



REPUBLIC OF KENYA

COURT OF APPEAL AT NYERI

Civil Appeal 163 of 2000

**WANDIRI KARIMI (minor suing through next friend and mother**

**LYDIA KARIMI.....APPELLANT**

**AND**

**1. GHALIB KHAN**

**2. NEER CONSTRUCTION.....RESPONDENTS**

*(Appeal from the judgment and order of the High Court of Kenya at Meru (Ongundi, J) dated 9/5/95*

**in**

**H.C.C.C. NO. 475 OF 1993)**

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**RULING OF THE COURT**

The applicant who is the respondent in the appeal seeks an order under **rule 80** of the Court of Appeal Rules that the appeal be struck out on the ground that the Record of Appeal does not comply with **Rule 85(1), (c)** as the written statement of Defence and parts of Amended Defence are omitted. The application is supported by the affidavit of *Mr. Harmesh Kumar Mahan* – Advocate for the applicant.

*Mr. Charles Kariuki*, learned counsel for the respondents, has filed a replying affidavit. The application is opposed mainly on the ground that it was filed 4½ years since the service of the record of appeal.

By proviso to **Rule 80** of the Court of Appeal Rules, an application to strike out the notice of Appeal or the appeal should not be brought after the expiry of thirty days from the date of service of the record of appeal on the respondent.

We are satisfied that the record of appeal was served on *M/s Mbae Mwarania & Co. Advocates* who were then on record for the applicant on 13/6/2000.

By virtue of **order 111 rule 6** Civil Procedure Rules *M/s Mbae Mwarania & Co. Advocates* were the applicant’s advocates on record in the appeal because there has not been any change of advocates. They ceased, however, to be the advocates for the applicant on 20/10/2004 when the firm of Bali Sharma & Bali Sharma Advocates filed a notice of change of advocates in the appeal.

Time for filing an application to strike out the appeal started running on 13/6/2000 when the firm of *M/s Mbae Mwarania & Co. Advocates* was served with the record of appeal. The application should have been filed on or about 13/7/2000. The application having been filed grossly out of time is incompetent.

However the respondents' counsel concedes that page 2 of the two-page Amended Defence is not included in the record of appeal. Without the second page which is required to be signed by the appellant or his advocates, the first page cannot be considered as a pleading. The effect of the omission of the second page of the Amended Defence is that the appellant has failed to include the applicants' pleading (Amended Defence) which is a primary document in breach of *rule 85(1)(c)* of the Court of Appeal Rules. **Rule 85(2A)** does not allow the filing of a supplementary record to include such a primary document. It follows that an essential pleading necessary for proper determination of the appeal is missing from the record of appeal thereby rendering the entire appeal incompetent.

Although the application to strike out the appeal is incompetent we would nevertheless in the circumstance of this case strike out the incompetent appeal.

Accordingly, both the application and the appeal are struck out with no orders as to costs.

***DATED and DELIVERED at NYERI this 13<sup>th</sup> day of May, 2005.***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR