REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.
CIVIL APPEAL (APPLICATION) NO. 19 OF 1998
BETWEEN
ANDREW KAMAU MUCUHA ....APPLICANT
AND
RIPPLES LIMITED ....RESPONDENT

(Appeal from the ruling and order of the High Court of
Kenya at Nairobi (Shah J) dated 14th December, 1994
in
H.C.C.S. NO. 4522 OF 1992)
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RULING OF THE COURT:

Two motions respectively dated 6th October, 1998 and 19th April, 2000, both taken out by the Ripples Limited, the respondent in the appeal, were argued together before us. Andrew Kamau Mucuha, the appellant, is named respondent in both motions, in which an order is sought striking out the appellant's appeal on the grounds, inter alia, that the ruling appealed from is not signed as required by ***Order XX rule 3 of the Civil Procedure Rules*** ; that essential documents in the hearing and determination of the appeal are omitted from the record of appeal and that the typed copies of proceedings included in the record of appeal do not tally with the handwritten notes of the trial judge and contain several typographical errors and omissions as to render the proceedings unintelligible.

The power of the court to strike out an appeal is donated by ***rule 80 of the Court of Appeal Rules*** , which provides that:

> *"A person affected by an appeal may at any time, either before or after the institution of th e appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."*

The applicant's case in the first motion is that the ruling appealed from is not signed. But before we consider the matter we wish to state that during the hearing of both applications we raised a concern as to why it was necessary to take out two motions when in fact the prayers in both the motions could have been the subject matter of one motion. Miss Muriu, for the appellant, explained from the bar that the omissions and errors relied upon in the second motion were realized long after the first motion had been filed. We wish to observe that a multiplicity of applications as in the present case only serve to increase costs, and in some cases confuse issues. In the circumstances of this case, all the applicant should have done was to seek leave to amend its motion to broaden the grounds upon which the application was brought. We defer further comment on this issue until later on in this ruling.

The ruling appealed from was delivered on 14th December, 1994, by Shah J (as he then was). A mandatory order of injunction had earlier been made by the superior court requiring the appellant to put the applicant herein into possession of premises on the ground floor of Rumwe House situated on L.R.

No. 209/4985, where it had been a tenant. The appellant had allegedly unlawfully and wrongfully evicted the applicant from the said premises. The appellant did not comply with that order. The applicant was compelled to take out committal proceedings against him. It filed a chamber summons in the superior court, dated 24th June, 1993, seeking leave of that court to institute contempt proceedings. It was granted the leave and thereafter brought a notice of motion before the same court seeking committal orders. It is that motion which Shah J heard and eventually granted in his ruling the subject matter of the present appeal. The details of the order the learned Judge made are not material in this ruling. Suffice it to say that he found the appellant guilty, fined him and made other orders which the appellant was aggrieved of and hence the present appeal.

Notwithstanding the fact that the appellant was refused a stay of execution of those orders both by the superior court and this Court, the applicant has not, for some reason, taken any further steps to get possession of the suit premises.

The copy of the aforesaid ruling included in the record of appeal is not signed. However, we checked the superior court record and it is quite clear to us that the learned Judge did sign the ruling on the date of its delivery as he was required to do by the provisions of ***Order XX rule 3*** aforesaid. It was, however, contended on behalf of the applicant that the copy of the ruling in the record of appeal should also have carried the trial Judge's signature. ***Rule 85 (1) of the Court of Appeal Rules*** , which makes provision as to what a record of appeal should include does not talk about a signed copy of the ruling or judgment appealed from, but:

"85 (1) (g) the judgment or order;

(h)certified copy of the decree or order."

This Court has in the past struck out some appeals on the sole ground that the judgment or ruling appealed from was not signed. Those cases are distinguishable from the one before us on the ground that in those earlier cases, the respective trial judges did not sign their judgments or rulings at the time of delivery or at all. By dint of the provisions of ***Order XX rule 3*** aforesaid, a pronouncement of a decision is given legal effect by the dating and signing of a copy thereof at the time of such dating and pronouncement. The ruling appealed from in this appeal clearly satisfies the requirements of ***rule 85 (1) of the Rules of this Cour***t and as we stated earlier, was dated and signed at the time of delivery; consequently, the applicant's first application lacks any merit.

Regarding the second application, three sets of documents are said to be omitted from the record of appeal, the first one being a chamber summons dated 24th June, 1993, in which, as we said earlier, the applicant sought the leave of the superior court to file committal proceedings against the appellant herein for breach of a court order. The second set of documents are a Notice of Motion dated 31st January, 1994,in which orders were sought authorising the attachment of the appellant's property. The third and last set of documents is a replying affidavit sworn by the appellant on 26th July, 1993, in response to the chamber summons dated 24th June, 1993, aforesaid, but which has erroneously been described in the present application as a Notice of Motion. The applicant also complains that the typed proceedings included in the record of appeal is replete with errors and omissions as render the proceedings unintelligible.

Rule 85 (1) of our rules, divides documents to be included in a record of appeal into two categories, namely, primary and secondary. In the primary category are those documents which if omitted from the record of appeal render the said record incurably defective. The secondary category of documents may be brought on record by either party with leave of the court, filing a supplementary record of appeal under ***rule 89*** of the said rules. Miss Muriu for the applicant conceded before us that all the omitted documents are not in the primary category which would then mean that the record of appeal is not incurably defective.

Mr Thiongo, for the respondent, does not think the record of appeal is inadequate in any way. His submission before us was that the appellant having included in the record of appeal the order granting the

applicant leave to file contempt proceedings it was not necessary to include in the record of appeal, the application for the leave. Besides, he said, if the applicant thought that the chamber summons for leave was essential in the present appeal it should have proceeded under ***rule 89 (1)*** and filed a supplementary record of appeal to bring the documents on record. Mr Thiongo was, however, quick to informally seek leave to file a supplementary record of appeal in terms of ***rule 89 (3)*** of the rules, in the event that we do not accept his earlier submission.

By dint of the provisions of ***rule 85 (3)*** the power to exclude any document from the record of appeal lies with the superior court. Neither the appellant nor the respondent has the right or power to exclude any document for whatever reason. If either party wishes to exclude any document from the record of appeal, he or it is obliged to move the superior court for a direction in that regard, failing which the record of appeal omitting any such document shall be rendered defective. That is the position regarding the present record of appeal. The issue that logically arises from that conclusion is whether the defect is curable. Both counsel were ***ad idem*** that the documents which are omitted from the record of appeal are not of the primary category. The documents which fall into that category are set out under ***rule 85 (2A) of the Court of Appeal Rules*** . They include the pleadings, the trial Judge's notes of the hearing, the affidavits read and all documents put in evidence at the hearing, the judgment or order, a certified copy of the decree or order and the notice of appeal. The only document which, prima facie, falls in that category is the affidavit which was sworn by the appellant on 26th July, 1993, in reply to the applicant's chamber summons dated 24th June, 1993. However, as rightly pointed out by Mr Thiongo, that affidavit forms part of the record of appeal. Its annextures are, however, omitted. That notwithstanding, the fact that the affidavit in question was not read at the hearing which gave rise to the ruling appealed against, it cannot be said to be a primary document.

In the result, we are of the view that the omitted documents render the record of appeal defective but not incurably defective. We, however, rule that the appellant gravely erred in omitting them from the record of appeal without the appropriate direction from the superior court under ***rule 85 (3)*** aforesaid.

Mr Thiongo sought our leave to file a supplementary record of appeal so as to bring the omitted documents on record in order to cure the defect. Before we consider the matter we deem it appropriate to first consider the third complaint the applicant raised, that is to say the errors and omissions in the typed copies of the trial court's proceedings. It may be as pointed out by the applicant that those errors and omissions exist in the typed proceedings. But, counsel for the appellant has appended a certificate to the record of appeal to the effect that he compiled the record of appeal using documents supplied to him by the trial court. The certificate which is prepared pursuant to the provisions of ***rule 85 (5)*** of our rules is mandatory. But is an appellant or his advocate supposed to first satisfy himself that the typed copies of proceedings supplied to him tally with the handwritten proceedings before appending such a certificate to the record of appeal? We do not think so. It is the duty of the trial court or indeed any court to ensure that copies of either proceedings or ruling or judgment agree with the original before giving it out to any person asking to be supplied with a copy thereof. We have checked the copies of proceedings included in the record of appeal and it is clear to us that they bear at the end a certificate by the Deputy Registrar of the High Court that they are a true copy of the original. The name of the officer who proof-read the typed proceedings is also indicated thereon. To our minds, the appellant or his counsel was perfectly entitled to append the said certificate under ***rule 85 (5)*** , aforesaid and relying on the Deputy Registrar's certificate, presume that the typed proceedings agree with the handwritten ones.

Back to the issue of leave. Under ***rule 52 (1)*** an application for leave to file a supplementary record of appeal has to be made to a single judge, and a formal application in that regard is necessary in view of the provisions of ***rule 42 (1)***. As Mr Thiongo's application was neither made in the course of the hearing of the appeal nor with the consent of the applicant (the respondent in the appeal). We are disinclined to grant the leave in the present motions.

In the result, the order that commends itself to us is to dismiss both the applications. But as regards costs, we think that neither party is entitled to any costs. We would have been inclined to penalize the applicant heavily on costs for the multiplicity of applications, seeking the same order although on different grounds, but we have decided against it more so because the appellant improperly, arrogated to

himself the duty which is squarely on the superior court to decide on which documents were not necessary in the hearing and determination of his appeal.

In the result, we make no order as to costs in both applications.

Dated and delivered at Nairobi this 4th day of May, 2001.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR