



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 191 OF 2005

BETWEEN

MUKAWA HOTELS HOLDINGS LIMITED APPELLANT/RESPONDENT

AND

BEAT KOCHRESPONDENT/APPLICANT

(Being an application to strike out the record of appeal and notice of appeal from the judgment/decree of the High Court of Kenya at Nairobi (Milimani)(Ibrahim,J.) dated 3rd March, 2004

in

H.C.C.C. No. 888 of 2001)

RULING OF THE COURT

By an application dated and filed in this Court on 14th September, 2005 the applicant/respondent applied for the striking out of the Notice of Appeal dated and filed in Court on 12th March, 2004. The application also sought the striking out of **Civil Appeal No. 191 of 2005** filed in this Court on 15th August, 2005, and a further order that the costs of the application and the appeal be awarded to the applicant/respondent. It was based on the grounds set out on the face thereof, namely; that:-

- (a) The notice of appeal herein is ex-facie invalid and incurably defective,***
- (b) No valid Notice of Appeal has been filed and served against the decision made on 3rd March, 2004***
- (c) The Record of Appeal filed herein is incurably defective***
- (d) The Record of Appeal filed herein does not contain essential primary documents***
- (e) In the premises an essential step in the proceedings had not been taken within the prescribed time.***

A supporting affidavit deponed to by **Mr. Gitonga**, learned counsel for the applicant/respondent and filed in court with the application complained about the wrong date recorded as that of delivery of the judgment, the subject of appeal No. 191 of 2004.

In a replying affidavit sworn by **Mr. Owang**, learned counsel for the appellant/respondent and filed in court on 31st April, 2009, he swore that though the judgment was delivered on 2nd March, 2004 but dated 3rd March, 2004, the appellant discovered the error on the face of the record of the superior court and filed an application in that court on 10th November, 2005 for an order to correct the error which order was granted on 12th May, 2006 and the date was corrected from 3rd March, 2004 to 2nd March, 2004. The application was heard by this Court on 18th February, 2010 when counsel for the parties reiterated what was contained either in the supporting or replying affidavit

As already stated, when the appellant/respondent discovered the error of the date the judgment was delivered, he applied through counsel, to the superior court for that error to be corrected under **section 99** of the Civil Procedure Act, Cap. 21 Laws of Kenya. The superior court (**Waweru, J.**) made a ruling on that application and stated thus:

“Upon my own examination of the judgment and the record of the court I find that there is an error arising therein from an accidental slip or omission, that error being that whereas Ibrahim, J. wrote the judgment, and pronounced it on 2nd March, 2004, he dated it on 3rd March, 2004. I can therefore amend the judgment to correct that error. I shall do so by substituting the 2nd of March, 2004 in place of 3rd of March 2004 as the date of the Judgment. The application by notice of motion dated 10th November, 2005 is therefore allowed upon the above terms with no order as to costs.”

The ruling is annexed to the intended supplementary record.

This aside, **rule 35(1)** of the Court of Appeal Rules provides as follows:-

“A clerical or arithmetical mistake in a judgment of the court or any error arising therefrom an accidental slip or omission may be at anytime whether before or after the judgment has been embodied in an order, be corrected by the court either of its own volition or on the application of any interested person so as to give effect to what was the intention of the Court when Judgment was given.”

With the annexed ruling of the superior court and the provisions of **rule 35(1)** of the Rules quoted above, of which learned counsel for the applicant/respondent is no doubt aware and that the Rules of this Court require it to enhance the ends of justice, we are of the view that the

application by Notice of Motion dated and filed in this Court on 14th September, 2005 was not necessary. That the application to the superior court was made after the application for striking out had been made does not take away the powers of this Court to do justice to the parties. The application by Notice of Motion dated and filed in this Court on 14th September, 2005 is hereby dismissed with no orders for costs.

Dated and delivered at Nairobi this 30th day of April, 2010

E. O. O’KUBASU

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR