



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPEAL (APPLI) 148 OF 2008

DICKSON WATHIKA MWANGI.....APPLICANT

AND

1. REUBEN NYANGINJA NDOLO.....1ST RESPONDENT

2. JERUSA CHEPSAP.....2ND RESPONDENT

3. ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

(Application to strike out the record of appeal filed in the Court of Appeal on 17/7/2008 appealing from the ruling and order of the High Court of Kenya at Nairobi (Wendoh, J) dated 26th June, 2008

in

Election Petition No. 11 of 2008)

RULING OF THE COURT

DICKSON WATHIKA MWANGI, the applicant, asks this Court to strike out the appeal lodged by the 1st respondent being Civil Appeal No. 148 of 2008 on three main grounds, that:

- (i) the record of appeal does not contain primary and essential documents for the determination of the appeal, namely the trial Judge’s notes of the hearing of the petition in the superior court on 23rd June, 2008, which hearing and determination provoked the appeal.**
- (ii) the formal certified order appealed from is fatally defective in that it purports that there was a hearing on 14th May, 2008 and 19th May 2008 leading to a delivery of a ruling on 26th June 2008.**

and

- (iii) The record of appeal was served on the applicant outside the period prescribed by the rules of the Court.**

The record of the appeal laid before us contains only the notes of the learned trial Judge for the proceedings before the superior court from the 11th February 2008 to 26th May 2008 and are captured on pages 76 to 321 of the record. However, the Judge's notes and all proceedings of 23rd June 2008 which incorporate the submissions of counsel and all that was said by the parties or counsel or what took place before the learned trial Judge made the decision the subject matter of the appeal are either missing or omitted. These documents are basic and primary documents which must be included in the record of appeal. See **rule 85(1) (d)**. Indeed, they are necessary for the proper determination of the appeal and it is well settled principle that the omission of a basic document in the record cannot be cured by the filing of a supplementary record. See **Kemfro Africa Limited v Lubia & Another [1987] KLR 27**.

Mr Ongoya learned counsel for the 1st respondent has feebly attempted to explain away the omissions, but, in our view they cannot be overlooked.

It must follow therefore that the mandatory terms of **rule 85(1) (d)** of the Rules of this Court not having been complied with, the appeal is fatally defective and incompetent.

Accordingly, on this ground alone, the application is allowed. Consequently, Civil Appeal No 148 of 2008 be and is hereby struck out with the costs of the application and of the appeal to the applicant.

Dated and delivered at Nairobi this 16th day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR