



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 100 of 2008

GRACE WAHU NJOROGE.....APPELLANT

AND

JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Ojwang, J)

dated 12th May, 2006

in

H.C.C.C. No. 3383 of 1995)

RULING OF THE COURT

This application expressed to have been filed under **rules 42, 80, 81** and **85** of the Court of Appeal Rules seeks an order to strike out the appeal filed herein on 3rd June, 2008, costs of the application and the appeal itself to be awarded to the applicant and such other and/or further relief to be granted as this honourable Court might deem fit and just to grant in the unique circumstances of this matter. It is based on the grounds set out on the face of the application and the averments in the affidavit of the applicant. The grounds on the face of the application are as follows:-

- “1. The Notice of Appeal is incurably defective and hence the Record of Appeal filed herein is invalid and incompetent.***
- 2. This appeal has been filed hopelessly out of time and hence the same is invalid and incompetent.***
- 3. the order being appealed against, i.e. the order made on 12th May 2006 is incorrectly drawn and hence the entire Record of Appeal is invalid and incompetent.***
- 4. The Certificate of Delay (which was drawn by the appellant and/or her Advocates) in the said Record of Appeal is not only incorrect but the same is misleading.***
- 5. Some Primary Documents have been omitted from the Record of appeal and hence the entire Record***

of Appeal is invalid and incompetent.”

The contents of the supporting affidavit are similar to the above grounds save for some minor details as to the application for and reception of proceedings of the superior court.

The application was heard by this Court on 8th October, 2009 when **Mr. Kimondo**, learned counsel for the applicant and **Mr. Mbichire**, learned counsel for the respondent addressed us on it. **Mr. Kimondo** submitted on ground 1 and 5 of the application that primary documents omitted from the Record of Appeal include further amended reply to further amended defence and defence to counter-claim, grounds of objection and amended certificate of delay and that this omission made the record of appeal incurably defective. He stated that this was confirmed by an application made by the appellant to this Court on 7th October, 2009 for leave to file a supplementary Record of Appeal which is a confirmation that these documents were omitted from the record of appeal. On ground 2 he submitted that although the appellant applied for proceedings on 12th May, 2006 the application letter was not copied to counsel for the applicant and so the said appellant is not entitled to rely on the proviso to **rule 81(1)** of the Court's Rules. According to counsel although the appellant was notified on 22nd February, 2008 that typed proceedings, judgment and/or ruling were ready, the Record of Appeal was not filed in Court within the required period. He also stated that the notice of appeal did not conform to Form D and that the order extracted does not show that the appellant ever filed any documents.

Mr. Mbichire, learned counsel for the appellant opposed the application and explained that the documents complained of were filed in the superior court before the application to strike out the appellant's further amended defence and counter-claim was made although these documents are not in the Record of Appeal. According to him 60 days allowed for the filing of the Record of Appeal lapsed on 1st June, 2008 and that the defence raises triable issues.

Beginning with the time factor the ruling out of which the appeal arose was delivered on 12th May, 2006 and it is on the same day the appellant applied for certified copy of proceedings and judgment. Paragraph 2 of the certificate of delay dated 23rd May, 2008 shows that the appellant was notified on 22nd February, 2008 that the proceedings were ready for collection on payment of requisite court charges but that she paid for and collected them on 1st April, 2008. Meanwhile notice of appeal dated 23rd May, 2006 was filed in Court on the same day which was in conformity with **rule 74(2)** of the Court's Rules. However, although the appellant was informed that the proceedings, judgment and/or ruling were ready on 22nd February, 2008 which she paid for and collected on 1st April, 2006 the record of appeal was not lodged until 3rd June, 2008. But under **rule 81** of the Court of Appeal Rules it is provided that:-

“81(1) subject to the provisions of rule 112 an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged:-

(a) A memorandum of appeal, in quadruplicate;

(b) The record of appeal, in quadruplicate

(c) The prescribed fee, and

(d) Security for the costs of the appeal;

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance (sic) within thirty days of the date of the decision against which it is denied to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

Rule **81(2)** provides that:

“An appellant shall not be entitled to rely on the proviso to sub-rule 1 unless his application for such copy was in writing and a copy of it was sent to the respondent.”

As regards this sub-rule, counsel for the applicant said his chambers did not receive copy of the letter applying for copy of proceedings and so the appellant cannot rely on it. Learned counsel for the appellant did not dispute the applicant’s submissions on this which then confirms he cannot rely on the said proviso. She would only be entitled to rely on the proviso to **rule 81(1)** if her letter applying for the proceedings had been copied to the advocates for the applicant. The letter was neither copied nor sent to the said advocates.

We have already referred to **rule 81(1)** of the Rules in regard to the documents required in order to lodge an appeal. Further, **rule 85(1)** of this Court’s Rules provides as follows:-

“85(1) For the purpose of an appeal from a superior court in its original jurisdiction the record of appeal shall, subject to the provisions of sub-rule 3, contain copies of the following documents:-

- (a) an index of all the documents in the record with the numbers of pages at which they appear;***
- (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by rule 78, his last known address and proof of service on him of the notice of appeal;***
- (c) the pleadings;***
- (d) the trial Judges notes of the hearing;***
- (e) the transcript of any shorthand notes taken at the trial***
- (f) The affidavits read and all documents put in evidence at the hearing, or if such documents are not in the English language, certified translation thereof;***
- (g) the Judgment or order;***
- (h) a certified copy of the decree or order***
- (i) the order, if any giving leave to appeal;***
- (j) a notice of appeal;***
- (k) Such other documents, if any as may be necessary for the proper determination of the appeal including any interlocutory proceedings which may be directly relevant:***

When learned counsel for the applicant submitted on this application he complained about failure by the appellant to include in the record of appeal the further amended reply to further amended defence and defence to counter-claim and grounds of objection. Learned counsel for the appellant did not contest this but instead submitted that these documents were filed in the superior court before the application to strike out the further amended defence and counter-claim was made and that the further amended defence and counter-claim was never served upon the appellant. But these documents were part of the pleadings in the superior court and ought to have been included in the record of appeal as per **rule 85(1)** aforesaid. In our view, failure to include them in the record of appeal is fatal to the appeal filed herein as they cannot be brought by way of a supplementary record of appeal. **Rule 85(2)(A)** does not allow that. In view of the foregoing and in particular considering grounds 2 and 5 set out on the face of the application we are satisfied that the record of appeal lodged herein on 3rd June, 2008 is incurably defective and cannot be salvaged by the application lodged herein on 7th October, 2009 for leave of this Court to file a supplementary record of appeal. The upshot of all we have said is that we allow the notice of motion to strike out the appeal and the same is struck out with costs. We award the costs of the motion and the

appeal to the applicant.

Delivered and dated 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