



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

Civil Appeal (Application) 189 of 2007

PASCALE MIREILLE BAKSH (nee Patel) ....1<sup>ST</sup> APPLICANT/RESPONDENT  
NILESH PRAHLADBHAI PATEL .....2<sup>ND</sup> APPLICANT/RESPONDENT

AND

NISHTH YOGENDRA PATEL  
The Legal Representative of the Deceased  
Plaintiff YONGENDRA  
PURSHOTTAM PATEL.....RESPONDENT/APPELLANT

Application to strike out the notice of appeal and record of appeal in an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Githinji) dated 13<sup>th</sup> March, 2006

in

H.C.C.C. NO.617 OF 1995)

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RULING OF THE COURT

In the judgment dated and delivered 13<sup>th</sup> March, 2006, in the High Court Civil Case No. 617 of 1995, the superior court dismissed the suit filed by the respondent/appellant, **Nishith Yogendra Patel** the legal representative of the deceased plaintiff **Yogendra Purshottam Patel** against **Pascale Mireille Baksh** (nee Patel) and **Nilesh Prahladbhai Patel**, the 1<sup>st</sup> application/respondent and 2<sup>nd</sup> applicant/respondent respectively in this application before us and allowed the counter-claims by the applicants/respondents with costs. The respondent/appellant felt aggrieved by that decision and filed Civil Appeal No.189 of 2007 against that decision in this Court on 28<sup>th</sup> August 2007. Upon being served with the record of that appeal, the applicants/respondents through their advocates, Hamilton Harrison & Mathews, brought this Notice of Motion before us dated 28<sup>th</sup> September 2007, premised upon **rule 80** of the Court of Appeal Rules in which they sought orders that:

- “1. The Notice of Appeal dated 20<sup>th</sup> March 2006 and the Record of Appeal lodged herein on 28<sup>th</sup> August 2007 be struck out.
2. The costs of the appeal and of this application be awarded to the applicants.”

The application is based on three broad grounds which are that:

- “1. The Record of Appeal does not include the complete pleadings as required by rule 85 (1) of the Court of Appeal Rules.
2. The Record of Appeal does not include all the documents filed or produced at the hearing in the High Court.

**3. No order has been made to exclude all the documents under rule 85 (3) of the Court of Appeal Rules.”**

In the affidavit in support of the application sworn by Mr. Kiragu Kimani the learned counsel of the applicants, the applicants specifically pointed out the documents that the applicants allege were not included in the record of appeal, and of which omission in their view renders the appeal incompetent. These are itemized at paragraph 5 of the affidavit. As we deem the allegations important and are, in our view, the mainstay of the entire application, we will reproduce paragraph 5 of that affidavit. It states:

**“5. I have perused the Record of Appeal and it has transpired that the said record is incompetent and defective and it is not properly before this Court in that it does not include the following documents:**

- (a) Request for particulars dated 21<sup>st</sup> August, 1998 served on the respondent’s advocate on 25<sup>th</sup> October, 1998. A copy of the Request for particulars and the page on which service was acknowledged is annexed hereto at pages 1 and 2 of the exhibit.**
- (b) Notice of Change of Advocates filed on 3<sup>rd</sup> October, 2003 and served on the respondent’s advocates 6<sup>th</sup> October 2003 (sic). A copy of the Notice of Change of Advocates and page on which service was acknowledged is annexed hereto at pages 3 and 4 of the exhibit.**
- (c) Memorandum of appearance filed on 20<sup>th</sup> May, 1998 and served on the respondent’s advocate on 21<sup>st</sup> May 1998. A copy of the “Memorandum of appearance and the page on which service was endorsed is annexed hereto at pages 5 and 6 of the exhibit.**
- (d) Notice of address for service dated 22<sup>nd</sup> March, 2006 and served on the respondent’s advocates on 25<sup>th</sup> April, 2006. A copy of the Notice of address for service and the page on which service was endorsed is annexed hereto at pages 7 and 8 of the exhibit.**
- (e) Schedule showing visits made by the late P.P. Patel and produced at the hearing as defendants exhibit “D6.” A copy of the schedule is at page 9 of the exhibit hereto.”**

Mr. Kiragu avers in that affidavit that the above documents were omitted from the record of appeal without any direction from the High Court directing their exclusion from the record.

In response to the application and to the affidavit by Mr. Kiragu, the appellant/respondent filed two replying affidavits. The first replying affidavit was sworn by Mr. Madan Gopal Sharma, the learned counsel for the applicant/respondent and the second was sworn by Mr. Sharma’s junior counsel in the application, Mr. Mohamed Akram Khan. In his affidavit, Mr. Sharma states that as he did not respond to the Request for particulars, the Request for particulars did not end up constituting a pleading and so was not a document required to be included in the record. As to the allegation of the omission to include the Notice of Change of Advocates in the record, Mr. Sharma denied receipt of the document and could not annex it to the record as he did not receive it. He also denied receipt of Memorandum of Appearance dated 18<sup>th</sup> May 1998 and says that document was apparently served at Rajab Manzil House long after he had moved his chambers from that building to Standard Building on Wabera Street. As to Notice of Address for service, Mr. Khan agrees in his affidavit that he received it but he did not hand it over to Mr. Sharma. He however, maintains that the Notice of address for service was filed late contrary to the requirements of the Rules and so could not be treated as a valid document upon which omission in the records, the record could be considered incompetent. As to the last document, namely the exhibit that was produced in superior court at the time of hearing, Mr. Sharma contended that the

document was included at page 3135 of the record.

Before us, Mr. Kimani readily admitted that the exhibit he had stated in his application, was not included in the record of appeal was indeed included and he conceded that ground and rightly apologized to the Court and to the respondents. That left only four documents that the applicants claim were not included in the record and of which omission rendered the appeal incompetent. Mr. Kimani, and Mr. Richard Kwach the learned counsel leading the appellant/respondent team, addressed us at length mainly on the effect of the omission to include those documents in the record of appeal as it is not in dispute that the four documents namely Request for particulars dated 21<sup>st</sup> August, 1998, Notice of Change of Advocates filed on 3<sup>rd</sup> October 2003, Memorandum of appearance filed on 20<sup>th</sup> May 1998 and Notice of address for service dated 22<sup>nd</sup> March 2006 were not included in the record of appeal which we must admit is extremely voluminous by any standards.

The first issue we need to consider is whether failure to include in the record of appeal Request of particulars would in itself render the record incompetent. **Rule 85 (1) (c)** of the Court of Appeal Rules states that one of the documents that must be included in the record of appeal is the pleadings. The next question we need to go into is when do the particulars become pleadings for purposes of **rule 85 (1) (c)**? In order to solve that question one has to go to the Civil Procedure Code. **Order VI rule 8** of the Civil Procedure Rules deals with particulars and **Order VI rule 8 (6)** states:

**“Particulars delivered shall be in form No.15 of Appendix B which shall be filed by the party delivering it together with the original Notice and shall form part of the pleadings.”**

In our view, that rule specifically states that Request for particulars above is not in itself a pleading. However, when the other party acts on that request and files particulars, which if he files it, he is bound to file together with original Notice, then the particulars together with original request become pleadings. If, however, the request for particulars is not acted upon as the appellant/respondent says through his advocate that he did not act on it in that he did not furnish the particulars requested, and that is not disputed then the Request for Particulars alone is not a pleading and failure to include it in the record of appeal cannot, in our view, render the record of appeal incompetent.

As regards notice of change of advocates, Mr. Sharma says in his affidavit that he was never served with it. Mr. Kimani states that if Mr. Sharma had not been served, then he would not have dealt with his firm and that he had been dealing with his firm to Mr. Kimani positive proof that the appellant's advocates received the Notice of Change of Advocates. That being the case, Mr. Kimani argues that excluding that document from the record of appeal renders the record incompetent and should be struck out. First, striking out a record of appeal is such a draconian act that no court can do so on analytical arguments such as Mr. Kimani advanced to prove that Mr. Sharma received the document. Secondly, and in any event, that document falls under **rule 85 (1) (b)**. That in effect means that under **rule 85 (2A)** it is one of the documents that can be introduced into the record of appeal by way of a supplementary record of appeal filed under **rule 89 (3)**. It can also be introduced by the applicant under **rule 89 (1)**. As we have stated, striking out a record of appeal is such a draconian act that if an appeal can be salvaged, through introducing documents through supplementary record so be it. It is only in cases where the documents not included in the

record are such vital documents that cannot be introduced through supplementary record **rule 85 (2A)** that the court would have no alternative but to strike out the record. The situation is not tenable here at least as far as the document – Notice of Change of advocates is concerned. Mr. Kimani did not pursue his clients complaint that Memorandum of Appearance was not included in the record and we leave it at that.

The last matter we require to deal with is the allegation that Notice of address for service dated 22<sup>nd</sup> March 2006, was not included in the record of appeal. We have expressed ourselves above when considering omission to include change of address. We agree that the mere fact, that it was filed late, is no good reason for failure to include it in the record. It is not up to a party to decide on his own what documents to include and what documents to exclude from the record of appeal. Indeed if a party feels a document is in law not a valid document, all he needs to do is to proceed to the court and seek its exclusion under **rule 85 (3)** but a party cannot on its own decide that because a document was not filed timeously, it is not a document for purposes of compiling record of appeal. However, notice of address for service, also falls under **rule 85 (1) (b)** and are therefore one of the documents which under **rule 85 (2A)** can be introduced by way of a supplementary record. Its omission from the record does not render the record incompetent to the extent that it would be struck out. As we have stated, if a record of appeal can be salvaged through the provisions of **rule 85 (2A)** and **rule 89**, the Courts have a duty not to strike out such a record. Mr. Kimani, says, if the appellants had approached him earlier, a way out would have been found. The appeal has not been set down for hearing and that being the case, he, under **rule 89** of this Court's Rules or the appellants, under **rules 85 (2A)** and **89 (3)** may still seek to include the relevant documents through supplementary record.

The upshot of all the above is that the application lacks merit and must be dismissed. It is dismissed with costs to the appellants/respondents.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of January, 2009.**

**E.O. O'KUBASU**  
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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**  
.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**