



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & OWUOR, J.J.A.)
CIVIL APPEAL NO. 192 OF 1999

BETWEEN
CALTEX OIL (KENYA) LIMITEDAPPELLANT
AND
RONO LIMITEDRESPONDENT

(An Appeal from the Judgment and Decree of the High Court
of Kenya at Nairobi (Justice Keiwua) dated 15th day
of February, 1999
in

H.C.C.C. NO. 1388 OF 1992)

RULING OF THE COURT

The present application by way of notice of motion filed on 1st October, 1999, is for the striking out of the notice of appeal and the appeal itself given and filed by the Respondent in respect of the judgment of Ole Keiwua, J. as he then was, delivered on 15th February, 1999, and the decree derived therefrom. This application was made on the main ground that the appeal had not been filed within the time prescribed by the Court of Appeal Rules.

Although this was not related to the grounds contained in the Applicant's notice of motion, Mr. Esmail for the Applicant in the course of his submissions, drew our attention to the fundamental issue that the appeal was incompetent because it did not comply with one of the mandatory provisions regarding the contents of a record of appeal, namely, as provided by Rule 85(1)(f) of the Court of Appeal Rules, that a record of appeal shall, subject to sub-rule (3), contain: "the affidavits read ... at the hearing ...".

Mr. Esmail in this regard, referred to the affidavit sworn by him and which it cannot be denied, was one of those filed in the proceedings of the suit. During the course of the hearing, the Respondent had applied to amend its defence. The Applicant's grounds of objection to this application was supported by Mr. Esmail's affidavit. That affidavit had annexed to it, a bundle of documents which was intended to establish, among other things, the crucial objections that the proposed amendments were false and dishonest and that they did not disclose any defence in law. What is more, when considering the amended defence in his judgment which is the subject matter of the appeal filed in this court, Ole Keiwua, J. after considering it and obviously, as well as Mr. Esmail's affidavit, made the following unflattering observation about the amended defence:

"It is clear to me that these parties did on the signing of the sale agreement pass out of the stage of negotiations into a definite contract. This is plainly clear from the defence and in the correspondence including the letter rescinding the sale agreement purportedly. In fact such a state of things is accepted by the defendant in the Amended Defence which only pleads

illegality in rather too remote circumstances. Thus, the submission on behalf of the plaintiff that the rescission factor was not within the terms stipulated into the agreement of sale.

It is not clear on the face of the Amended defence why the defendant contends that there are no admissions therein ...".

We have spent some time on the issue of the amended defence in order to show that the affidavit of Mr. Esmail already referred to, including the important bundle annexed to it and which is an integral part of the affidavit, was not only, in respect of an important aspect of the matter before the learned Judge, but also, formed a part of the proceeding in the superior court and one which must have been read by the learned Judge. The other related important issue namely, the one raised by Mr. Esmail from the bar, and which will determine whether we have jurisdiction to hear the present appeal at all, is whether the affidavit of Mr. Esmail as contained in the record of proceedings without its annexure, constitutes a breach of the mandatory provisions of Rule 85(1)(f). The annexure as we have already observed, is an integral part of this affidavit and without it, the affidavit is incomplete.

We have come to the conclusion that the mandatory provisions of Rule 85(1)(f) which requires nothing else than a complete affidavit to be included in the record of appeal, has been breached. This omission being neither one that has been sanctified under Rule 85 sub-rule (3), nor one which may be rectified with the leave of this Court under Rule 85(2A), makes the appeal incompetent and we have no alternative but to strike it out.

In the circumstances, we do not feel called upon to consider the grounds contained in the Applicant's notice of motion filed on 1st October, 1999. There will therefore be no order as to costs.

Dated and delivered at Nairobi this 17th day of March,

2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.