



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal (Appli) 311 of 2004

STEPHEN E.C. NGALA.....
.....APPELLANT

AND

1. BURKA AHMED SALIM

2. SWALHA AHMED SALIM.....
RESPONDENTS

(Appeal from an order of the High Court of Kenya at Mombasa (Maraga J) dated 16th November, 2004

in

H.C.C. APPEAL NO. 58 of 1998)

RULING OF THE COURT

Although Mr Asige, learned counsel for the appellant, made a spirited effort to oppose the order sought in this matter for striking out the record of appeal, we see no option but to accede to the application.

It is an application made under **rule 80** of the rules of this Court seeking an order that:

“The entire Record of Appeal be struck out for being incompetent as it does not contain documents and pleadings which are mandatorily required to be part of the Record of Appeal under rule 85 of this Court’s rules:

In essence the applicant, through learned counsel Mr Odongo, says that the record of appeal omitted the pleadings, proceedings and judgments of the two lower courts below which are primary documents under **rule 85** and the record is thus rendered incompetent. There is no affidavit in reply made to rebut that assertion and indeed it is conceded by Mr Asige that there are no pleadings, proceedings or judgments of the lower courts. According to Mr. Asige, these were all irrelevant since the appeal does not emanate from the superior court in its appellate jurisdiction but from its original jurisdiction. It was

original because the matter before the superior court was an application for review and a ruling was given thereon which is now the subject matter of the appeal. The primary pleadings therefore would be the notice of motion for the review and the affidavits filed in support and opposition thereto together with the order appealed against. It did not matter, he submitted, that the review was related to a judgment of the superior court in its appellate jurisdiction from a judgment of the subordinate court which determined the original dispute. All these, in his view, were unnecessary material and are not required under **rule 85(1)** to be made available to this Court. The appellant or his counsel made the decision to exclude the documents now complained about and there was nothing improper about that as it accords with the rules.

As we stated earlier, the dispute between the parties commenced in the subordinate Court, in C.M.C.C. No 2425 of 1997. A decision was apparently made in that court on 7th August 1998 and an appeal was preferred to the High Court in Mombasa in H.C.C.A No. 58 of 1998. That appeal was dismissed on 12th May 2003. We get all that information from one document included in the record of appeal intitled simultaneously as “*Draft Decree in Appeal*” and, “*Memorandum of Appeal.*” There was no second appeal to this Court but the aggrieved party sought a review of that judgment by the superior court in a notice of motion filed on 12th August 2003 on the grounds *inter alia* that:

(ii).....

- **The litigants and their advocates as well as the appellate court proceeded on the basis that there was a competent suit before the court of first instance, while indeed a boundary dispute could not be the basis of a competent suit before the lower court or the High Court unless boundaries have been fixed as by law provided and the registrar has recorded his decision. In this appeal it is clear from the record that boundaries have not been fixed and the lower court entertained the suit without jurisdiction, which is an error apparent on the face of the record, which has certainly occasioned grave injustice.**
- **the summons to enter appearance issued by the lower court and allegedly served on the appellants were incompetent and a nullity and were issued in violation of rules of court, and review ought to be granted to correct this fundamental error.**
- **Failure on the part of the respondent or request for judgment in default of pleadings before formally proving his case is a fatal omission which whitted (sic) away the jurisdiction of court on formal proof and is an error on the face of the record capable of being remedied by an order on review.**
- **The court was not properly and satisfactorily served in this appeal**

(iii) - In the meantime the court be pleased to issue an injunction against the decree holder restraining him from further demolishing the appellants’ structure, or what remains of it, on the disputed boundary line, until the hearing and determination of this review application.

Alternatively the court do order the maintenance of the status quo – ante so as to prevent further demolition of the appellants structure on the disputed boundary line until the hearing and determination of this review application, on the grounds that;

-If the suit property is further demolished irreparable damage will be occasioned to the appellant; and

-this application may altogether be rendered nugatory.

That was the application determined by the superior court on 16th November 2004 which is the subject matter of the appeal before us.

It becomes apparent at once that matters of the original suit and the appeal before the superior court are inextricably intertwined and it cannot therefore be right to argue as Mr Asige does that such matters

are irrelevant and need not form part the record of appeal. Indeed we may wonder loudly why the material must be kept away from this Court. In Our view, the matter now before us arose in the superior court in its appellate jurisdiction and was necessary that the decision of that court and the pleadings of the lower court upon which the decision was based ought to form part of the record for the fair and just adjudication of the dispute.

Mr Asige argued that it was not all documents in the lower court’s file that are necessary for an appeal to this Court. He is right. But only in part. One may readily think of documents filed after determination of the subject matter of the appeal. They would be irrelevant and superfluous documents. But it is 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 should have first been looked at and it is only then that the court would come to the conclusion that the judge erred in principle or that he was plainly wrong. Some material may however be excluded by a direction or an order given under **Rule 85(3)** of the Rules. The sub rule states:

“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.”

Sub **rules (1)** and **(2)** of that rule enumerate what documents ought to be contained in a record of appeal both in the superior court’s original and appellate jurisdictions. But the rule makes no mention of primary or secondary documents. What constitutes these has been defined by this Court many times before and we need only refer for illustration to **Commercial Bank of Africa Ltd vs Ndirangu [2000] 1 EA 29** where the court 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..... 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.”

We think in this matter that the documents which are admittedly omitted from the record before us were a necessary part of the documents considered by the superior court before it made the decision now challenged before us. Accordingly, their omission renders the record of appeal incompetent and we so find.

The upshot is that the notice of motion dated 23rd December 2004 is hereby granted and we order that the record of appeal be and is hereby struck out with costs.

Dated and delivered at Mombasa this 21st day of July, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.M.GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR