



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, MUSINGA, MURGOR, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. 7 OF 2013**

**BETWEEN**

**SACCO SOCIETIES REGULATORY AUTHORITY .....APPELLANT/RESPONDENT**

**AND**

**BIASHARA SACCO SOCIETY LTD ..... RESPONDENT/APPLICANT**

**(Application to strike out notice of appeal, record of appeal and supplementary record of appeal in an Appeal from the Ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated 17<sup>th</sup> August, 2009**

**in**

**H.C. Misc. Appl. (Judicial Review) No. 40 of 2011)**

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**RULING OF THE COURT**

1. **Biashara Sacco Society Limited**, the ex parte applicant in the aforesaid Judicial Review application, hereinafter referred to as **“the applicant”**, filed an application by way of Notice of Motion allegedly brought under **Rule 85** of this Court’s Rules seeking the following orders:

**“1. That the notice of appeal dated 23<sup>rd</sup> August, 2012, the record of appeal dated the 18<sup>th</sup> April, 2013 and the supplementary record of appeal dated 28<sup>th</sup> April, 2013 herein be struck out with costs.**

**2. That the costs of this application be borne by the respondent.”**

2. The application was premised on the following grounds:

**“i) That the notice of appeal is defective**

**ii) That the record of appeal is incomplete.**

**iii) That the record of appeal is inconsistent and does not conform with the record in the superior court.**

**iv) That the supplementary record of appeal is filed without leave of the court.**

**v) No prejudice will be occasioned if the above orders are granted.”**

3. A brief affidavit in support of the application sworn by **Joseph Kamau Njamuku**, the Chairman of the applicant, was annexed to the application. The contents thereof are merely a rehash of the aforesaid grounds.

4. **Mr. Stephen Ligunya**, the appellant’s learned counsel, filed a replying affidavit for and on behalf of the respondent. He stated that the impugned ruling, which is the subject matter of this appeal, was delivered on 17<sup>th</sup> August, 2012. The respondent, being dissatisfied with the said ruling, filed a notice of appeal dated 23<sup>rd</sup> August, 2012. The notice was lodged and duly signed by the Deputy Registrar within 14 days of the date of the decision.

5. On 21<sup>st</sup> August, 2012 counsel applied for copies of the proceedings and a certified copy of the ruling for purposes of lodging the record of appeal. That was done within the stipulated period of 30 days. However, the Deputy Registrar did not respond to the said request.

6. On 4<sup>th</sup> September, 2012 a reminder was done to the Deputy Registrar and again there was no response thereto. The certified copies of the proceedings and the ruling were finally issued on 5<sup>th</sup> April, 2013 which was 220 days from the date of the ruling.

7. On 11<sup>th</sup> April, 2013 the Deputy Registrar issued a certificate of delay stating, *inter alia*:

**“The time taken by this court to prepare and supply copies of proceedings and the certified ruling was from 28<sup>th</sup> August, 2012 to 5<sup>th</sup> April, 2013 that is 220 days. The certificate of delay was prepared and ready for collection on 11<sup>th</sup> day of April, 2013.”**

8. Mr. Ligunya further stated that the record of appeal was lodged on 18<sup>th</sup> April, 2013 within the stipulated time, excluding the 220 days certified by the Registrar as having been required for the preparation and delivery of delivering of the certified copies of the proceedings and ruling.

9. A supplementary record of appeal was filed on 28<sup>th</sup> April, 2013 and counsel stated that its filing was within the stipulated period of 15 days after filing the record of appeal when no leave of the court is necessary. In his view, therefore, the applicant’s application is without merit.

10. In his brief submissions in support of the application, **Mr. Ng’ang’a**, learned counsel for the applicant, made an oral application to amend the rule under which the application was brought to read **Rule 84** and not **85**. He said that he had made a clerical error in citing **Rule 85**. That oral application was opposed by **Mr. Gichamba**, the respondent’s learned counsel, saying that it constituted one of the grounds of opposing the application. In our view, we do not think that the respondent will be prejudiced by the applicant’s move to cite the correct rule since an appropriate replying affidavit has already been filed. In any event, **Article 159 (2) (b) of the Constitution of Kenya, 2010** requires courts to administer justice without undue regard to procedural technicalities. We are aware that prior to the amendment of the Court of Appeal Rules in 2010, applications to strike out notices of appeal or appeals had to be

brought under **Rule 85** but under the **Court of Appeal Rules, 2010**, the appropriate rule is **84**. We will therefore deem this application as having been rightfully filed under **Rule 84** of this Court's Rules but proceed to deal with it on its merits.

11. Mr. Ng'ang'a submitted that the notice of appeal was defective and the record of appeal incomplete and not consistent with the record of the High Court. He further argued that the supplementary record of appeal was filed without leave of the court. He also contended that the dates of lodging of the notice of appeal as well as the record are not shown on the documents. Counsel further argued that the respondent had not annexed a receipt to show when the proceedings were paid for.

12. Lastly, he submitted that the respondent had failed to include some materials that were before the High Court, for example, further affidavit dated 29<sup>th</sup> November, 2011 which was one of the documents that were relied upon by the trial court in arriving at its decision.

13. In a brief reply, Mr. Gichamba, relying on the contents of the affidavit shown by Mr. Ligunya, submitted that the notice and the record of appeal as well as the supplementary record of appeal were all filed appropriately and in accordance with the rules of this Court. He stated that the notice of appeal was filed on 28<sup>th</sup> August, 2012 as shown on the court's date stamp and the memorandum of appeal was lodged on 19<sup>th</sup> April, 2013. Under **Rule 88** of this Court's Rules, where a document that ought to have been included in the record of appeal is omitted from the record, the appellant may, within 15 days of lodging of the record of appeal, file the same by way of a supplementary record of appeal, without seeking any leave of the court, Mr. Gichamba submitted. The record of appeal having been filed on 19<sup>th</sup> April, 2013 and the supplementary record having been filed on 3<sup>rd</sup> May, 2013, Rule 88 had been complied with, he stated.

14. Counsel admitted that there was an oversight in failing to include in the record of appeal the respondent's further affidavit dated 29<sup>th</sup> November, 2011. However, that is not a fatal omission because under **Rule 92** of this Court's Rules the applicant, being the respondent in the appeal, is at liberty to file a supplementary record of appeal to introduce the missing affidavit. **Rule 92 (1)** states as follows:

***"If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies or any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."***

15. In a brief reply, Mr. Ng'ang'a submitted that the provisions of **Rule 92** are not couched in mandatory terms, such that a respondent may either, elect to file a supplementary record of appeal or, apply to have the appeal struck out. In this case the applicant (respondent) had chosen the latter option.

16. We have taken into consideration the rival submissions by counsel as summarized hereinabove. Under **Rule 75 (1)** of this Court's Rules, any person who desires to appeal to this Court must give a notice in writing which should be lodged in duplicate with the Deputy Registrar of the High Court. **Sub rule (2)** stipulates that the notice shall, subject to **rules 84** and **97**, be lodged within 14 days of the date of the decision against which it is desired to appeal. The impugned decision was delivered on 17<sup>th</sup> August, 2012 and the notice of appeal was filed on 28<sup>th</sup> August, 2012. It is thus clear that the same was filed within the stipulated period of time. However, the Deputy Registrar did not endorse the date when the notice was lodged in the High Court registry at Nyeri. We think that was an oversight on the Deputy Registrar's part because he had signed the same on the appropriate part. The appellant (the respondent herein) cannot be blamed for the Deputy Registrar's omission.

17. The respondent annexed to its replying affidavit a letter dated 21<sup>st</sup> August, 2012 applying for certified copies of the proceedings and the ruling, which letter was copied to the applicant's advocate. A reminder was done on 4<sup>th</sup> September, 2012.

18. In view of the delay that was occasioned by the court in its preparation of the certified copies of the proceedings and ruling, the Deputy Registrar issued a certificate of delay on 11<sup>th</sup> April, 2012. Having received the certificate of delay the appellant filed the record of appeal on 19<sup>th</sup> April, 2013. Excluding the period of delay which was 220 days, we are satisfied that the record of appeal was timeously filed.

19. Turning to the supplementary record of appeal, the same was filed 14 days after filing of the record of appeal. Under **Rule 88** of this Court's Rules the appellant did not require leave of this Court to file the same.

20. We are therefore satisfied that the notice of appeal, the record of appeal and the supplementary record of appeal were all filed in accordance with the time frames stipulated by the Rules of this Court.

21. As regards the appellant's failure to include in the record of appeal a further affidavit dated 29<sup>th</sup> November, 2011, that is an omission that is curable under **rule 92** of this Court. The respondent is at liberty to file a supplementary record of appeal to introduce the same. We cannot strike out a competent appeal because it is alleged that a document that ought to have been in the record of appeal was not included. If that were the case **Rule 92** would serve no purpose.

22. All in all we find no merit in this application and dismiss the same with costs to the respondent.

**Dated and delivered at Nyeri this 27<sup>th</sup> day of November, 2013**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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