



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

**Civil Appeal 146 of 2005**

**WESTMONT POWER (KENYA) LIMITED ..... APPELLANT**

**AND**

**BOSLEY FREDERICK & MOHAMED ALI**

**T/A CONTINENTAL TRADERS & MARKETING.....RESPONDENTS**

*(An appeal from a ruling of the High Court of Kenya*

*At Nairobi, (Kuloba, J.) dated 3<sup>rd</sup> April, 2003 in H.C.C.C. NO. 1700 OF 2001)*

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**RULING OF THE COURT**

This is an application made on behalf of the respondents Bosley Frederick & Mohamed Ali T/A Continental Traders & Marketing, expressed as having been brought under *rule 42(1) and 80* of the Court of Appeal Rules seeking to strike out the appeal on the following grounds: -

- “1. Pages 64, 69, 70, 74, 77, 78, 80, 81, 83 and 84 of the Record of Appeal are incompetent and illegible.
2. The Memorandum of appeal has not been signed by Messrs Kapila Anjarwalla & Khanna who are the advocates on record for the respondent/appellant in the Superior Court.
3. The Notice of Appeal purports to give appellant’s intention to appeal against a “Ruling” given on 3<sup>rd</sup> April, 2003 whilst the only decision delivered on the said date was a “Judgment”.
4. The Record of Appeal does not contain the Amended Chamber Summons filed in the Superior Court on the 21<sup>st</sup> December 2001 together with the affidavit attached thereto, the Affidavit of the process server for the service of summons. Decree given on 26<sup>th</sup> November 2001 Certificate of Cotes (sic) dated 10<sup>th</sup> December 2001.”

The application was supported by an affidavit of Mr. S.O. Owino the learned counsel for the respondents.

When this application came up for hearing before us on 9<sup>th</sup> May, 2007 Mr. P. Nowrojee assisted by Ms. Nagi appeared for the appellant (respondent in this application) while Mr. S. Owino appeared for the

respondent (the applicant in the application).

Mr. Owino took us through the pages complained of as having some of their portions omitted. In Mr. Owino's view omitting those portions was in breach of **rule 85(1) (f)** of the Rules of this Court, and as such the same cannot be brought in by way of supplementary record of appeal. To support that submission Mr. Owino sought to rely on the authority of **Pepco Construction Company Limited v. Carter & Sons Limited – Civil Appeal (Application) No. 80 of 1999 (unreported)**.

As regards the second ground Mr. Owino submitted that since the Memorandum of Appeal was signed by A.R. Kapila & Co. Advocates and not Messrs Kapila Anjarwalla & Khanna who were the advocates on record this was, in his view, a breach of **Order III r.7** of the **Civil Procedure Rules**. To support that submission Mr. Owino relied on the authority of **Kobil Petroleum Limited v. Patrick Olasa Wabidonge – Civil Appeal No. 289 of 2000 (unreported)**.

The third ground related to the Notice of Appeal which stated that the intention to appeal was against a "Ruling" whilst the decision delivered by the superior court was a "Judgement". It was Mr. Owino's contention that as that notice of appeal cannot be amended then the appeal is incompetent. He relied on the authority of **Ngome v. Plantex Co. Ltd [1984] KLR 972**.

Finally Mr. Owino took issue with the omission from the record of appeal of the Chamber Summons filed in the superior court. It was his view that these were primary documents as they formed part of the pleadings.

For the foregoing reasons Mr. Owino asked us to strike out this appeal with costs.

When Mr. Nowrojee rose to address us he sought to rely on the replying affidavit of Sheetal Kapila. As that replying affidavit deals with the issues raised by Mr. Owino we think it appropriate to reproduce the same. The replying affidavit states as follows: -

***"I, SHEETAL KAPILA residing at Lower Kabete Road and of Post Office Box Number 41144-00100, Nairobi make oath and state as follows: -***

- 1. I am an Advocate of the High Court of Kenya practicing under the name and style of A.R. Kapila & Company, who have been instructed to act by the Respondent/Appellant in this Appeal. I am familiar with the facts of this matter and I am duly authorized by the Respondent/Appellant to make this Replying Affidavit in opposition to the application to strike out the Notice of Appeal.***
- 2. It is true that the Respondent/Appellant's advocates in the Superior court were the firm of Kapila Anjarwalla & Khanna, as stated in paragraph 2 of Mr. Stephen Owino's Affidavit in support of the Applicant/Respondent's application. However, the Respondent/Appellant instructed my firm to represent it in the Court of Appeal in this Civil Appeal No. 146 of 2005, as is evidenced by the Statement of Address for Service contained on pages 1 and 2 of the Record of Appeal. The Memorandum of Appeal has also been prepared and signed by an advocate from my firm, as has the Record of Appeal.***
- 3. The pages of the Record of Appeal which Mr. Owino contends in this application are incomplete and thus illegible had been originally annexed to an affidavit dated 27<sup>th</sup> March, 2002 sworn by one Mohamed Ali, one of the two partners of the firm which is the Applicant/Respondent, and which had been sworn in support of the Notice of Motion filed in the Superior Court on 27<sup>th</sup> March 2002. These pages have been photocopied and included in the Record of Appeal as they had appeared in Mr. Mohamed Ali's affidavit.***
- 4. The decision delivered on 3<sup>rd</sup> April 2002 by Mr. Justice Kuloba, which is the subject of this Appeal, was indeed a ruling, as is evidenced by its heading, and could not have been otherwise, as the said decision had been given pursuant to an application made by way of a Notice of Motion dated 27<sup>th</sup>***

*March 2002.*

**5. It is contended by the Applicant/Respondent in its application that the omission of a number of documents, as specified in ground 4 of the Notice of Motion and paragraph 4 of Mr. Owino's affidavit, is good ground for the striking out of the Notice of Appeal and the Appeal. The said documents are not primary documents as specified in Rule 85(1) of the Court of Appeal Rules made under Section 5 of the Appellate Jurisdiction Act, nor are they such documents that are necessary for the proper determination of this appeal.**

**6. What is stated above is true and to my knowledge, save as to matters deponed to on information and belief, the sources and grounds whereof have been specified and set out herein."**

In his submission Mr. Nowrojee more or less elaborated on what was deponed to in the replying affidavit. He pointed out that what the appellant's counsel did in preparing the record of appeal was to reproduce what had been filed in the superior court and that the documents complained of were actually the respondents' own documents. It was Mr. Nowrojee's submission that the applicants were seeking to take advantage of their own wrong doing.

As regards the second ground Mr. Nowrojee submitted that instructions were given to A.R. Kapila Co. Advocates and that this Court has its own rules on the issue of instructing advocates to appear for appeal and that it has not been shown that any of the Rules of this Court has been breached.

On the third ground it was submitted by Mr. Nowrojee that the notice of appeal was proper in describing the decision to be appealed from as a Ruling and not a "Judgment".

Finally on the issue of the copies of the Amended Chamber Summons having been omitted from the record, Mr. Nowrojee's answer was that the same related to garnishee proceedings. He pointed out that the said Amended Chamber Summons is dated 21<sup>st</sup> December, 2001 while the appeal is from the decision of Kuloba J. given on 3<sup>rd</sup> April, 2003 which was two years after the Amended Chamber Summons. It was Mr. Nowrojee's contention that the Amended Chamber Summons was not a pleading for the purposes of this appeal.

For the foregoing reasons Mr. Nowrojee asked us to dismiss this application with costs.

We have now considered the rival submissions in this matter. We may now briefly deal with the grounds set out in support of the application to strike out the appeal. As regards the first ground the complaint was that the numbered pages were either incomplete or illegible. The short answer to this complaint was that these pages were photocopied and included in the Record of Appeal as they had appeared in Mr. Mohamed Ali's affidavit. On our own consideration of this ground we found that the so called incomplete pages were actually what had been produced as exhibits in the superior court. They were photocopied as they were shown in the affidavit of Mr. Mohamed Ali.

We find it rather mischievous on the part of the respondents that they should seek to take advantage of their own mistakes. We find no merit in that ground.

The second ground complained of was that the Memorandum of Appeal had not been signed by Messrs Kapila Anjarwalla & Khanna who were the advocates on record in the superior court. In answer to this Sheetal Kapila in her replying affidavit states that the respondent/appellant instructed her firm to represent it in the Court of Appeal in this **Civil Appeal No. 146 of 2005** as evidenced by the statement of Address for Service contained in the Record of Appeal. She goes on to state that the Memorandum of Appeal was also prepared and signed by an advocate from her firm. This, in our view, was quite proper and in accordance with **Rule 23(1)** of this Court's Rules which provides: -

**"Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such**

**notice on the other party or on every other party appearing in person or separately represented, as the case may be.”**

In view of the foregoing we find no merit in the second ground.

The third ground related to the Notice of Appeal filed by the respondent/appellant. It was the contention of Mr. Owino that while the Notice of Appeal referred to a “*Ruling*” the decision given was a “*Judgment*”. We found this rather interesting submission. What was before the superior court was an application for summary judgment under **Order XXXV rule 1** of the **Civil Procedure Rules**. The application was argued before the superior court (Kuloba J.) as from 24<sup>th</sup> June, 2002 and a ruling finally delivered on 3<sup>rd</sup> August, 2003. What was delivered is entitled “*Ruling*” and after delivering the same on 3<sup>rd</sup> April, 2003 the learned Judge as if to put the issue beyond any doubt, recorded as follows: -

**“COURT:**

**This ruling was read out and delivered by me in open court in the presence of counsel for the applicant, and in the absence of respondent’s counsel who had been duly notified of to-day this 3<sup>rd</sup> day of April, 2003.”**

It was pursuant to the foregoing that a Notice of Appeal was filed on behalf of the appellants. The learned Judge delivered a ruling and it is that ruling that the appellant intended to appeal against. Clearly, we see nothing wrong with the Notice of Appeal filed and any arguments to the contrary must be rejected.

Lastly on the issue of the Amended Chamber Summons our perusal of the record and having regard to what Mr. Owino submitted to us, our short answer is that Mr. Owino was not candid in his submissions. The documents he referred to as being part of the pleadings had nothing to do with the appeal. We have no hesitation in rejecting the fourth ground in support of this application to strike out the notice of appeal.

Having considered all that was urged before us and in view of the foregoing we have come to the conclusion that the Notice of Motion dated 28<sup>th</sup> July, 2005 filed by applicants/respondent was, indeed, unmeritorious. Accordingly the application to strike out the appeal is dismissed with costs. It is so ordered.

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

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**