



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal Appli 255 of 2004

SAMUEL MWEHIA GITAUAPPLICANT/ 1ST RESPONDENT

AND

ELIJAH KIPN'GENO ARAP BII1ST RESPONDENT/APPELLANT

KENYA COMMERCIAL BANK2ND RESPONDENT

(Application to strike out an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mugo, Ag. J.) dated 22nd September, 2004

in

H.C.C.C. NO. 882 OF 2003)

RULING OF THE COURT

There is no opposition to the main issue raised in the application before us and indeed there cannot be as there is an array of authorities from this Court in support of the application. It is a notice of motion taken out by the 1st respondent in the main appeal, *Samwel Mwehia Gitau* seeking an order under **rule 85(1) (c)** of the Rules of this Court that the notice of appeal filed on 23rd September 2004 and the memorandum of appeal dated 19th November, 2004 together with the entire record of appeal be struck out. **Rule 85(1) (c)** merely provides for the contents of a record of appeal and the copies of documents that must be contained therein, amongst them the pleadings. It is **rule 80** of the rules which provides for striking out where an essential step in the proceedings has not been taken. And the essential step which the applicant puts forward is that the record of appeal does not contain a copy of the original plaint, and the original statement of the defendant's defence and counter-claim filed in the superior court. Learned counsel for the applicant Mr. Ngugi contended, and was supported in that contention by Mr. Kibanya for the 2nd respondent, Kenya Commercial Bank Ltd, that these were primary documents, the omission of which would render the appeal incompetent.

It is not denied by learned counsel for the 1st respondent, Mr. Sumba, that those documents are not part of the record of appeal. He rather contends in an affidavit on record sworn by him, that those documents were irrelevant because, once the amendments were made to the original plaint and the original defence and counterclaim, the originals became extinguished and the amendments took

precedence. At all events, he argued, the averments in the original documents were reproduced in the amended pleadings and there was no need to duplicate them by production of the originals. The primary documents in the appeal were therefore the amended pleadings. It was his further view that even if the original documents were essential for inclusion in the record of appeal, they could be introduced in a supplementary record.

At the hearing of this application however, Mr. Sumba had abandoned the views expressed in his affidavit and conceded that the original pleadings were not only primary documents which could not be introduced in a supplementary record, but also that the record of appeal was incompetent without them. The answer came from one of this Court's decisions on similar issues, **Delphis Bank Limited v Caneland Limited & 2 others Civil Application No. NAI. 33 of 1999 (ur)**. The argument in that case was identical to Mr. Sumba's. But 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”.

The only way such documents may be excluded is by an order of a judge or registrar under **rule 85 (3)** of the rules of this Court, which in this case was not invoked. The respondent was therefore clearly wrong to decide on his own accord to exclude the documents complained of. We think in view of the authority cited above, Mr. Sumba was right in conceding the application on that issue.

The sole issue raised by Mr. Sumba in opposition to the application was that the application was itself incompetent because it was filed in contravention of the proviso to **rule 80**, that is to say, after the expiry of thirty days from the date of service of the record of appeal. The record of appeal was served on 25th November, 2004 but the application was filed on 22nd July, 2005. The applicant was however alive to the provisions of **rule 80** and so filed an application under **rule 4** for extension of time to file the application for striking out. That application was dated 7th April, 2005 and was filed on 15th April, 2005 seeking only one substantive prayer: -

“That this Honourable Court be pleased to extend time with which the 1st respondent/applicant may move this Court on an application to strike out the notice and record of appeal filed herein.”

The other prayer was for costs of the application. The matter was heard before a single judge of this Court who was satisfied with the explanation for delay and in a ruling delivered on 22nd July, 2005, the learned Judge granted the application stating: -

“Having weighed up all these factors I, pursuant to Rule 4 of the Court of Appeal rules, exercise my discretion in favour of the applicant and grant the application now before me”.

The learned single Judge however proceeded to add: -

“I hereby order that the time for filing this application by Samuel Mwehia Gitau dated 7th April, 2005 seeking to strike out Civil Appeal No. 255 of 2004 is extended to 15th April, 2005 and that the application already filed on that date be deemed to have been filed in time.”

It is the last paragraph which Mr. Sumba latched on in submitting that the extension of time was only granted up to 15th April, 2005 and that the application which was filed on 25th July, 2005 was without leave and was therefore incompetent. With respect, we do not find any substance in that submission.

Both counsel agree, and it is clearly the case, that there was only one application dated 7th April, 2005 which was filed on 15th April, 2005, and it did not seek any prayer for striking out **Civil Appeal No. 255 of 2004**. There could not therefore have been an extension of time for filing such an application to 15th April, 2005 or deeming it to have been filed on that date. It was purely an unfortunate but obvious slip in the ruling and we must take a reasonable view of it. There was a clear finding, reproduced above, that the application before the learned single Judge was for grant and it was granted. That application sought extension of time to file an application for striking out the notice and record of appeal. It was the understanding of the applicant that he would then proceed to file the application and he did so three days after the ruling. He was right in so doing. The objection is overruled.

In the result we grant the application and order that the notice of appeal dated 23rd September, 2004 and the record of appeal filed on 12th November, 2004 in Civil Appeal No. 255 of 2004 be and are hereby struck out. The costs of the application and of the struck out appeal shall be borne by the 1st respondent, **Elijah Kipn’geno arap Bii**.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of June, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR