and that in any event the Court had certified the proceedings as being correct. He did not cite any authorities for that proposition. We would reject both those arguments. We are of the view that submissions by counsel, whether written or oral, are an integral part of the proceedings, and an important consideration by a Judge in arriving at his or her decision. Its exclusion is fatal, and renders the appeal incompetent. We also express the view that the record belongs to the party that lodges the same, and it is that party's responsibility and obligation to ensure that it incorporates all the documents required under the Rules. Such a party cannot shift the blame on the Court or the Registrar in an attempt to persuade the Court that the record is complete. Finally, Mr. Gikandi submitted that he had already filed an application for leave to file a supplementary record to include the missing documents, and that, accordingly, the Court should invoke the new sections 3A and 3B of the Appellate Jurisdiction Act to save the record of appeal. Here is what this Court said in the case of ***Uhuru Highway Development Ltd (supra) at pg. 317*** (per Omolo, JA):

"This Court has repeatedly ruled that primary documents cannot be amended and primary documents, as far as I understand the position, are such documents which cannot be brought into the record of appeal by way of a supplementary record. Rule 85 (1) (a) to (k) lists all the documents which are to be included in a record of appeal. Rule 85 (2A) then lists those documents which, if left out of the record of appeal, may be brought in by way of a supplementary record. The documents which may not be brought in by way of a supplementary record and are, therefore, primary documents are:

(i) pleadings;

(ii) the trial judge's notes of the hearing;

(iii) the affidavits read and all documents put in evidence at the hearing (exhibits), or, if such documents are not in the English language, certified translations thereof;

(iv) the judgment or order;

(v) a certified copy of the decree or order; and

(vi) the notice of appeal.

These documents are 'primary' in the sense that once they are omitted from the record of appeal, they cannot be brought into the record by the filing of a supplementary record."

With regard to the application of sections 3A and 3B of the Appellate Jurisdiction Act, this Court, in a recent decision in ***Mohamed Koriow Nur vs Attorney General and Others (C. A. No. Nai. 347 of 2009)*** stated as follows:

"In **City Chemist (NBI) & 2 others vs Oriental Commerial Bank Ltd Civil Application No. Nai. 302 of 2008 (ur)** this Court referred to the parentage of the "*overriding objective*" in England since 1999 and stated:

'It was tailored to enabling the court to deal with cases justly which includes as far as practicable:

"(a) ensuring that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(v)

(e) ensuring that it is dealt with expeditiously and fairly; and

(f) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.'

Those are not pious aspirations and the court has a duty to give them operational effect. That however, 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 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."

We are, therefore, of the view that the trial court's notes including submissions made by counsel are primary documents and their omission from the record renders the appeal incompetent. It cannot be cured by invoking the aforesaid sections 3A and 3B.

Accordingly, and for reasons cited, we find that there is merit in the two applications before us, and we allow both of them, and order that the record of appeal dated 21st October, 2008 and lodged in this Court on 24th October, 2008 be and is hereby struck out with costs to both the applicants.

Dated and delivered at Mombasa this 12th day of March, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

……..

JUDGE OF APPEAL

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR