



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU

Civil Appel (Appli.) 190 of 2006

MOHAMED ADEN ABDI .....APPLICANT/RESPONDENT

AND

ABDI NURU OMAR

ALI MOHAMED HAJI T/A

DELTA HAULAGE SERVICES LTD. ....RESPONDENTS/APPELLANTS

*(An application to strike out record of appeal in an intended appeal from the judgment and decree of the High Court of Kenya at Kisumu (Warsame, J.) dated 10<sup>th</sup> February, 2006*

in

H.C.C.C. NO. 304 OF 1999)

\*\*\*\*\*

RULING OF THE COURT

**Mohamed Aden Abdi**, the respondent in Civil Appeal No. 190 of 2006, has moved this Court for an order striking out an appeal which is not disclosed in the body of the application. The application is however, brought in Civil Appeal No. 190 of 2006 and cites the appellants in that appeal, **Abdi Nuru Omar, Alimohamed Haji T/A Delta Haulage Services Ltd** as respondents. It is expressed to be brought under **rules 42** and **85** of the Court of Appeal Rules and the reason given for seeking the orders sought is that the record of appeal does not include the exhibits which were produced at the trial as “mandatorily required to be included.”

At the hearing of the application, Mr. Otieno for the applicant submitted that documentary exhibits are primary documents and non-inclusion of them in the record of appeal renders that record incurably defective.

But Miss. Nungo for the respondents, while conceding that documentary exhibits are primary documents, submitted that the wording of the proviso to **rule 85(1)** makes it permissible for documents which an appellant does not consider to be relevant to his appeal to be excluded. She appeared to imply that the decision as to which exhibits are relevant is within the discretion of the appellant. With due respect to learned counsel, had that been so, then **rule 85 (3)** of the Rules would not have been

promulgated. That sub-rule provides thus:

**“ A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally.”**

Clearly the decision as to which documents are to be excluded is a matter for the superior court. The respondents did not seek any direction under **rule 85(3)** aforesaid. It is our view therefore that the proviso to **rule 85(1)** has to be read with **rule 85 (3)**.

Miss. Nungo raised other points in opposition to the application. The first one related to the provisions cited for the application. The applicant cited **rules 42** and **85** of the Court of Appeal Rules and no more. An application to strike out an appeal is normally brought under **rule 80** of the Rules. Miss. Nungo submitted that a failure to cite that provision meant that the jurisdiction of this Court was not properly invoked. Mr. Otieno conceded the applicant improperly omitted to cite that rule. He was however of the view that the omission was not fatal as the grounds relied upon for the application can be raised by the Court, *suo motu*. We have looked at the application and in an appropriate case, this not being one, the Court may strike out an application in which appropriate provisions are not cited. In the instant application however, the prayers in the motion and the affidavit in support leave no doubt that the applicant was seeking an order pursuant to **rule 80** of the Court Rules.

Miss. Nungo also raised the issue relating to the applicant’s failure to cite the appeal which he wanted struck out. We earlier pointed out that the application to strike out was brought in Civil Appeal No. 190 of 2006. It cites the parties to that appeal. Clearly the respondents were made aware that the appeal which was in issue was Civil Appeal No. 190 of 2006. It would have been more prudent to cite the appeal in the prayers, but the mere failure to do so, in our view, is not fatal to the application.

The third and final ground which Miss. Nungo raised related to the competence of the application. It was her submission that the application was brought outside the period stipulated in the proviso to rule 80, without leave of the Court. In answer to that submission, Mr. Otieno for the applicant submitted that the period stipulated in the proviso to that rule was supposed to end on 28<sup>th</sup> September, 2006, but in his computation that day fell on a weekend. So in his view by operation of the law the time was extended to the next working day, which was 29<sup>th</sup> September, 2006. He did not cite the relevant law but we believe he had in mind **rule 3 (b)** of the Court of Appeal Rules which provides that:

**“3. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-**

**(a) .....**

**(b) If the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;”**

The record of appeal in this matter was filed in court and served on 29<sup>th</sup> August, 2006. Under the proviso to **rule 80**, an application to strike out an appeal has to be made within 30 days of service of the record of memorandum of appeal. The last day of filing the application, as stated by Mr. Otieno was 28<sup>th</sup> September, 2006. He stated from the bar that the date fell on an excluded day. We have however checked the calendar and it is clear that Mr. Otieno was not truthful on this. The date fell on a Thursday which was neither a Sunday nor a public holiday. That being the case, the application was filed out of time without leave and is therefore incompetent. It falls to be struck out and accordingly we order that the application dated 4<sup>th</sup> September, 2006 and lodged in court on 29<sup>th</sup> September, 2006 be and is hereby struck out. But as regards costs, we are of the view that Mr. Otieno misled the Court regarding the last day his client’s application should have been filed. We take a serious view of the matter and to express our displeasure, we order Mr. Otieno to personally pay the costs of the motion which we assess at

Kshs.5000/=.

As for the appeal itself, Miss Nungu having conceded that the documents omitted are primary documents which cannot be brought in by filing a supplementary record, the appeal, *ipso facto*, is incompetent and can only be struck out. We therefore, order the appeal to be and is hereby struck out with no order as to its costs. Orders accordingly.

*Dated and delivered at Kisumu this 30<sup>th</sup> day of November, 2007.*

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**