



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

**Civil Appeal (Appli) 94 of 2004**

**KENYA INDUSTRIAL ESTATES LTD..... APPELLANT/APPLICANT**

**AND**

**SAMUEL SANG ..... 1<sup>ST</sup> RESPONDENT**

**HEMA INVESTMENTS LTD ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from a judgment and decree of the High Court of Kenya*

*irobi (Visram, J.) dated 21<sup>st</sup> January, 2004*

**in**

**H.C.C.C. NO. 994 OF 1998)**

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**RULING OF THE COURT**

There is an application filed by M/S. Kenya Industrial Estates (KIE), who are the appellants in the main appeal, on 7<sup>th</sup> May, 2007, (dated 23<sup>rd</sup> April, 2007) seeking one order:

“That this Honourable Court of Appeal be pleased to grant the applicant leave to file a further supplementary record of Appeal”.

*Rule 85 (2A) as well as rule 89 of this Court’s rules (“the rules”) are relied on for that application. For support of the application, Mr. John Fredrick Omwoyo, the Chief Legal Officer of KIE swore an affidavit on 23<sup>rd</sup> April, 2007 wherein he deposed as followed: -*

*“5. THAT I am aware that the hearing aforesaid failed to take off after the advocate for the Respondent insisted that his application for and on behalf of the Respondent dated 31<sup>st</sup> March, 2006, be heard first.*

*6. THAT the aforesaid application, a copy thereof annexed hereto and marked “JF01” principally sought the striking out of the record of appeal lodged on 17<sup>th</sup> May, 2004 and the Supplementary Record of Appeal lodged on 2<sup>nd</sup> May, 2006 for reasons inter alia that they had respectively failed to include some primary and secondary documents stated on the face of the said application.*

*7. THAT I am informed by C.N. Wanjao Advocate for the Applicant that the failure to include some*

primary and secondary documents particularly the *Plaint* filed in HCCC NO. 994 of 1998 and dated 28<sup>th</sup> April, 1998, an *Order* issued by Honourable Lady Justice Aluoch dated 10<sup>th</sup> November, 1998, an *Order* by Honourable Justice Mulwa dated 4<sup>th</sup> December, 1998 and a *Chamber Summons Application* dated 11<sup>th</sup> October, 2001 and filed on 23<sup>rd</sup> October, 2001 together with the supporting affidavit was by an oversight on the part of the applicant's advocates on record.

8. THAT the aforesaid documents are annexures to the affidavit in support of the Application referred to in paragraph 6 above.

9. THAT the Applicant now craves for the leave of the court to file a further Supplementary Record of Appeal to place before the court the documents not included in the earlier lodged records with a view to paving the way for the hearing and determination of the appeal on the merits.

10. THAT I verily believe that no prejudice will be occasioned to the Respondents that cannot be remedied by an award of costs for the following reasons: -

a) THAT the Respondents did not proceed under rule 89(1) of the Court of Appeal Rules to file a Supplementary Record of Appeal to bring the aforesaid documents on record or at least raise the issue with the Applicant's advocates with a view to having the said documents included in the Supplementary Record of Appeal lodged on 2<sup>nd</sup> May, 2006.

b) THAT the Respondents through their advocates had all along prior to the filing of their application referred to in paragraph 6 above intimated to the Court their readiness to proceed with the hearing of the appeal without taking issue with the non-inclusion of any documents in the Record of Appeal.

c) THAT the Respondents have abandoned their Application referred to in paragraph 6 above as evidenced by the letter by M/S. Omotii & Co. Advocates dated 22<sup>nd</sup> March, 2007 addressed to the Deputy Registrar of this Honourable Court. Annexed hereto and marked : "JF0 2" is a copy hereof."

It is not disputed, as stated by Mr. Omwoyo in that affidavit, that the application filed by the two respondents seeking to strike out the main appeal was withdrawn. It was obviously filed way out of line with the provisions of **rule 80** of the rules of this Court. It is also common ground, as stated in the affidavit, that although leave was given to the applicant to file a supplementary record of appeal and the record was indeed filed, there were other documents which are necessary for determination of the appeal which were left out and there was no order sought or issued under **rule 85 (3)** for exclusion of any document. What is in issue is whether the documents intended to be included in the intended supplementary record are primary or secondary documents. There would be little difficulty in acceding to the application if such documents were secondary, particularly considering that the respondents could have, but did not, take advantage of the clear provisions of **rule 89 (i)** of the rules. But we are told by Mr. E.M. Omotii, learned counsel for the respondents, that some of the documents intended to be introduced through a supplementary record are of a primary nature which cannot legally be so introduced. It is necessary therefore to consider the nature of those documents.

The advocates on record for the applicant are led in this matter by retired Judge, Andrew Hayanga who is now back in private practice. Mr. Hayanga referred us to the affidavit in support of the application for the documents sought to be introduced and enumerated them thus: -

a) The original *plaint* filed in HCCC 994/98 which was amended twice.

b) An order made by Aluoch J on 10<sup>th</sup> November, 1998.

c) An order made by Mulwa J on 4<sup>th</sup> December, 1998.

d) A request for judgment dated 14<sup>th</sup> December, 1998 and filed on 15<sup>th</sup> December, 1998.

e) A chamber summons dated 23<sup>rd</sup> October, 2001 together with the supporting affidavit inclusive of annexures thereto.

All those documents according to Mr. Hayanga were not documents of a primary nature and may be included in a supplementary record. He pleaded that they were not omitted deliberately but due to human error in preparation of the bulky record of appeal and therefore the fault was excusable. For his part, Mr. Omotii, apart from urging us to reject the application on account of the delay of three years taken before this application was filed, submitted that it was not possible to grant it because the original plaint which is said to have been amended twice subsequent to its filing was a primary document. So were some exhibits produced in the course of the hearing of the suit which are identified in the proceedings before the superior court but are nowhere in the record.

Responding to those submissions Mr. Hayanga contended that the original plaint was not a useful document as it was replicated in the two subsequent amendments. Only the amended portions were underlined. So were the exhibits referred to. They are capable of introduction through a supplementary record. According to Mr. Hayanga and his team, as far as they could establish, there was no authority stating otherwise and therefore this Court had unlimited discretion to exercise in the matter.

We have considered the application, the affidavits on record and the rival submissions of both counsel who cited no authorities to resolve the central issue as stated above, whether the documents intended to be introduced were primary or secondary documents. Fortunately for us, we have resolved that issue before and we find no difficulty in resolving it now.

**Rules 85 and 89** of the rules of this Court are relied on in this application. **Rule 85** relates to what a record of appeal shall contain, whether such appeal is from the superior court in its original jurisdiction or in its appellate jurisdiction. It is couched in mandatory terms and had for many years been construed strictly by this Court to the chagrin of many a party who had not compiled a proper record of appeal. But by **Legal Notice No. 76/90, sub-rule 2A**, which is now relied on, was introduced. It states:

**“Where a document referred to in paragraph (a), (b), (e), (i) or (k) of sub-rule (1) is omitted from the record the appellant may, with the leave of the Court, include the document in a supplementary record of appeal filed under rule 89(3).”**

**Rule 89** relates to the preparation and service of supplementary record and in **sub-rule 3**, it provides:

**“An appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal and shall as soon as practicable thereafter serve copies of it on every respondent who has complied with the requirements of rule 78.**

As is evident from **sub-rule 2A**, only the following documents may be introduced in a supplementary record: -

**“(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;**

**(e) the transcript of any shorthand notes taken at the trial;**

**(i) the order, if any, giving leave to 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:”**

The rest of the documents listed under **rule 85 (1) and (2)** are primary documents.

There is no definition in the rules themselves of what document is primary or secondary. But this Court has construed the provision in several decisions including **Commercial Bank of Africa Ltd v Ndirangu [2000] I EA 29 (CAK)** and **Uhuru Highway Development Ltd vs. Central Bank of Kenya [2002] I EA 314 (CAK)**. In the latter case, Omolo J.A stated:-

**“This Court has repeatedly ruled that primary documents cannot be amended and primary documents, as far as I understand the position, are such documents which cannot be brought into the record of appeal by way of a supplementary record. Rule 85(1)(a) to (k) lists all the documents which are to be included in a record of appeal. Rule 85(2A) then lists those documents which, if left out of the record of appeal, may be brought in by way of a supplementary record. The documents which may not be brought in by way of a supplementary record and are, therefore, primary documents are:**

(i) **pleadings**

(ii) **the trial Judge’s notes of the hearing**

(ii) **the affidavits read and all documents put in evidence at the hearing (exhibits), or, if such documents are not in the English language, certified translations thereof;**

(iv) **the judgment or order**

(v) **a certified copy of the decree or order, and**

(vi) **the notice of appeal**

**These documents are ‘primary’ in the sense that once they are omitted from the record of appeal, they cannot be brought into the record by the filing of a supplementary record.”** - emphasis is added.

In the **Commercial Bank of Africa Case** (Supra) this Court explained the basis for the emphasis placed by the rules on a complete and accurate record of appeal. It stated:

**“It is, however, trite law that for an appellate court to interfere with the exercise of judicial discretion of a trial court all the material that was before that court, except such material as is excluded by a direction or an order given under Rule 85(3) of the Rules, should have first been looked at and the court after doing so comes to the conclusion that the Judge erred in principle or that he was plainly wrong.”**

It went further and drew a distinction between primary and secondary documents:

**“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 it 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.”** -Emphasis is added.

The provisions and authorities cited above make it clear what is or is not primary or secondary in a record of appeal. But the issue still remains: is an original plaint which has subsequently been amended, and the amended plaint is included in the record of appeal, a primary document, the omission of which would render the record incompetent? The answer was provided by this Court in **Delphis Bank Ltd v Caneland Ltd & 2 others Civil Appl. NAI. 33/99 (ur)** which was followed in **Samuel Gitau vs. Elijah Kipng’eno arap Bii & Another Civil Appeal (Appl.) No. 255/04 (ur)** .The Court stated: -

**“The issue which we are called upon to decide is whether the original plaint and the original defence should be excluded from a record of appeal when the two documents are amended. We are certainly not trying the suit.**

**Rule 85 of the Rules specifies the contents of a record of appeal. Sub-rule (1) (c) clearly shows that the two documents must be incorporated in the record of appeal for the purpose of an appeal from a superior court. We think that this is a mandatory rule and failure to comply with it would render any appeal incurably defective and the same is liable to be struck out as incompetent.**

**In Dhanji Ramji vs. Malde Timber [1970] E.A 427 Spry, V.P. said: -**

**“First, as regards amended pleadings, it is clear that the court looks only to the pleading as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on the record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. (underlying ours)**

**We would agree”.**

So there it is. The original plaint ought to have been included in the record as a primary document. It was not. So were the exhibits which were evidently omitted from the record. In the result we find and hold that the application is incapable of grant as sought and we must dismiss it. It is so ordered. Costs of the application shall be borne by the applicant.

***Dated and delivered at Nairobi this 8<sup>th</sup> day of June, 2007.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**