



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, SHAH & BOSIRE JJ. A.)

CIVIL APPEAL (APPLICATION) NO. 161 OF 1999

BETWEEN

ABOK JAMES ODERA T/A A.J.ODERA & ASSOCIATES.....APPLICANT

AND

JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCARES.....RESPONDENT

**(Appeal from the ruling and decree of the High Court of Kenya at Nairobi (Justice E O O’Kubasu)
dated 30th July 1998**

in

HCCC No 183 of 1998)

RULING

John Patrick Machira, trading as Machira & Co, Advocates, as respondent in this appeal, has moved this Court under rule 80 of the Court of Appeal Rules (the Rules), for an order striking out the appeal on the grounds firstly, that an essential step in the proceedings has not been taken. He contends that essential pleadings and proceedings were omitted from the record of appeal during its preparation and their exclusion renders the appeal incurably defective and therefore incompetent; and secondly, that the notice of appeal in the appeal is incurably defective.

Abok James Odera, trading as A J Odera & Associates, is the appellant and the respondent in the application. He does not think the excluded documents are essential, nor, in his view, that their omission renders the appeal incompetent. An earlier appeal, to wit Civil Appeal No 176 of 1998, which he brought to challenge the same ruling and decree as herein was, on 9th July, 1999 struck out for the same reason given for seeking an order striking out this appeal. The appellant, however, argues, firstly, that as the documents omitted did not form part of the suit from which this appeal lies their exclusion would not offend any of the provisions of rule 85 of the Rules. Secondly, that the appeal which was struck out concerned two prayers, one which sought for an order striking out Civil Case No 518 of 1996, concerning which the omitted documents are part of. The appellant, however, concedes that his notice of appeal does not conform fully with its form given in the Rules, but contends that the defects in it are not fatal to the appeal.

The applicant is the plaintiff in High Court Civil Case No 183 of 1998, in which he makes a liquidated

demand for Kshs 23,681,581.35 being fees for professional services rendered. The appellant as defendant in the suit, on the main, averred in his statement of defence thereto, that the claim was inchoate and that the applicant could only properly raise his claim in High Court Civil Case No 518 of 1996, by way of a bill based on either the Advocates Remuneration Order or a separate agreement. He later, on 20th February, 1998, by an application dated 13th February, 1998, moved the superior court by Chamber Summons praying for an order that Civil Suit No 183 of 1998 be struck out, or in the alternative that pending determination of High Court Civil Case No 518 of 1996, that suit be stayed.

Before the above application was determined the applicant also brought an application for summary judgment pursuant to the provisions of order 35 rule 1(I)(a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, seeking summary judgment for the sum which he claimed in the plaint less Kshs 4 million which he averred herein that it was paid subsequent to the filing of his suit.

In both the aforesaid interlocutory applications the issue which featured prominently is whether indeed the appellant had paid Mr Machira, his fees for representing him in High Court Civil Case No 518 of 1996. The appellant in his application was contending that he had made payment to him in the sum exceeding Kshs 4.5 million, while Mr Machira was contending in his application that the only money he had received before filing High Court Civil Case No 183 of 1998, was Kshs 150,000 for filing that other suit on behalf of the appellant. The two applications were argued together. The ruling appealed against concerns the two applications but the grounds of appeal are confined to the order which granted the applicant summary judgment.

The relevant parts of rule 85(1) of the Rules which the appellant allegedly breached are paragraphs (c), (f) and (k). Paragraph (c) deals with pleadings, while paragraph (f) deals with "affidavits read and all documents put in evidence at the hearing, ..." Paragraph (k) deals with "such-other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant. Of all the above categories of documents only those falling in paragraphs (c) and (f) are in the primary category the omission from the record of appeal of which will render an appeal incurably defective and incompetent. The omission of the documents described in paragraph (k), aforesaid, do render the appeal defective but not incurably defective.

The pleadings omitted from the record of appeal herein are not those in High Court Civil Case No 183 of 1998, out of which this appeal arises, but those of High Court Civil Case No 518 of 1996. We have no hesitation in coming to the conclusion that those pleadings are not primary documents in this appeal. Issues which were canvassed in High Court Civil Case No 183 of 1998, did not flow out of those pleadings, and they, cannot, therefore be regarded as falling under paragraph (c) of rule 85(1). The issue which then follows from that conclusion is whether they fall under paragraph (f) or (k) of that rule. Neither party exhibited the file for Civil Case No 518 of 1996. The trial judge, *suo motu*, called for and perused the file and after doing so came to the conclusion that the applicant, apart from acting as counsel for the appellant, had nothing to do with the case. On that ground he dismissed the appellant's application for striking out the applicant's suit. We do not think that in the circumstances the file can be regarded as falling under paragraph (f) of rule 85(1), above.

It is however, noteworthy that this Court in Civil Appeal No 176 of 1998 did not consider the pleadings and proceedings in High Court Civil Case No 518 of 1996 to be peripheral. Of course they were not peripheral in the matter. The appellant there, was challenging not only the decision of the superior court granting the applicant summary judgment, but also the order dismissing his application seeking an order striking out Civil Case No 183 of 1998. That was the reason the Court in that appeal gave for treating the pleadings and proceedings in Civil Case No 518 of 1996 as being primary documents. The Court, in pertinent part, stated, as follows:-

“Besides the appellant's record of appeal does not contain the pleadings and proceedings in the Nairobi High Court Civil Case No 518 of 1996. As indicated earlier the latter case was the subject of the alternative prayer in the appellant's chamber summons referred to above whose determination by the High Court resulted in the order appealed from by the appellant. That case was availed to the High Court judge who looked at it and made a finding in respect thereof.”

To the extent that the appellant in this appeal has excluded his complaint against the order dismissing his aforesaid Chamber Summons the pleadings and proceedings in Civil Case No 518 of 1996, aforesaid, can at best only be treated as "such other documents."

Mr Nowrojee who with Mr Ritho appeared for the applicant, submitted before us that because o 13 of the Civil Procedure Rules empowers the Court to call for any file from the court registry which he considers relevant, for perusal, such file thus becomes an exhibit. With due respect we cannot agree. Rule 85(1)(f) as worded envisages exhibits put in by the parties to a suit. It reads, in pertinent part, as follows:-

"... all documents put in evidence at the hearing..."

The documents in question were not relied upon by either party and neither were they produced by any of them. They cannot therefore be treated as exhibits envisaged by that paragraph.

Mr Nowrojee also submitted in the alternative, that even if the said documents are treated as falling under rule 85(1)(k) the wording of that paragraph suggests that non-compliance thereof would render an appeal incompetent although not incurable. The submission is novel but with due respect if such omission is not fatal it will be quite harsh to strike out an appeal on that ground, unless of course the appellant for whatever reason is not ready or is reluctant to regularise the defect by seeking the leave of the court under rule 85(2A) of the Rules to put in a supplementary record of appeal pursuant to the provisions of rule 89, of the Rules. It would have been prudent on the part of the appellant, if he was in any doubt whatsoever, to seek the direction of the superior court pursuant to the provisions of rule 85(3), as to whether or not the said documents should be excluded from the record of appeal.

As regards the notice of appeal two defects in it were pointed out, the first one being that it was signed on behalf of the defendant instead of the appellant. That indeed is a defect but it is not of such a nature as to render the document invalid. The appellant is the defendant in the suit from which this appeal arose. It does not mislead and in our view on that ground the defect is not fatal. The second defect in the notice is, we think, a clerical one. It reads, in pertinent part, that it is "intended to serve this appeal" instead of "this notice on", as provided in Form D, of the Rules.

In the case of *Attorney General v Kamlesh Mansukhlal Damji Pattni and 2 others* Civil Application No NAI 59 of 1999 (unreported), Kwach JA sitting as a single judge in an application under rules 4 and 44 of the Rules, held that a notice of appeal which misdescribed the parties, gave an incorrect address of one of the parties, and which gave a wrong date of the decision against which an appeal was intended, was incurably defective, and that the errors were not of the character which would be corrected under rule 44. With respect we agree. The errors in that case were of a fundamental nature and were misleading unlike those in our case which do not mislead and which, in our view, are curable. In the result and for the foregoing reasons, the application fails and is dismissed but we make no order as to costs.

Dated and Delivered at Nairobi this 30th day of June 2000.

P.K.TUNOI

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JUDGE OF APPEAL

A.B.SHAH

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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