



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, O’KUBASU & DEVERELL, J.J.A.)
CIVIL APPEAL NO. 22 OF 2004
BETWEEN

1. SEVENTH DAY ADVENTIST CHURCH EAST AFRICA LTD..... 1ST APPELLANT
2. PASTOR R.M. NYAKEGO 2ND APPELLANT
3. E.N. ADUKE3RD APPELLANT

AND

M/S MASOSA CONSTRUCTION COMPANY LTD RESPONDENT

RULING OF THE COURT

This is an application, by way of notice of motion, stated to have been brought “under rules 42, 80 & 85 of the Court of Appeal Rules and All “**Enabling provisions of the law**” in which the applicant **M/s Masoso Construction Co. Ltd** seeks orders that this Court strikes out the record of appeal lodged by the respondents. The grounds upon which the application is brought are stated to be as follows:-

“a) The record of appeal lodged by the respondents herein on 30th day of January, 2004 is incurably defective insofar as same does not contain exhibits material to the determination of this appeal.

b) The record of appeal lodged by the respondents is incomplete.

c) The respondents herein choose (sic) to omit exhibits “D 2 & D 3” which were produced by themselves in the course of trial in the superior court, without leave of the Court in terms of Rule 85(3) of the Court of Appeal Rules. d) The respondents abrogated unto themselves the authority of the superior court Judge/Registrar of excluding exhibits which are material to this honourable court.

e) The omission to include exhibits produced in the superior court in the record of appeal so lodged shall militate against the fair and just determination of the appeal by this Honourable Court. f) The exhibits omitted by the respondents from the record of appeal are primary documents in terms of Rule 85 (2A) of the Court of Appeal Rules.

g) The documents so omitted are incapable of being brought on record vide supplementary record of appeal. h) The appeal herein is fatally defective and cannot be redeemed by any amount of amendment and/or filing of supplementary records of appeal. i) The application herein has been made within the statutory 30 days.

j) This is a fit and proper application to be granted ex-Debito justitiae.”

In addition to the foregoing, the application was supported by an affidavit sworn by Mr. Joseph Mboya Ogutu, who is the advocate appearing for the applicant company. In that affidavit, Mr. Ogutu explains in great details his reasons for seeking the striking out of the respondents' Civil Appeal No. 22 of 2004.

When the motion came up for hearing before us on 22nd June, 2005, Mr. Ogutu, in his usual humility, meticulously argued the same in a bid to convince us that the respondents' record of appeal was so defective that we had no option but to strike it out. He referred us to a few authorities in support of his submission.

The main ground in this application is simply that the exhibits produced during the trial in the subordinate court were not included in the record of appeal.

In his reply to Mr. Ogutu's arguments, Mr. Soire, the learned counsel for the respondents (*the appellants in the appeal that is sought to be struck out*) referred us to rule 85(1)(f) of this Court's Rules and boldly submitted that documents which are not relevant may be excluded from the record of appeal. He went on to submit that failure to include them did not render the record defective. He was of the view that the said exhibits (*which were excluded from the record of appeal*) were covered by rule 13 of this Court's Rules. He further stated that it was practically impossible to produce the exhibits.

The gist of this application is, indeed, very simple. It relates to the exhibits produced during the course of the trial in the subordinate court. These exhibits were not included in the record of appeal. And for this reason, the applicant company (the respondent in the appeal) sought the striking out of the entire appeal. **Rule 85** of this Court's Rules sets out what should be contained in the record of appeal and for the purposes of this application, we refer to **rule 85(1)(f)** of the Rules which provides:-

“(f) the affidavits read and all documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof.”

In the present application, it was conceded by Mr. Soire that the exhibits produced during the trial in the subordinate court were not included in the record of appeal. In his view, failure to include those exhibits did not render the record of appeal defective. He made a startling submission to the effect that documents which are not relevant may be excluded from the record of appeal. That cannot be correct in view of **rule 85(3)** which provides:-

“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.”

It is therefore only a judge or registrar of the superior court who may direct which documents should be excluded from the record of appeal. A party is not allowed to usurp those powers and purport to decide what is relevant and what is not to be included in the record of appeal. No wonder one of the grounds on which this application is brought was couched in the following words:-

“d) The Respondents abrogated unto themselves the authority of the Superior Court Judge/Registrar of excluding Exhibits which are material to this Honourable Court.”

The above may be the language of Mr. Ogutu, but in our view we must say that the decision as to whether to exclude the exhibits produced in the course of the trial court is reserved for the judge or the registrar of the superior court. In dealing with a similar situation in **ZIPPORAH MUKAMI & OTHERS V. JOHN GITONGA M'NABEA & ANOTHER** – Civil Appeal No. 299 of 1997 (unreported) this Court stated:-

“The original record of appeal did not incorporate certain exhibits produced during the course of the trial in the subordinate court in contravention of the mandatory provision of rule 85(1)(f) as read with rule 85(2) of the Rules of this Court. The decision to omit them was taken by the counsel for the

appellants who thought that they were not necessary for the determination of the appeal before us. But, rule 85(3) imposes the decision as to whether to omit them or not on a judge or registrar of the superior court. The election by the counsel for the appellants to exclude the said exhibits is not supported by the rules and the decisions of this court.”

In the above stated appeal, the counsel for the appellants thought that the exhibits were not necessary for the purposes of the appeal while in the current application, counsel for the appellants (as stated by Mr. Soire) thought that the exhibits were not relevant. We must state once again that rule 85(3) does impose the decision as to what should be excluded on a judge or registrar of the superior court. A party to an appeal or its counsel has no power to decide what should be excluded from the record of appeal. If a party is in doubt as to what should be excluded the only path to be taken is via rule 85(3) of the Rules. We are not saying anything new but for the sake of completeness we refer to this Court’s decision in **MUCUHA V. RIPPLES LTD** [2001] 1EA 138 in which it was held:-

“Rule 85(1) of the Court of Appeal Rules divides documents to be included in the record of appeal into primary documents (which include the pleadings, the trial Judge’s notes of the hearing, the affidavits read and all documents put in evidence) and secondary documents. The failure to include primary documents renders a record of appeal incurably defective. Omitted secondary documents can be put in by the filing, with leave of the court, of a supplementary record by either party. Though under rule 85(3) of the Court of Appeal Rules the decision as to which documents should be included or excluded in a record of appeal is exclusively vested in the superior court, and in absence of a direction from that court, no party has the right to exclude any document.”

Need we say any more on this matter? Clearly, the exhibits which were excluded from the record of appeal are primary documents which may not be put in by way of a supplementary record of appeal. In any case, Mr. Soire did not even suggest that what had been omitted could be brought in by way of supplementary record of appeal. His position was simply that the exhibits were not relevant. He is obviously in error in view of rule **85(3)** of the Rules and the decisions of this Court.

For the foregoing reasons, the application to strike out the appeal must be allowed. Consequently, the appeal (*Civil Appeal No. 22 of 2004*) is incompetent and it is ordered struck out with costs to the respondent. The costs shall include the costs of the motion.

DATED and DELIVERED at KISUMU this 15th day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR