



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:SHAH, BOSIRE, & O’KUBASU JJ.A.)

CIVIL APPEAL NO. 46 OF 1999

BETWEEN

DORCAS WANGARI MACHARIA.....APPELLANT

AND

TERRY WACHEKE MUIGAI..... 1STRESPONDENT

AGNES WAMBUI MUIGAI 2NDRESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Mr. Justice Shaikh Amin) dated 24th October, 1995

in

SUCCESSION CAUSE NO. 590 OF 1985)

RULING OF THE COURT

The first respondent, Terry Wacheke Mungai, through her advocate Mr Murimi, has moved this Court under rules 80 and 42 of the Rules of this Court for orders that this appeal, that is Civil Appeal No 46 of 1999 be struck out on the grounds that:

“(a) the appellant has failed to include in the record of appeal :

(i) The answer to the petition by the first respondent.

(ii) The exhibits produced in the lower court.

(b) The record of appeal offends rule 13 of the Court of Appeal Rules and especially the exhibits on pages 123 to 136, 141, 143, 145 and 148 of the record of appeal.

(c) The record of appeal is unnecessarily underlined.”

It transpired that the answer of the first respondent, which was part of the record of the superior court, was on pages 17 and 18 of the record of appeal lodged in this Court.

Only Mr Murimi’s copy of the record did not contain that pleading. It is open for Mr Murimi to seek a copy thereof from the appellant. Noninclusion of a pleading in the service copy of the record does not

qualify for striking out of an appeal when all other copies of the record contain the same.

A composite exhibit produced in the superior court, namely three photographs marked as exhibit 6, according to Mr Murimi, is not included in the record. Mr Kuria for the appellant says the same is in the record. As we shall demonstrate later on in this ruling, it is not necessary for us to decide whether the said exhibit is or is not in the record. The same observations would apply to an unmarked exhibit produced in the superior court, namely identity card No 3340676/66 belongs to the first respondent. The record of the superior court does not show that it was numbered as an exhibit.

Mr Murimi's second complaint is that the exhibits (photographs) at pages 123 to 136, and 141, 145 and 148 of the record of appeal are not clear and easily legible in contravention of rule 13(2) of the Rules of this Court. That may be so but inclusion of not quite legible copies does not call for striking out of the record of appeal. Either the appellant or the respondents could bring legible copies on record, with the leave of the court, by filing a supplementary record of appeal. This remedy is provided for in rule 89 of the Rules of this Court. Exhibits W4 a casualty record card from the Nariobi Hospital, as well as a note to "Mama Njeri" appearing at page 145 of the record, which, according to Mr Murimi, are not legible, are, in our view sufficiently legible. In any event, legible copies could be brought in by way of supplementary record.

The third objection by Mr Murimi is that pages 154 to 172, namely, written submissions filed on behalf of the appellant were underlined in several parts. Although it is prudent to include clean copies in the record of appeal, we do not see how the underlining *per se* would form a basis for striking out of the record of appeal

The issue that has weighed heavily upon our minds is the competency or otherwise of the appeal, in view of the fact that the notice of appeal, which gives jurisdiction to this Court, refers to a ruling delivered on 25th day of October, 1999. There is no such ruling in the record of appeal. There is a ruling delivered on 24th October, 1995 which it would appear to us is the ruling against which this appeal is brought. However, according to the learned judge's notes, that ruling was delivered on 26th October, 1995. Therefore as it stands the notice of appeal is defective. It refers to a non-existent ruling. A notice of appeal is a primary document. It cannot be amended. Therefore whether the ruling was delivered on 24th October, 1995 or on 26th October, 1995 does not matter for the purposes of this appeal, which is purportedly based on a ruling dated 25th October, 1995. Effectively, therefore, the adjournment sought by Mr Kuria to enable him to check the record of the superior court to confirm the exact date when the ruling was delivered will serve no useful purpose. Any adjournment for that purpose would be futile simply for the reason that there is no way in which the three dates, that is, 24th and 25th and 26th October, 1995 could be reconciled by this Court to cure the defect in the record of appeal. In these circumstances we have no alternative but to strike out the appeal itself, and we so order. As the striking out of the appeal comes as a result of the point raised by this Court, and not by the first respondent, we make no order as to costs.

Dated and delivered at Nairobi this 29th day of September, 2000.

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.