



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal (Appli) 179 of 2008**

DELPHIS BANK LIMTIED

**(NOW ORIENTAL COMMERCIAL BANK LTD)
.....APPELLANT/RESPONDENT**

AND

- 1. CHANNAN SINGH CHATHE**
- 2. SATWANT SINGH CHATTHE**
- 3. SUKHWINDER SING CHATTHE**
- 4. RAGHBIR SINGH CHATTHE (ALL T/A CHANNAN AGRICUTURAL CONTRACTORS)**
- 5. CHARANJIT SINGH HAYER**
- 6. RAJNIKANT KARSANDAS SOMAIA
.....RESPONDENTS/APPLICANTS**

(Being an application to strike out the notice of appeal and record of appeal against the order of the High Court of Kenya at Kisumu (Tanui, J.) dated 4th May, 2005

in

H.C.C.C. No. 164 of 2003)

RULING OF THE COURT

This is yet again one of those endless motions within this appeal, i.e. **Civil Appeal No. 179 of 2008**, to have the record of appeal struck out for one reason or the other. The motion is under **rule 80** of the Court's Rules. Seven grounds were listed as the basis for striking out the appeal. They are:-

- “1. THAT the Notice of Appeal dated 23rd July, 2008 and filed on 24th July, 2008 was not served upon the Applicant's advocates.***
- 2. THAT the Applicant will rely on the Record of Appeal to argue out the application.***

3. ***THAT the Applicant does not have the legal capacity to institute or lodge the Notice of Appeal and the Record of Appeal thereof.***
4. ***THAT the Memorandum of Appeal contains grounds challenging some decisions made by Tanui, J. on 4th May, 2005 which no Notice of Appeal was issued thereof.***
5. ***That no leave was sought to appeal from the decision of Tanui, J. for refusal to grant an application for adjournment***
6. ***That the Record of Appeal does not contain primary documents.***
7. ***Further grounds such as may arise shall be argued at the hearing hereof.”***

During the hearing of the motion before us **Mr. Gichaba** learned counsel for the applicant **Rajnikant Karsandas Somaia** abandoned virtually every ground except the second one which is to the effect that the record of appeal was being relied upon to argue the motion. Proceeding on that ground, **Mr. Gichaba** contended that the record of appeal does not contain an extracted copy of the order giving the appellant Delphis Bank Limited (**now Oriental Commercial Bank Limited**) leave to appeal to this Court. It appears that Mr. Gichaba was at first of the view that an order granting leave to appeal is a primary document which if left out of the record of appeal renders such an appeal incurably defective. With respect to Mr. Gichaba, that was an entirely incorrect appreciation of the legal position. In **DAMARIS WANGUI ELIZABETH VS NZUKI MWINZI & ANOTHER, Civil Application No. 261 of 2006** (unreported), a decision which this Court made on 19th June, 2009 in Nairobi, the Court explained what is meant by a primary document. **Rule 85(1)** of the Court’s Rules sets out the documents which are to be included in a record of appeal. Then **rule 85(2A)** sets out the documents which, if originally left out of the record of appeal, may be brought in under **rule 89(3)** by way of a supplementary record being filed with the leave of the Court. Those documents which are not included in **rule 85(2A)**, if left out of the record, cannot be brought in under **rule 89(3)**. It is those documents which are not listed in **rule 85(2A)** and which, therefore, cannot be brought in under **rule 89(3)** and such documents are normally described by the Court as primary documents. If they are left out of the record, the appeal is normally described as being incurably defective in the sense that the record cannot be cured by bringing into it the document so left out, by way of a supplementary record.

An order granting leave to appeal is listed at **rule 85(1)(i)** and that rule is specifically included in **rule 85(2A)**. It is thus not a primary document and thus can be brought in by way of a supplementary record of appeal. An appellant can bring it in under **rule 89(3)**; any of the respondents herein could also bring it in under **rule 89(1)** if they feel it is necessary for the just decision of an appeal.

In the motion before us neither Mr. Gichaba, nor Mr. Karanja for the 1st to 4th respondents nor Mr. Menezes for the 5th respondent ever pointed out to us how the leaving out of an extracted copy of the order giving leave to appeal will hinder them in the conduct of their respective cases. In any case at page 195 of the record we have before us there is this entry

“ORDER – leave is granted to the defendant to file the appeal against the ruling.

B. K. TANUI/JUDGE”

That should or ought to satisfy any stickler for rules of procedure unless such rules are to be treated as rituals which must be undergone by any one who wishes to appeal. There is no merit in the motion before us and it is our hope that these unnecessary applications will cease so that the appeal itself can be listed for hearing. We order that the motion dated and lodged in the Court on 22nd September, 2008 be and is hereby dismissed. Each part to the motion shall bear their own costs thereof. Those shall be our orders.

Dated and delivered at Kisumu this 17th day of July, 2009

R. S. C. OMOLO

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JUDGE OF APPEAL

D. K. S AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR