



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, OWUOR & KEIWUA JJ.A)
CIVIL APPEAL NO. 252 OF 1999**

BETWEEN

**UNITED FINANCE LIMITED APPELLANT
AND
JOEL MUTHUI KYAMBU RESPONDENT**

**(Appeal from the judgment and Decree of the High Court of
Kenya at Nairobi (Justice G.S. Pall) dated 8th
October, 1998
in
H.C.C.C.No.3782 of 1992)

RULING OF THE COURT

The respondent in this appeal, Joel Muthui Kyambu, applies that the appeal be struck out on the grounds, inter alia, that the appellant in compiling the record of appeal did not comply with the provisions of **rule 85(1)(h)** of the Court of Appeal Rules, that the record of appeal does not include a certified copy of the decree appealed against, that the notice of appeal was served on him outside the period prescribed in the rules and that the record of appeal is incomplete, has errors and omissions which as a result render the record of appeal fatally defective. The application has also a prayer for an order setting aside an order of stay of execution pending appeal which is still in force in this matter.

This is the second application by the respondent in which he seeks a striking out order. In the earlier application the respondent contended that the notice of appeal was filed out of time without leave. In addition, as in the instant application, he included a prayer for an order setting aside the orders for stay of execution pending appeal. The application was dismissed with costs for want of merits. In view of that the applicant's complaint that he was not served timeously with the notice of appeal must be rejected as that is a matter he should have raised in the earlier application. It is also clear that his complaint that the copy of the decree in the record of appeal is not certified, lacks merits. There is a certificate on the second page of the copy of the decree in the record of appeal and in our view that is sufficient compliance with the provisions of **rule 85(1)(h)** aforementioned. The decision of this court in **R. v. The Commissioner For Co-operative Societies**, (Civil Appeal No.50 of 1995) (unreported) is of no assistance to the applicant on the issue. It appears that the applicant misapprehended what the court said in that case. It is not every page of the decree which needs certification, although it would be a prudent thing to do if the decree runs into more than one page. The court in the case cited merely said that all copies of the record of appeal must have a certified copy of the decree.

The applicant's most important point in this application is with regard to errors and omissions in the record of appeal. He included in the record of the application what he terms as the correct copy of the typed proceedings of the superior court on this matter. Mr Gaturu for the appellant submitted before us

that the said copy was not a true record of the proceedings before the superior court and implied that they were not authentic. In his view the correct record of the proceedings is the one the appellant has included in the record of appeal.

We have examined both copies of proceedings and we note that both of them are certified by the superior court as true copies of the original record of proceedings which gave rise to the present appeal. A careful perusal of both documents, however, clearly shows dis-similarities in content in several places. As yet we do not know which of the two copies represents the correct version of the proceedings of the superior court. The appellant's counsel was served with a copy of the application before the same came for hearing. He did not cause any replying affidavit to be filed to rebut or at least deny the allegations in the respondent's affidavit in support of the present application. If indeed the copy of proceedings supplied by the respondent was not genuine as Mr Gaturu implied, the most logical thing he should have done was to file a replying affidavit to give the court the true position.

The issue as to which of the two copies of proceedings reflects the correct position may not be resolved here, more so because the original record of proceedings before the trial court was not transmitted to this court. By dint of the provisions of **rule 85(5)** of our rules, an appellant is obliged to affix a certificate on each copy of the record of appeal to the effect that it is correct. Such a certificate in our view, is to confirm that the appellant has checked each page against the superior court record and is satisfied that it agrees with that record. The appellant has appended such certificate on each copy of the record of appeal but it would appear to us that the certificate was perfunctorily appended.

Some of the sentences in the copy of proceedings included in the record, are unintelligible, and others are not complete. The respondent has supplied what, prima facie, appears to be the true record of proceedings in the court below, which in a way supplies the missing words and figures. So whether or not the copy of proceedings supplied by the respondent is the correct one, a careful reading of it shows that they are incomplete and incomprehensible in some parts and, therefore, need rectification. Such rectification may not be done through the filing of a supplementary record of appeal under **rule 89(3)** of the Court of Appeal Rules, in view of the provisions of **rule 85(2A)** of the rules.

In view of the foregoing there is merit in the applicant's application. The record of appeal is incurably defective and the appeal is thus rendered incompetent. It is ordered struck out with costs. The applicant shall also have the costs of the application.

Dated and delivered at Nairobi this 18th day of February, 2000.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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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