



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 350 OF 2002**

**KENYA AIRWAYS CORPORATION LIMITED .....APPLICANT**

**AND**

- 1. TOBIAS ONG'ANY AUMA**
- 2. AARON MUISYO MWAILU**
- 3. JOHN OTIENO OWILI**
- 4. WALTER OJWANG' AWICH**
- 5. FIDELIS NTHUNTHI**
- 6. HENRY MUNENE KARUBIU**

**(Suing on their behalf and on behalf**

**of the Ex-employees of Kenya Airways .....RESPONDENTS**

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Justice Mbogholi)  
dated 23<sup>rd</sup> February, 2001**

**in**

**H.C.C.C. NO. 4434 OF 1992)**

**\*\*\*\*\***

**RULING**

This is the appellant's application under **Rule 85(2A)** Court of Appeal Rules for an order that leave be granted to the applicant to file a supplementary record of appeal containing:

- (a) The memorandum of appearance dated 12<sup>th</sup> September, 1992.
- (b) The chamber summons dated 10<sup>th</sup> November, 1992.
- (c) The certificate of urgency dated 17<sup>th</sup> March, 1997 together with the supporting affidavit of even date.

- (d) The notice of motion dated 7<sup>th</sup> March, 2001 filed on 9<sup>th</sup> March together with the supporting affidavit and certificate of urgency.
- (e) The order of the superior court made on 9<sup>th</sup> March, 2001.
- (f) The affidavit of John Khaminwa sworn on 20<sup>th</sup> March together with the annextures.
- (g) The order of the Court of 8<sup>th</sup> May, 2003.

The first appeal filed by applicant against the judgment of Mbogholi Msagha J given on 23<sup>rd</sup> February, 2001 was Civil Appeal No. 13 of 2002. The respondents applied for the striking out of that appeal on the ground that the record of appeal had omitted crucial documents. This court found that the appellant had omitted the skeleton payroll, a primary document from the record thereby rendering the record of appeal incurably defective and proceeded to strike out the appeal with costs on 8<sup>th</sup> November, 2002.

Thereafter the applicant filed an application for extension of time to lodge the Notice of appeal and the record of appeal being Civil Application No. Nai. 311 of 2002. That application was allowed by this Court on 5<sup>th</sup> December, 2002 and the present appeal was lodged on 30<sup>th</sup> December, 2002.

On 16<sup>th</sup> January, 2003 the respondents filed a second application for striking out the appeal on the grounds, inter alia, that the record of appeal is incompetent as it had omitted crucial documents namely:

- (a) Memorandum of Appearance filed on 14<sup>th</sup> October, 1992
- (b) Notice of Motion dated 7<sup>th</sup> March, 2001
- (c) Chamber Summons dated 10<sup>th</sup> November, 1992
- (d) Notice of Motion dated 7<sup>th</sup> March, 2001
- (e) Certificate of urgency dated 17<sup>th</sup> March, 1997
- (f) Order made on 9<sup>th</sup> March, 2001
- (g) Replying affidavit of John Khaminwa sworn on 20<sup>th</sup> March, 2001 together with the annextures.

The present application was filed on 10<sup>th</sup> June, 2003 before the respondents application of 16<sup>th</sup> January, was heard. The respondents application was dismissed with costs on 27<sup>th</sup> June, 2003. In dismissing the application the court stated inter alia:

*“... the omitted documents are not in the primary category, which would then mean that the record of appeal is not incurably defective.*

***It follows, therefore, that the omitted documents may properly be filed by way of supplementary record of appeal, with leave under rule 89(3) in which case the omission is not fatal and clearly curable .....***

***The appellants application already filed for leave to file such a supplementary record may now proceed to hearing before a single Judge of this Court on a priority basis so that the substantive appeal determining the rights of the parties on the merits can be heard and determined with expedition”.***

It has been submitted and I respectfully agree that that Ruling of the full court does not in any way fetter this court’s discretion under **Rule 85(2A)** Court of Appeal Rules.

I have considered the respective affidavits and the submissions of each counsel. The superior court gave judgment for the respondents – 960 ex-employees of Kenya Airways for illegal redundancy. Although the total sum to be awarded was to be computed later, the applicant estimates that the award under the decree will not be less than Kshs.2,000,000,000. The superior court has stayed the execution of the decree on condition that the applicant gives security by way of either a Bank guarantee or insurance Bond in the sum of Kshs.500 million. I have perused the grounds of appeal.

The pending appeal is certainly not a frivolous appeal. The real subject matter of the appeal is a very large sum of money. The applicant has given credible reasons why documents named in paragraphs (a) (b) and (c) of the application were omitted. The record of appeal is bulky. It is in four volumes with over 1,400 pages. The documents in paragraphs (d) – (g) of the application are post judgment documents which respondents by their dismissed application of 16<sup>th</sup> January, 2003 claimed that they should have been included in the record of appeal. All the seven documents do not relate to the dispute which was determined by the superior court and are not essential in the determination of the appeal on the merits.

This court has already held that the omission to include the seven documents in the record of appeal is not fatal to the appeal and has rejected an application to strike out the appeal. It follows that the appeal will have to be heard on the merits whether or not this application is allowed. In the circumstances, allowing this application will neither cause delay in the hearing of the pending appeal nor cause any prejudice to the respondents. Rather, allowing this application will facilitate the just determination of the pending appeal. Any prejudice that respondent may suffer as a result of delay in the determination of the appeal caused by this application can be adequately compensated by costs.

For the foregoing reasons, I allow the application with costs to the respondents, I grant leave to the applicant to file a supplementary record of appeal containing the specified documents. The supplementary record of appeal to be filed and served within 14 days.

**Dated and delivered at Nairobi this 24<sup>th</sup> October, 2003.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**