



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & KEIWUA, J.J.A.)
CIVIL APPEAL NO. 262 OF 1999**

BETWEEN

RAHILU MOHAMED KHAN APPELLANT

AND

STANDARD CHARTERED BANK (K) LTD. FIRST RESPONDENT

MARYAM ABDULHAMID IBRAHIM SECOND RESPONDENT

**(Appeal from a ruling and order of the High Court of Kenya at Mombasa,
Hayanga, J., dated the 19th day of August, 1999
in
H.C.C.C. NO. 297 OF 1997)**

RULING OF THE COURT

The respondents in this appeal, Standard Chartered Bank (K) Limited (the bank) and Maryam Abdulhamid Ibrahim (Maryam), filed in the appeal, separate but similar applications, under **rule 80** of the Court of appeal Rules, for an order striking out the appeal on the grounds, firstly, that it was filed out of time without leave, and secondly, that primary documents, to wit, the plaint and the application for leave to issue and serve a third party notice, were omitted from the record of appeal, in breach of the mandatory provisions of **rule 85(1)(c)** of the rules.

The appellant, Rahilu Mohamed Khan (the appellant), as respondent in both applications, brought action against the bank for the recovery of monies she had entrusted to it. She avers in her amended plaint dated 21st May, 1998, that the bank, without her authority or knowledge, allowed Maryam to operate the appellant's bank account with the bank, and more specifically to withdraw money from it for purposes unknown to her. The total amount thus withdrawn, she says, is in excess of Kshs.930,711.65. It forms part of her claim. There are ancillary reliefs but their details are not material to this ruling.

The bank was duly served with summons to enter appearance and the plaint, it appeared and filed a written statement of defence denying the claim. The appellant regarded the defence as frivolous and a sham and, therefore, moved the superior court under **order 35 rules 1 and 2** of the Civil Procedure Rules for summary judgment. Before the application was posted to come for hearing, the bank applied for and was granted leave to issue and serve a third party notice upon the second respondent in the appeal. The appellant also, in the meantime was granted leave, upon application, to amend her plaint. Thereafter pursuant to an application by the bank for 3rd party directions, the court, on 18th February, 1999, directed that Maryam as the named 3rd party, file her defence to the third party notice within 21 days, and that the issue of liability between the bank and the third party be heard and determined concurrently with the

question of liability between the appellant as plaintiff and the bank as defendant in the suit.

The application for summary judgment came for hearing on 13th July, 1999. Mr. Mabeya appeared for the appellant, Mr. Gor for the 1st respondent and Mr. Khatib for the 3rd party. Both Mr. Gor and Mr. Khatib raised, in limine, the question of the competence of the application in view of the third party directions that the liability of the third party to the defendant would be determined at the same time with that of the defendant to the plaintiff. Hayanga, J. reserved his ruling on the matter which he delivered on 19th August, 1999. In that ruling the learned Judge, in effect, upheld the preliminary point, and on 31st August, 1999, clarified his ruling in the following manner:

"Order:

I think the effect of the orders of 19th August, 1999 is that the application for summary judgment is incompetent and was therefore struck out."

The appellant was aggrieved, and on the same day she filed a notice of appeal declaring her intention to appeal against the ruling dated 19th August, 1999. On 7th September, 1999 her counsel addressed a letter to the superior court bespeaking copies of certified proceedings and the ruling, which letter is shown to have been copied to C. B. Gor and Gor, Advocates, Court Chambers Mombasa, and Khatib & Company, Arcaff Building, Mombasa. Both firms of advocates deny they received the copies notwithstanding that counsel for the appellant, has exhibited a copy of a page from their delivery book to show the copies had been delivered to them. It is on the basis of that denial that both the respondents urge that the appellant cannot rely on the proviso to rule 81, of our rules, to exclude from computation the time that was necessary for preparing copies of proceedings and ruling for purposes of this appeal. It was contended on behalf of the respondents that an affidavit of service should have been filed as the best evidence of service. With due respect, our rules do not provide for service of a copy of the letter bespeaking the copies of proceedings and ruling or judgment, as the case may be, upon the respondent in the intended appeal. Rule 81(2), merely states that such copy "... was sent to the respondent." We eschew any attempt to impose requirements which are not provided for in our rules.

In compiling her record of appeal, the appellant did not include the original plaint, the copies of the application for leave to issue a third party notice, and the notice itself. The respondents contend that the plaint and the application are pleadings, and, therefore, their omission from the record of appeal breaches the mandatory provisions of rule 85(1)(c) and therefore render the appeal incurably defective. A plaint is clearly a pleading, but we doubt whether the application for a third party notice is a pleading. It is not the document or set of documents which, under the Civil Procedure Rules, sets out the defendant's claim, but the notice itself. This is clear from the wording of **Order 1 rule 14(3)** of the Civil Procedure Rules, which, in pertinent part, provides that:

"The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within the time limited for filing the defence..."

And rule 16 of the same Order, in pertinent part, provides that:

"Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled ... to judgment against the third party to the extent claimed in the third party notice ..."

The Supreme Court Practice, 1993, has a commentary at p.252, which makes the point clearer. It reads thus:

"Indeed, generally speaking, a defendant and a third party stand in relation to one another as if the defendant had brought a separate action against the third party ..."

And in the paragraph preceding that there is a short statement which, in pertinent part, reads thus:

"The service of the third party notice, and the issue of contribution between codefendants, in an appropriate case, creates a "lis" between the parties in question, which remains to be disposed of, if necessary by determination by the court."

In view of the foregoing, we agree with Mr. Mabeya, that the application for a third party notice is not a pleading but we are unable to agree with him that a third party notice is not a pleading. A third party notice is a manner prescribed in the Civil Procedure Rules for instituting a suit and cannot be anything else, but a pleading. The definition of the term "Pleading" in **Section 2** of the Civil Procedure Act, is not exhaustive, and must be read with **Order 4 rule 1** of the Civil Procedure Rules to get its full meaning.

We finally come to the question whether an amended complaint supplants the complaint and in a way expunges it from the record. That was Mr. Mabeya's submission. He cited the English case of **Warner v. Sampson And Another**, [1959] 1 ALL ER 120, to support his submission in that regard. In his judgment, Hodson L.J, made the following, among other remarks:

"Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order, and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand; the purpose of amendment being to determine the real question in controversy between the parties."

Of course once a complaint is amended, what stood before amendment does not define the case of the plaintiff, but the amended complaint does. It, however, forms part of the lower court record and unless a Judge or Registrar, of the superior court otherwise directs that it be excluded from the record of appeal as provided under **rule 85(3)**, of our rules, it should be included in the record of appeal. In the result we dismiss the respondents' respective applications dated 17th and 13th January, 2000, respectively, but nonetheless strike out the appeal on the ground that primary documents, to wit, a third party notice, and the complaint were omitted from the record of appeal, which omission renders the appeal incurably defective. We make no order as to costs.

Dated and delivered at Nairobi this 11th day of February, 2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR