



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLI) NO. 256 OF 2007

1. LAWRENCE GITONGA

2. JAMES MUTIRIA

3. SYLVIA NJUE MUTIRIAAPPLICANTS/RESPONDENTS

AND

KINORO TEA FACTORY LIMITED.....RESPONDENT/APPELLANT

N’CHABARI M. NJAURESPONDENT

(Application to strike out a Notice of Appeal and Record of Appeal being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ang’awa, J) dated 2nd November, 2005

In

H.C.C.C No. 1153 of 2002)

RULING OF THE COURT

Before us is an application by way of notice of motion expressed as brought “*under Rules 80, 81 and 85 of the Court of Appeal Rules.*” The application seeks orders that:-

“(a) The Notice of Appeal and the Record of Appeal filed in Court on 3rd December, 2007 be struck out.

“(b) The costs of and incidental to this application and of the appeal be borne by the appellant.”

This application is brought on the grounds, inter alia, that:-

“(i) Primary documents have been excluded from the record without an order for such exclusion .

“(ii) Other documents necessary for the proper determination of the appeal have been omitted from the record.

“(iii) The order extending time within which to appeal or to file a notice of appeal has not been included in the record.

(iv) Essential steps in the proceedings have not been taken within the prescribed time.”

The application is further supported by the affidavit of Mr. Nelson Kaburu Felix, the advocate appearing for the applicants in this matter.

In his submissions before us, Mr. Kaburu, sought to rely on the grounds set out above and the supporting affidavit together with a few decided cases. He particularly referred us to **rule 85 (2)** of the Rules of this Court. It is for these reasons that Mr. Kaburu was of the view that the omission of these documents rendered the appeal incompetent.

Mr. T. Wamiti who appeared for the respondent/appellant made a feeble attempt to resist this application but finally conceded that the record of appeal was defective.

In dealing with this application we must start with **rule 85(1)** of this Court’s Rules which provides:-

“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 the 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 judge’s 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 translations thereof;***
- (g) the judgment or order;***
- (h) a certified copy of decree or order;***
- (i) the order, if any, giving leave to appeal;***
- (j) the 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;***

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.”

And **sub-rule 3** referred to above provides:-

“A judge or registrar of the superior court may, on the application of any party direct which documents or parts of documents should be excluded from the record. Application for such direction may be made informally.”

Having considered the foregoing and what has been urged before us, we are satisfied that this application for striking out the record of appeal cannot be resisted since even Mr. Wamiti has finally conceded that some primary documents have been excluded from the record of appeal. In **COMMERCIAL BANK**

OF AFRICA LTD. V. NDIRANGU [2000] 1 E.A. 29, this Court considered a similar situation and stated:-

“Rule 85 (1) above, enumerates documents to be included in a record of a first appeal to this Court. The documents are of two categories, primary and secondary. The omission of any or parts of a document in the primary category renders an appeal incurably defective and therefore incompetent. We have already held that documents which were filed in court after the ruling appealed against are superfluous. Among those documents are the amended defence and counterclaim, the reply thereto and defence to the counterclaim. The trial court’s notes whether or not either party considers them relevant and essential to the determination of the appeal, provided they were made before the decision appealed from, are primary documents and unless specifically excluded by a judge’s direction given under Rule 85(3) aforesaid, their omission from the record, as is the case here, render the appeal incompetent. Likewise all interlocutory applications and orders made pursuant thereto, and all exhibits, must be included in the record of appeal unless excluded as aforesaid. A party in a suit has no discretion to exclude from the record of appeal any document, whether primary or otherwise in view of that provision. Had the rules-making authority thought otherwise, there would have been no necessity of specifically vesting the power on the Superior Court to give a direction in that regard.”

In view of the foregoing, clearly this application to strike out the notice of appeal and record of appeal cannot be resisted . We accordingly allow the application and order that the notice of appeal and the record of appeal filed herein be struck out with costs to the applicants.

Dated and delivered at Nairobi this 28th day of November, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR