



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: TUNOI, OWUOR & KEIWUA, JJ.A.
CIVIL APPEAL (APPLICATION) NO. 108 OF 2001
BETWEEN

AL-NASIBH TRADING CO LTD APPLICANT/1ST RESPONDENT

AND

DOLPHIN PALMS LIMITED

HAPPY TWINS FREIGHT FORWARDERS LTD

SAMUEL ALEX AYIEKO OYUGI

MARGARET AKINYI AYIEKO RESPONDENTS

(Application to strike out record of appeal from an order

of the High Court of Kenya at Mombasa (Angawa J)
dated 22nd July, 1997

in

H.C.C.S. NO. 234 OF 1994)

RULING OF THE COURT

By its application brought under **rules 80 and 85 (1) (d) and (g) of the Court of Appeal Rules** the first respondent seeks to have this appeal struck out. **Rule 80** is relied on because a step has not been taken by the appellant in the appeal. **Rules 85 (1) (d) and (g)** are cited because these respectively require that the trial judge's notes of the hearing and the judgment or order of the court have not been included in the record of appeal. Those omitted from the record are those prior to September 11, 1995 which were long before the ruling appealed from dated July 22, 1997. The judgment omitted from the record is that one dated June 24, 1994 and which triggered the objection proceedings on which the ruling of July 22, 1997 was the culmination of.

There is some consensus among counsel for these parties that in order to appreciate what the objection proceedings were all about, this Court sitting on appeal, would need to peruse the earlier judge's notes and judgment.

It is therefore our view that both the judge's notes preceding the ruling of July 22, 1997 and the

judgment of June 24, 1994 are not only necessary but relevant in the consideration of the appeal.

One other matter which had been emphasised by Mrs Gudka for the respondent is that the proviso to **rule 85 (1)** allows a party to determine and decide which documents are irrelevant or relevant to the appeal without recourse to **rule 3** of that rule which gives the Registrar or judge of the superior court the discretion to exclude documents when an application is made to that effect. We do not think that Mrs Gudka's submission can possibly be right because if it is, it will render **rule 85 (3)** otiose or irrelevant. We are of the view that the proviso to **rule 85 (1)** is to be read and construed together with **rule 85 (3)** and we so hold.

Accordingly, **Civil Appeal No. 108 of 2001** is struck out for being incompetent. The appellant shall pay to the first respondent the costs of the appeal and of the application.

Dated and delivered at Mombasa this 24th day of January, 2003.

P. K. TUNOI

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

M. Ole KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR