



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: KWACH, TUNOI & BOSIRE J.J.A)  
CIVIL APPEAL NO. 169 OF 2000**

**BETWEEN**

**CHEMIGAS LIMITED .....APPELLANT**

**AND**

**BOC KENYA LIMITED .....RESPONDENT**

**(Appeal from a ruling and order of the High Court of  
Kenya at Nairobi (Gacheche, Comm. of Assize) dated  
15th December, 1999**

**in**

**Milimani Civil Case No. 935 of 1999)**

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**RULING OF THE COURT**

Two applications were argued before us at the same time. The first in time bears the date 5th July, 2001, and was taken out by BOC Kenya Limited, the respondent in the appeal; and in it the respondent seeks an order striking out the appeal as incompetent on the ground that a copy of the formal order included in the record of appeal has a different case number from that which the appeal arises. The second application is dated 6th July, 2001, and was taken out by Chemigas Limited, the appellant, seeking leave of the court to amend the aforesaid formal order by deleting the number on it, to wit 965, and substitute it with 935 as the correct case number.

**Order XX rule 6(1)** of the Civil Procedure Rules, provides that:

***"6 (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit."***

By reason of **rule 7(6)** of the same Order, any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

A formal decree or order is a primary document by dint of the provisions of **rule 85(1)** of the Court of Appeal Rules (the Rules). So unless a record of appeal includes a valid copy of it, the appeal is liable to be struck out as incompetent.

The appellant through its counsel, Mr Regeru, contended before us, and it was also his submission,

that the defect in the formal order included in the record of appeal is merely clerical in nature, minor and that such an irregularity can be corrected by the Court, in exercise of its wide discretion under both rules 44 and 1(3) of the Rules. In his view, rule 44 contemplates that any document for use in this Court regardless of its source may be amended by leave of this Court.

He submitted further that only defects of a minor nature may be the subject matter of an amendment under rule 44, but not otherwise. He urged us not to fetter our discretion to grant leave to amend, because, in his view, unless a robust approach is adopted the appellant may be put into unnecessary inconvenience and expense and that needless delay may result in the final determination of the dispute between the parties.

Mr Ngaira for the respondent in the appeal, submitted before us that the formal order being a primary document may not be the subject matter of an amendment before this Court. In his view the defect in the said order is fundamental as it affects the validity of the appeal. Factors such as expense, inconvenience and delay are not, in his view, relevant in considering the competence or otherwise of an appeal as doing so will in effect, run counter to clear statutory provisions. He cited decisions of this Court to support his submissions.

The present appeal is from the order of the superior court dated 15th December, 1999. It is the kind of order which is required to be drawn. Rule 85(1)(h) of the Rules, requires that an extracted formal order from which the appeal arises be certified. The certification is not merely a routine matter but a judicial act to confirm the correctness of the particulars as to the case number, the parties to it and the decision of the court against which an appeal is intended. The number of the case is normally inserted on the title of the order or decree as the case may be, according to the format for drawing decrees and orders given in Appendix C to the Civil Procedure Rules, with particular reference to Order XX rules 6 and 7. The requirement that the case number be included in the title is not otiose. The number is the identifying mark of every case and its omission or incorrectness is a fundamental defect.

In PARSI ANJUMANI V MUSHIN ABDUL KARIMI ALI (Civil Application No. NAI. 326 of 1998) (unreported) which was cited with approval in REPUBLIC V THE MANAGING DIRECTOR KENYA POSTS & TELECOMMUNICATIONS CORPORATION (Civil Appeal No. 24 of 1999) (unreported), this Court said:

***"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(2A) 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 (2A) 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."***

There is a line of other decisions of this Court which hold that a primary document, cannot lend itself to an amendment and we do not consider that there is a good enough reason to depart from that position. Besides, a decree or order envisaged by the provisions of rule 85(1) of the Rules, is the foundation of every appeal, and unless it accords in every respect with the judgment or ruling appealed against, a decision of this Court in such an appeal may proceed upon a wrong premise. Its correctness in substance and form is really a matter for the court which gave or issued it. Moreover, it is not uncommon for parties in a particular case being involved in more than one case. So whether or not the number of the case is the correct one or not is a matter for the court from which a decree or order emanated. That perhaps explains why rule 85(1)(h) requires a certified copy of the decree or order appealed from to be included in the record of appeal. As we stated earlier, certification of such a document is not merely ministerial act, but a judicial act as it entails one satisfying himself that the formal order accords with the judgment or ruling giving rise to it.

Moreover, as Mr Regeru submitted, the Rules of this Court must be read together. It is by doing so that the significance of rule 85(2A) will be appreciated. That subrule and sub-rule (5) of the same rule place the responsibility on the appellant and his legal adviser or advisers as the case may be to include in a

record of appeal proper and correct documents, and the power to amend donated by rule 44 is not intended to validate an otherwise incompetent appeal. The power to amend is a power which in our view, should be exercised quite sparingly and in matters where minor amendments are involved.

In the result we are disinclined to grant leave to amend the formal order. As Mr. Regeru conceded that the appellant's appeal would be incompetent unless the amendment it sought was granted, the order that then commends itself to us is that the appeal be and is hereby struck out, with costs.

We also award the costs of both applications to the respondent in the appeal.

**Dated and delivered at Nairobi this 31st day of July, 2001.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**