



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OWUOR, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 261 OF 2002

BETWEEN

TAWFIQ BUS SERVICESAPPLICANT

AND

INDIGO DEVELOPMENT LIMITEDRESPONDENT

(Application for leave to amend a Notice of appeal in an

intended appeal from the Ruling and order of the

High Court of Kenya at Mombasa (Khaminwa, Comm. of

Assize) dated 28th June, 2002

in

H.C.C.C No. 582 of 2001)

RULING

In this application brought under rules 1(2), 42 & 44 of the Rules of this Court, the applicant seeks the following orders.

"1.That this Honourable Court do grant leave to the applicants to amend the heading of the Notice of Appeal in the manner shown in the proposed amended Notice of appeal annexed to the affidavit in support of the application.

2.That the proposed Amended Notice be adopted as properly filed."

The ground upon which the amendment is sought is that the Notice of appeal, the subject matter of the application, does not comply with form (D) to schedule 1 under **rule 74(6)** in that instead of the heading reading "CIVIL CASE NO. 582 OF 2001" a typing mistake was made to read "CIVIL APPEAL NO. 582 OF 2001".

This is the mistake which according to Mr. Noor Mohamed, who canvassed the application before me,

is so minor that it should not stand in the way of the applicant in his effort to file a substantive appeal before this Court. According to him, this is a document that can be amended in terms of **rule 44** of the **Rules** with the leave of the court.

Mr. Maobe's objection to the application is predicated on the fact that a Notice of appeal is a primary document in terms of **rule 85(1)** of the **Rules** and it is not a document specified in **rule 85(2 A)** which can be filed by way of supplementary affidavit if originally excluded from the record of appeal. It therefore cannot be amended in that it falls outside the ambit of **rule 44** of the **Rules**.

With due respect to counsel's persuasive argument, my own view of the matter and the recent authorities of this Court goes against this argument. This very point was dealt with by a full Bench of this Court in a recent case of **PARSI ANJUMANI VS MUSHIN ABDULKARIM ALI Civil Application No. Nai. 328 of 1998** where this Court stated thus:

"Whilst it is true that rule 44 speaks of an amendment of any document, it must necessarily be construed in the light of rule 85(2 A) which was brought in by way of an amendment in 1990. If any document were interpreted liberally to include every document then the whole purpose of rule 85 (2 A) would be defeated. Every rule, particularly one brought in by way of an amendment, must be given effect to and cannot be treated as meaningless or superfluous. If that be right, as we think it is, a primary document cannot lend itself to an amendment".

That being my view as aforesaid, the leave sought by the applicant to amend the Notice of appeal is denied. The application is hereby dismissed with costs to the respondent.

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

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR