



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O'KUBASU J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 42 OF 2001 (25/2001 UR)**

BETWEEN

1. MANCHESTER OUTFITTERS SUITING DIVISION LTD1ST APPELLANT

2.GALOT INDUSTRIES LIMITED2ND APPELLANT

AND

1. STANDARD CHARTERED FINANCIAL SERVICES LTD.....1ST RESPONDENT

2. A.D GREGORY & CAHILL2ND RESPONDENT

**(Application for leave to file supplementary record of
appeal from judgment, decree of the High Court of
Kenya at Nairobi (Mr. Hon. Justice Githiji) dated
30/7/99**

in

H.C.C.C NO. 5002 OF 1990)

R U L I N G

This is a notice of motion brought under Rules 42, 85(2A) and 89(3) of the Court of Appeal Rules in which the applicants are seeking the following orders:-

1.THAT the Appellants/Applicants be granted leave to file a Supplementary Record of Appeal.

2.THAT the Supplementary Record of Appeal already filed by the Appellants/Applicants and served on the Respondents be deemed to have been duly filed and served". This application is brought on the grounds that: "1.The Supplementary Record of Appeal for which leave is prayed for consists of documents falling under Rule 85(1) (K) and Rule 89(3) of the Court of Appeal Rules.

2.The Supplementary Record of Appeal consists principally

(1) of the written submissions of the parties filed in the Superior Court; and

(2) of the proceedings in the Superior Court which have taken place after the Judgment and or after the Record of Appeal has been lodged herein on 2.5.2000.

3.The written submissions by both parties filed in the Superior Court are missing from the Record

of Appeal and objection thereto has been taken by the Respondents.

4.The said written submissions had not been supplied by the High Court Registry and were not with the new counsels on record. The same were thus unintentionally omitted.

5.The said submissions are necessary for the proper determination of the Appeal.

6.Interlocutory proceedings which took place in the Superior Court after this Appeal was already lodged or after the judgement but not determined by the time the Appeal was lodged, could not be included in the original Record of Appeal.

7.The same are now included as they are necessary for the proper determination of the appeal and fall within the appropriate rules of this Honourable Court".

In addition to the foregoing, there is a supporting affidavit sworn by one Mohan Galot who is the Chairman of the appellants companies.

When this application came up for hearing before me on 11th July, 2001, Mr. Le Pelley for the respondent, while not opposing the application urged me to exclude certain documents which he thought were irrelevant. Indeed, in his view, we already have quite a number of irrelevant documents in this matter.

Mr. Nowrojee for the applicants contended that the documents referred to by Mr. Le Pelley were not irrelevant as they may affect the prayers sought. It should be pointed out that in this matter the respondents had applied for striking out of the appeal on the grounds that:-

"(a)The record contains all documents filed in and all judges notes of hearing and applications regardless of relevance;

(b)The pleadings in the suit are supposed by rule 85(1) (c) and rule 85(4) (i.e. Rules of this Court) to be placed together, whereas they are in fact placed over 2 volumes, as follows: Vol. 1 pp 108 - 113, 364 -367; Vol. 2 pp 377 -422, 515 - 520; 562 -628.

(c)The notes of the hearings of Dugdale J are not the notes of the trial Judge who was Githinji J since the judgment of the Court of Appeal (set out in the record Vol. 2 pp 712 to 723) stated (at p 715) that the suit was to be heard de novo before another Judge because of the impressions made on the Judge and that therefore it is improper to include these proceedings in this record;

(d)The written submissions made to the Judge as directed by the Judge (volume 3 p 1200) and handed to the Judge have not been included in the record of appeal;

(e)The documents in the record have not been bound in order in which they are set out in rule 85(1) of the Court of Appeal Rules, which is contrary to rule 85(4), all the documents from Vol. 1 p 14 to 107, and 114 to 361, from Vol. 2 p 425 to 54, p 521 to 561 and p 629 to 747 are documents which if they should be in the record at all come under rule 85(1) (k) and so should have been at the end of the record".

That application for striking out the appeal came before us (Omolo, Shah & O'Kubasu JJ.A) and we dismissed it. In dismissing that application for striking out we stated inter alia:-

"Mr. Le Pelley relied on the case of Commercial Bank of Africa Limited vs. I.C. Kamau (Civil Appeal (Application) No. 257 of 1997 (unreported) in support of his argument to the effect that the party preparing a record of appeal should first look at what documents are not material and ought to apply to seek directions under rule 85(3) of the Rules. This Court ruled that the trial court's notes whether or not either party considers them relevant and essential to the determination of the appeal are essential documents; that non-inclusion thereof rendered the

appeal incompetent; that a party to an appeal has no discretion to exclude from the record any document, whether primary or otherwise, unless the provision in rule 85(3) is invoked; that that sub-rule opens the door for bringing on record, with leave of the court, certain essential documents which, by an oversight or inadvertence, were excluded".

In view of the foregoing, I find no merit in Mr. Le Pelley's objection to some of the documents being included in the supplementary record of appeal. Perhaps it is too early to declare these documents irrelevant. Mr. Nowrojee did not wish to take any chances and hence decided to put everything before the court.

The upshot of the foregoing is that this application is allowed and the applicants are hereby granted leave to file a Supplementary Record of Appeal. It is further ordered that the Supplementary Record of Appeal already filed by the Appellants/Applicants and served on the Respondents be deemed to have been duly filed and served. There will be no order for costs.

Dated and delivered at Nairobi this 13th day of July, 2001.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR