



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL (APPLICATION) 87 of 2004

DORCAS INDOMBI WASIKE APPLICANT/APPELLANT

AND

**BENSON WAMALWA KHISA (in his capacity as the
Personal Representative of the estate of
RISPAH NALIAKA KHISA) RESPONDENTS**

**(Application for leave to file a supplementary record of appeal from a judgment and decree of the High Court of
Kenya at Kitale (Nambuye, J.) dated 9th July, 1999**

in

KITALE H.C.C.C. NO. 17 OF 1997

(ORIGINAL ELDORET H.C.C.C. NO. 27 OF 1996)

RULING OF THE COURT

This is an application by **Dorcias Indombi Wasike**, the appellant in *Civil Appeal No. 87 of 2004* for leave to file a supplementary record of appeal to include a certified copy of the decree. The application is brought under **Sections 3A** and **3B** of the *Appellate Jurisdiction Act* (Act) which enact the overriding objective principle.

Section 3A (1) of the Act provides:

“The overriding objective of this Act and the rules made here under is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act”.

Section 3B (1) of the Act stipulates the aims that the court should strive to achieve in matters before it in furthering the overriding objective, one of them being the just determination of the proceedings.

The application is apparently made out of abundant caution in order to pre-empt any future application for striking out the appeal on account of any fatal irregularity in the record of the appeal.

The applicant filed the appeal on 30th April, 2004. The record of appeal incorporates a copy a decree given by the superior court on 9th July, 1999 and issued on the 12th July, 1999 which decree is the subject matter of the appeal. The copy of the decree bears the stamp of the superior court and the signature of the Deputy Registrar of the superior court. **Rule 85 (1) (a)** of the Court of Appeal Rules (Rules) provides that the record of appeal should contain:

“a certified copy of the decree or order”

appealed from.

Mr. Amolo, learned counsel for the applicant intimates that he was prompted by Mr. Mbeja, learned counsel for the respondents to make this application when the latter informed him orally that he would raise the issue of certification of the decree at the next hearing of the appeal, and, that after doing research, he discovered several decisions of this Court to the effect that in addition to sealing and signature, the copy of the decree should bear a certification stamp.

That position taken by the Court is aptly illustrated in **Premier Dairy Ltd. vs. Amarjit Singh Sagoo & Another** – *Kisumu Civil Application No. Nai. 213 of 2008* (unreported) where this Court said in part:

“a certified copy of the decree is a primary document. It is not one of those documents which under Rule 85 (2 A) of this Court’s Rules, may be brought in by filing a supplementary record of appeal or which if defective may be amended and brought in through the filing of a supplementary record of appeal under rule 89 (3) of this Court’s Rules. As was stated earlier, Mr. Amoko, for the appellant concedes that the record does not contain a certified copy of the decree.

In view of what we have stated above, the omission is not curable and his argument that a copy of the decree signed and sealed as required by Order XX of the Civil Procedure Rules suffices, is not tenable”.

Mr. Amolo relies mainly on **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission and three Others** – *Civil Appeal (Application) No. 152 of 2009* (unreported) for the application of the overriding objective principle to primary documents. In that case, an application for striking out an appeal for failure to include the trial Judges notes – admittedly a primary document, was dismissed on the ground that such striking out of the appeal would not facilitate the overriding objective of the Act and the Rules. The Court instead required the 1st respondent to file a supplementary record of appeal under **Rule 89 (3)** as an alternative to striking out the appeal.

Mr. Mbeja in opposing the application contended that the applicant has taken six years to try to remedy an incompetent appeal and that **Sections 3A and 3B** of the Act do not vary the provisions of **Rule 85 (1) (h)**.

The contention by Mr. Mbeja that the overriding objective principle does not vary the requirement of **Rule 85 (1) (h)** is, with respect, erroneous. The decision in **Deepak Kamani’s** case (supra) is important in two respects. Firstly, the decision in effect overrules the previous decisions which have strictly applied **Rule 85 (1) (h)** and struck out appeals on purely technical ground, namely, that a primary document has been omitted from the record of appeal, or, as in this case, a certified copy of the decree has not been included in the record of appeal. The ratio of the decision in **Deepak Kamani’s** case, is that failure to include a primary document in the record of appeal does not render the appeal incompetent in view of the overriding objective of the Act and the rules of this Court, and, that where there is an alternative which enables the appeal to be dealt with justly, the Court should not take the draconian step of striking out the appeal.

Secondly, the decision enriches **Rule 89 (3)** by allowing an appellant to file a supplementary record of appeal incorporating a primary document which had been omitted unlike the construction in previous decisions which excluded the introduction of primary documents by supplementary record. The overriding objective principle has been introduced into our law by a statute and it is, inherently a principle of substantive law. We agree as submitted by Mr. Amolo that, where there is a conflict between the statute (*overriding objective principle*) and a subsidiary legislation (rules of this Court) the statute must prevail. A conflict is however unlikely to arise because **Section 3A (1)** of the Act not only enacts the overriding objective principle but also expressly superimposes the overriding objective to the application of the existing rules with the result that the Court is enjoined to apply the overriding objective principle in both the substantive and procedural matters. That is to say that the rules should also be construed in a manner which facilitates the just, expeditious, proportionate and affordable resolution of the appeals.

It follows from the foregoing that, it is now permissible depending on the facts and circumstances of each case for an appellant to introduce a primary document including a certified copy of the decree by a supplementary record of appeal.

Nevertheless, there is procedural difficulty on how to go about it. Is leave of the court required and if so, under which provisions of the law should the application be founded? In this case, the application is made under **Section 3A** and **3B** of the Act. Mr. Amolo stated that he could not find any provision in the Rules under which the application could be brought.

There are two rules which permit an appellant to file a supplementary record of appeal.

The first one is **Rule 85 (2A)** which 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 the leave of the court include the document in a supplement record of appeal filed under Rule 89 (3)”.

The second one is **Rule 89 (3)** itself which allows an appellant to lodge a supplementary record of appeal at any time. Unlike **Rule 85 (2A)**, leave of the court to lodge a supplementary record of appeal under **Rule 89 (3)** is not required. It is **Rule 85 (2A)** which deals with documents that the record of appeal should contain that is applicable in this case. That Rule omits some documents mentioned in **Rule 85 (1)**, namely, pleadings, trial judges notes, affidavits read and all documents put in evidence at the hearing, judgment or order, a certified copy of the decree or order and a notice of appeal (all considered as primary documents) as documents which can, with the leave of the court be included in a supplementary record of appeal.

We have already observed that the overriding objective principle is expressly superimposed on the existing rules. The effect of this, is that **Rule 85 (2A)** is deemed as amended to embrace all the documents specified in **Rule 85 (1)** with the result that it is now permissible for an appellant with leave of the court to include any of the documents referred to in **Rule 85 (1)** including primary documents in a supplementary record of appeal.

It follows that an application for leave to file a supplementary record of appeal should have been made under **Rule 85 (2A)** and **Rule 89 (3)**. We, thus, deem the present application as properly made under those rules.

On the merits of the application, the appeal seeks to set aside the judgment of the superior court awarding 5.3 acres to the respondent. The appellant’s husband is alleged to have occupied the suit land for a long time and to have fully developed the land. The dispute has been raging since 1972. In a previous application by appellant for extension of time for lodging a record of appeal and a memorandum of appeal – **Wasike vs. Khisa & Another** [2004] 1 KLR 197, the Court found that the intended appeal is not frivolous. The Court also found in that application that the decree had been executed and the respondent put in possession of the suit land. Thus, the respondent is not likely to suffer any undue prejudice if the application is allowed.

We are satisfied in the circumstances of the case that, in furtherance of the overriding objective, the application should be allowed so that the appeal can be effectually and completely determined.

For those reasons, we allow the application and give leave to the applicant to file a supplementary record of appeal incorporating a certified copy of the decree within 14 days from the date hereof. We give the costs of this application to the respondents.

Dated and delivered at Nairobi this 23rd day of April, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR