IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL (APPLICATION) 81 OF 2010

BETWEEN

DANIEL KIPKEMBOI BETT AND 7 OTHERS …… RESPONDENTS/APPLICANTS

AND

MARGARET WANJIKU CHEGE ……..……. APPELLANT/RESPONDENT

(Being an application to strike out the Record of appeal, in an appeal from the Ruling of the High Court of Kenya at Kitale (Ombija, J) delivered on 1st February, 2010

In

H.C.C.C. No. 55 of 2009)
****

RULING OF THE COURT

In **BIGGUZI VS. RANK LEISURE PLC [1999] 1 W.L.R. 1926**, Lord Woolf, dealing with the question of over-riding objective in litigation had this to say:-

> ***"Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR 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 the 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 the 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."***

Sections 3A and ***3B*** of the Appellate Jurisdiction Act was introduced into our civil litigation system by our Parliament in order to deal with the problem Lord Woolf was talking about in the case cited above: namely, furious and sustained arguments to prevent a claim from proceeding to hearing irrespective of its intrinsic merits; that would be the position taken by the person against whom the claim was made and the position would be so taken because the claimant had failed to comply with a particular rule of procedure.

That is exactly what happened before this Court when the notice of motion dated and lodged in the Court on 20th April, 2010 came up for hearing before us at Eldoret on 24th September, 2010. The applicants in that motion, Daniel Kipkemboi Bett & seven named others want the appeal lodged by Margaret Wanjiku Chege, i.e. Civil Appeal No. 81 of 2010, to be struck out on two grounds, namely:-

> ***"(a) The Order and Ruling appealed from contained in the Record of Appeal have not been certified in line with the mandatory provision of Rule 85 (1) and it renders the entire Record of Appeal fatally defective.***
>
> ***(b) The Record of Appeal has not been certified to be correct by either the Appellant or her Advocate as stipulated in Rule 85 (5) as read with Rule 22 and this renders the purported Appeal incurably defective and incompetent."***

Mr. S.R. Adere, learned counsel who led Mr. Joel K. Bosek for the applicants, argued these grounds with a lot of passion before the

Court. They submitted that the appeal of the respondent must be struck out, irrespective of any merits that may be in the appeal. Elaborating on ground (b) Mr. Adere submitted that under ***Rule 85 (5)*** of the Court of Appeal Rules, a record of appeal itself must contain a certificate signed either by an appellant himself if acting in person or by his authorized agent as set out in ***Rule 22***. The required certificate is to state that a record of appeal has been:-

> ***"Certified correct and prepared to accord with copies as supplied by the High Court -----."***

The record of Civil Appeal No. 81 of 2010 has such a certificate with some signature below it and the name "KIARIE & COMPANY, ADVOCATES FOR THE APPELLANTS." But according to Mr. Adere, it is not known who has signed the certificate, i.e. whether the signatory is an advocate in the firm of KIARIE & CO. Advocates and signed for and on their behalf. Mr. Adere specifically drew our attention to page 75 of the record of appeal which is signed by the same person -----

> ***"FOR KIARIE & COMPANY ADVOCATES FOR THE PLAINTIFF."***

In answer to this contention, Mr. Kiarie for the appellants told us that the signature appearing under the certificate is his and we did not understand Mr. Adere to dispute that assertion.

We do not think that even under the old position before the enactment of ***sections 3A & 3B*** of the Appellate Jurisdiction Act, the appeal would have been struck out on this basis. The applicants do not contend before us that they do not know who has lodged the appeal against them. They know that the appeal has been lodged by the respondent, Margaret Wanjiku Chege; they know that Margaret Wanjiku Chege has always been represented in the proceedings by the Firm of M/s Kiarie & Company Advocates of Kitale, and that Mr. Kiarie is the advocate who has been appearing on behalf of the respondent. It would be a total violation of the letter and spirit of ***sections 3A*** and ***3B*** of the Act to strike out the appeal merely because Mr. Kiarie has not stated under his signature that he was certifying the record on behalf of Kiarie & Company Advocates. Kiarie & Co. Advocates is merely a firm name under which Mr. Kiarie practices and we see absolutely no harm or prejudice which could have been possibly occasioned to the applicants by the failure by Mr. Kiarie to state that he was signing the certificate on behalf of his law firm. We reject this ground as a basis for striking out the record of appeal.

On the first ground for striking out the appeal, Mr. Adere submitted that ***Rule 85 (1) (h)*** requires that a record of appeal must contain a certified copy of the order or the decree against which the appeal is brought. While agreeing that at page 74 of the record of appeal there is an order which is certified by the Deputy Registrar of the High Court at Kitale, Mr. Adere submitted that that order is a photo-copy of the original order. ***Rule 85 (1) (h)*** requires a certified copy, not a certified photocopy of the order and according to Mr. Adere, there is really no valid order at all in the record of appeal. A certified photo-copy of an order is not provided for in the rules and Mr. Adere compared the position to that which obtained in **MURAI & OTHERS VS. WAINAINA (NO. 2) [1978] KLR 31**, where the Court of Appeal, comprising Sir James Wicks, C.J., Madan & Wambuzi, JJ.A held, that striking out the appeal:-

> ***"1. That the requirement of rule 85 (1) (h) that a decree must be filed with the record of appeal was mandatory and could not be cured by an order under rule 85 (3) which was intended to exclude material not needed for the determination of the appeal; nor was it appropriate to adjourn the appeal to allow the appellants time to file a decree as they had not attempted to rectify the omission when the objection was first raised to the competence of the appeal.***
>
> ***2. That the failure to file the decree was not a mere technicality and, even if it had been, it could not have excused non-compliance with a mandatory requirement; moreover the failure could not be overridden by the requirements of section 3 (2) of the Judicature Act since section 3 concerned cases, unlike the present case, where customary law was applicable and appeared to be intended to help unrepresented parties who were ignorant of legal procedure rather than parties assisted by counsel."***

It is clear from this case i.e. the case of **MURAI & OTHERS**, that there was in fact no decree at all in the record of appeal and when the Court pointed out that difference to Mr. Adere , his answer was that though he did not have the particular decision with him, there was in fact a decision of this Court in which a photo-copy of the order was included in the record, but the Court still proceeded to strike out

the record on the basis that a photo-copy order is not what is required under ***Rule 85 (1) (h)***; what is required under that provision is a certified copy of the order or decree, not a certified photo-copy of the order. We accept Mr. Adere's assertion on the point that there is such a decision of the Court as a member of this bench, VISRAM, JA was himself aware of the decision. But as was pointed out by this Court in **DEEPAK CHAMANLAL KAMANI & ANOTHER VS. KENYA ANTI-CORRUPTION COMMISION & 3 OTHERS**, Civil Appeal (Application) No. 152 of 2009 (unreported) after the enactment of ***sections 3A & 3B*** of the Act, which also find support in **Article *159 (2) (d)*** of the new Constitution, the approach of the courts must necessarily be different from that which was adopted prior to the enactments. In **KAMANI'S Case**, the Court stated:-

> ***"So that as Lord Woolf says in the BIGGUZZI Case the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."***

The Court later on stated:-

> ***"-----. In dealing with decisions of the court made before the amendments, litigants and the practicing bar must now bear in mind the existence of the amendments and that the court will consider previous decisions bearing in mind the existence of the amendments."***

We would repeat these assertions, word for word, in the present ruling. The applicants agree that there is in fact a photocopy of the order appealed from in the record of appeal. They agree that it correctly reflects the decision of the superior court. The only complaint against it is that it is a "***photocopy***" and not a "**certified *copy***". Once again we think it would be a gross violation of the letter and spirit of ***sections 3A*** and ***3B*** of the Act and even ***Article 159 (2) (d)*** of the new Constitution to strike out the appeal on the ground that the record contains a photo-copy of the order. There is in fact an order and it is certified; if the applicants feel it is not sufficient for justice to be done in the matter on the basis of a photocopied order, they are perfectly at liberty to file a copy of the order through a supplementary record under ***rule 89 (3)*** of the rules.

Nor do we think it is necessary for us for the purposes of this decision to define what a technicality is, as Mr. Adere appeared to want us to do. Suffice it to say that the grounds upon which the applicants were asking us to strike out the appeal can properly be described as technical because they do not challenge any inherent merits in the appeal itself; they only challenge the manner in which the appeal has been lodged.

For the reasons stated herein, the notice of motion by the applicants dated and lodged in this Court on 20th April, 2010 fails and we order that it be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Eldoret this 12th day of November, 2010.

R.S.C. OMOLO
……
JUDGE OF APPEAL

S.E.O. BOSIRE
……
JUDGE OF APPEAL

ALNASHIR VISRAM
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.