



**IN THE COURT OF APPEAL  
AT NAIROBI  
CIVIL APPEAL NO. 321 OF 2000**

**BERCO AUTO SPARES LTD.....APPLICANT**

**AND**

**HANNAH WANJIRU WANGANGA.....RESPONDENT**

**(An appeal from the decision and/or ruling of the High Court of Kenya at Nairobi**

**(Angawa, J) dated 26th October, 2000**

**in**

**H.C.C.C. NO. 1676 OF 2000)**

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**RULING OF THE COURT**

The applicant, *Berco Auto Spares Limited*, has moved this Court for orders to have *Civil Appeal No. 321 of 2000* struck out on two grounds. The first ground upon which the relief is sought is that the notice of appeal dated 2nd November, 2000 and lodged in the superior court on the same day was not served at all on the respondent's advocates, Messrs, Mwicigi Kinuthia & Company. We will deal with that ground first.

Mr. Kinuthia for applicant has stated, in his affidavit sworn on the 2nd day of March, 2001 in support of this application, that the said notice of appeal not having been served upon his office, the respondent has contravened the provision in rule 76(1) of the Rules of this Court which sub-rule requires that a notice of appeal ought to be served on the respondent within seven days of lodgement thereof. If that indeed was the case the respondent's appeal would be incompetent. On the other hand, Mr. Mutua who appears for the respondent says that his clerk Alex Musili did serve a copy of the said notice of appeal on Mr. Kinuthia's office on 8th November, 2000. Alex Musili's affidavit, sworn on 12th March, 2001, in response to Mr. Kinuthia's affidavit shows that Mr. Kinuthia's office was served with a copy of the said notice of appeal on 8th November, 2000. On the reverse of the second page of the copy of the notice of appeal annexed to Mr. Musili's affidavit appears a rubber-stamp which purports to show that Mr. Kinuthia's office was served with the said copy on 8th November, 2000. Mr. Kinuthia pointed out that the second page of the notice of appeal in the record of appeal was not the same as the second page thereof exhibited to Mr. Musili's affidavit. The words in the latter show the names "*Impala House*" and "*Sixth Floor*" in two separate lines whereas in the former the words are in one line, that is, "*Impala House Sixth Floor*". Mr. Kinuthia's veiled suggestion is that the second page of the said exhibit was substituted. Mr. Mutua's response was that whilst copying the notice of appeal in a second lot for the original purpose the lines may have shifted. Mr. Kinuthia stated from the bar that none of his clerks ever received the said copy. That is not enough. On what was argued and stated before us we are not satisfied

that a copy of the notice of appeal was indeed not served on Mr. Kinuthia's office. From what is before us we are unable to say that the rubber stamp endorsed on the said exhibit is forged as Mr. Kinuthia suggested somewhat indirectly. That ground of application therefore fails.

The second ground relied upon by Mr. Kinuthia is that a copy of an amended plaint lodged in the superior court on 29th November, 2000 is not included in the record of appeal. If the amended plaint was lodged prior to delivery of the ruling appealed against it would have been a primary document. But that amended pleading was not before the superior court when the application for injunction was being argued. It was lodged after the date of delivery of ruling which was 26th October, 2000. Rule **85(1)(c)** of the Rules of the Court requires that pleadings be included in the record of appeal but that does not mean that the pleadings which were not in existence prior to the date of the ruling appealed against must be included in the record of appeal. This ground also fails.

In the end result this application is dismissed with costs.

**Dated and delivered at Nairobi this 27th day of July, 2001.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**E. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**