Case Number:	civ app 24 of 99
Date Delivered:	19 Nov 1999
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Akilano Molade Akiwumi, Philip Kiptoo Tunoi, Samuel Elikana Ondari Bosire
Citation:	REPUBLIC vs MANAGING DIRECTOR KENYA POSTS & TELECOMMUNICATIONS CORPORATION[1999] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal struck out
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AKIWUMI, TUNOI & BOSIRE, JJ.A.

CIVIL APPEAL NO. 24 OF 1999

BETWEEN

REPUBLIC ..... APPELLANT

AND

THE MANAGING DIRECTOR

KENYA POSTS & TELECOMMUNICATIONS

CORPORATION .....RESPONDENT

(Appeal from the order and ruling of the High Court of Kenya at Nairobi (Githinji J) dated 16th November, 1998

in

MISC.C.A. NO. 400 OF 1998)

RULING OF THE COURT

The main point raised in the present appeal by us, ***suo moto,*** relates to the contents of primary documents in appeals to this Court such as a decree or ruling, and a certified copy of an order which, as the case may be, must, according to **rule 85 (1) (h**) of our Rules, be included in a record of appeal. This issue has recently, been of some concern to this Court. In the present appeal, it is the alleged certified Order derived from the ruling of 16th November, 1998, of Githinji, J., contained in the record of appeal, that is involved.

As is clear from the following provisions of the **section 66 of the Civil Procedure Act**:

> "Except where otherwise expressly provided in this Act .... an appeal shall lie .... from the orders of the High Court to the Court of Appeal.".

As such, an order is a primary document in an appeal and which must comply with certain requirements. In this case, as prescribed by order 20 r 7 (6) of the Civil Procedure Rules:

> "Any order .... shall be prepared and signed in like manner as a decree.".

The other relevant provisions of the Civil Procedure Rules, namely, order 20 r 6 (1) is as follows:

> "The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.".

Some assistance may also be gained from the precedent Form No. 1 of Appendix C of the Civil Procedure Rules which is to be followed in the preparation of a decree in an original suit like that brought by way of notice of motion by the appellant for the judicial review of the decision of the respondent, the Managing Director of the Kenya Posts & Telecommunications Corporation, by way of **certiorari and mandamus.** This notice of motion was struck out after hearing the respondent's chamber summons application of 27th May, 1998, by the Order appealed against in the present appeal. It is important to note in this precedent that after setting out the claim, it goes on, to provide so as, inter alia, to establish the authenticity of the order, for the inclusion of the name, in this case, of the judge of the superior court who made the decision in the suit, in the following manner:

"This suit coming this day for final disposal before .... ".

Bearing in mind the provisions of **order 20 rr 6 (1) and 7 (6)** already referred to, it can be said that even if the decision appealed against in the present appeal is not a decree but an order, the latter should be prepared in a like manner as the former. It is therefore not surprising that in Appendix C of the Civil Procedure Rules and in the copy of the Law Society of Kenya Court Routine which leading counsel for the appellant kindly supplied us, no precedents as to what an order should contain, are specifically set out. Indeed, in the circumstances, this would not even be necessary.

It will now be convenient to consider the Order contained in the record of appeal of the present appeal to determine if it is a valid primary document for the purposes of **rule 85 (1) (h)** of our Rules. In the Order and after the title, it is then recorded that the final determination of the suit was made by Mr Justice Khamoni and not Mr Justice Githinji who upon the successful application of the respondent to strike out the suit, gave the ruling disposing of the suit on 16th November, 1998. This admitted mistake in the Order in respect of the judge who made the decision, is not a minor clerical error or one that as suggested by leading counsel for the appellant, could be cured by this Court under **section 100 of the Civil Procedure Act** or **section 3 (2) of the Appellate Jurisdiction Act**. The defect is a serious and fundamental one in a primary document like the Order, which certified or otherwise, or accidental or otherwise, deprives the Order of any validity for the purposes of the present appeal as an order which is mandatorily required by rule 85 (1) (h) of our Rules to be included in the record of appeal. This alone makes the present appeal incurably incompetent and should be struck out.

This decision is not unlike the position taken by this Court in the case of **PARSI ANJUMANI V MUSHIN ABDULKARIM ALI Civil Application No. NAI 328 of 1998, (unreported).** In this Court's ruling in that case, it was held that a notice of appeal being a primary document within the context of **rule 85 (1)** of our Rules and not one of those specified in **rule 85 (2A)** of our Rules which can be filed by way of a supplementary record of appeal or an affidavit if omitted from the record of appeal, a notice of appeal could not be amended in anyway to correct any mistake contained therein. A notice of appeal

which contained a mistake rendered the record of appeal defective and which in turn, made the appeal itself, incurably incompetent. In its ruling this Court said:

> "We have given most anxious consideration to these rival contentions. At the end of the day, in our judgment, although there is considerable force in Mr. Suchak's submissions, those of Mr. Kimani must prevail. Whilst it is true that rule 44 speaks of an amendment of any document, it must necessarily be construed in the light of rule 85 (2 A) which was brought in by way of an amendment in 1990. If any document were interpreted liberally to include every document then the whole purpose of rule 85 (2 A) would be defeated. Every rule, particularly one brought in by way of an amendment, must be given effect to and cannot be treated as meaningless or superfluous. If that be right, as we think it is, a primary document cannot lend itself to an amendment.".

In his Ruling in the case of **ATTORNEY GENERAL V KAMLESH MANSUKHLAL DAMJI PATTNI & OTHERS Civil Application No. NAI 59 of 1999 (UR.22/99) (unreported),** Kwach, J.A. put the matter more succinctly as follows:

> "The Notice of Appeal which the applicant wishes to correct seems to me on the face of it to be incurably defective. The decision against which the applicant desires to appeal was given on 11th February, 1999 but on the Notice of Appeal it stated that it was given on 11th February, 1998. The applicant who should be the appellant in the intended appeal is referred to as the respondents (sic). These are not the sort of errors that can properly be cured by an application under **rule 44** of the Rules. They are serious mistakes which render the Notice of Appeal itself invalid. A notice of appeal is a primary document within the meaning of **rule 85 (1)** of the rules and unless a record of appeal contains a valid copy of such a notice the appeal is liable to be struck out as incompetent either at the instance of the respondent or by the Court pursuant to **rule 101 (b)** of the Rules.".

Our decision in the present appeal might have been different if we were not dealing with an issue of jurisdiction, but with merely one that involved a deviation from form as provided in **rule 42** of our Rules, for the making of applications to this Court. See **ECHARIA V ECHARIA, Civil Appeal No. 247 of 1997 (unreported).**

The Order has other defects which in our view, and having regard to **PARSI ANJUMANI V MUSHIN ABDULKARIM ALI** and **ATTORNEY GENERAL V KAMLESH MANSUKHLAL DAMJI PATTNI & OTHERS,** supra, also deprive it of any validity for the purposes of the present appeal. It seems that for a long time now, orders for the purposes of **rule 85 (1) (h**), have continued to be extracted without setting out at the beginning, the particulars of claim or the relief sought as required by **order 20 r 6 (1)**. We think that unless the civil procedure rules are amended, this should not be condoned. With respect, however, to the absence of the descriptions of the parties which are also not included in the Order, we note that the precedent in Form No. 1 after contenting itself, with the setting out the title of the suit which gives the names of the parties, does not give their descriptions. It merely provides as follows: "Claim for ....

> This suit coming on this day for final disposal before .... in the presence of .... for the plaintiff and

> of .... for the defendant it is ordered that ....".

The precedent does not comply entirely with **order 20 rr 6 (1) and 7 (6)** and for this reason we refrain from holding that the failure to include the descriptions of the parties renders the Order fatally invalid for the purpose of the present appeal. But another matter that in our view further renders the Order fatally defective is as follows: Mbogholi Msagha, J. had on 22nd April, 1998, declined to grant stay applied for by the appellant pending the hearing of its suit. Subsequently, on 5th May, 1998, the learned judge then granted stay for the maintenance of the status quo until the determination of the suit. The suit was finally disposed of by Githinji, J. in his ruing of 16th November, 1998, in which he upheld the respondent's application of 27th May, 1998, to strike out the appellant's suit for judicial review. After the delivery of his ruling and in separate proceedings, Mr Le Pelley, counsel for the appellant intimated to Githinji, J. that the appellant would appeal against his ruling and applied for the status quo order earlier made by Mbogholi Msagha, J. to be continued until he made a formal application for stay of execution. Mr Kiplagat, counsel for the respondent did not oppose this informal application and Githinji, J. then made the following order:

> "As Mr Kiplagat agrees there will be stay .... until the filing and hearing of a formal application for stay pending appeal. The application for stay to be filed within 14 days.".

However, the order allegedly striking out the appellant's suit, contains not only an order to that effect, but also, the following two orders which were neither sought or considered in the respondent's application to strike out the appellants' suit, nor contained in the ruling of Githinji, J. on this application:

> "2That there be stay of allocation of the frequencies allowed to previous East Africa Television Network Limited on 16th October 1997 and on 15th October 1997 to any other person until the filing and hearing of a formal application for stay pending appeal.

3.That application to be filed within 14 days.".

As already established, these two orders were only made in separate proceedings after the delivery of the ruling of Githinji, J. striking out the appellant's suit. The preface of the Order itself, whilst making reference to the respondent's application of 27th May, 1998 brought under **order 6 r 13 (1) (b)** of the Civil Procedure Rules without even stating that it had been brought to strike out the appellants suit, is, not unexpectedly, completely silent about the subsequent informal application made by the appellant for stay of execution. Apart from creating the incongruous situation whereby, the appellant, according to its notice of appeal, intends to appeal against the whole decision of Githinji, J. given on 16th November, 1998, would be appealing against the two orders which were in its favour. The insertion of these two orders in the Order is highly irregular and creates a false impression of what really happened. These are serious defects that also make the Order, a primary document, itself, invalid and thus rendering the present appeal incurably incompetent.

For all the reasons set out hereinbefore, the present appeal is hereby struck out.

As regards costs, since the issue of the invalidity of the Order was raised by us and since under order 20 r 7 (2) of the Civil Procedure Rules, it is incumbent on the Registrar to satisfy himself that the order has been drawn up in accordance with the ruling before signing and sealing the same, there will be no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 19th day of November,

1999.

A. M. AKIWUMI

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR