**Commercial Bank of Africa Ltd v Ndirangu**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Ruling:** 30 June 2000

**Case Number:** 257/99

**Before:** Gicheru, Bosire and O’Kubasu JJA

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**Summarised by:** W Amoko

*[1] Appeal – Record of appeal – Primary and secondary documents – Appeal from ruling granting leave to appeal – Copy of judge’s notes and interlocutory applications omitted –*

*Whether amended pleadings filed after decision appealed from are material – Whether omission of primary documents from the record of appeal renders the decision incurably defective – Rule 85 of Court of Appeal Rules.*

**Editor’s Summary**

Commercial Bank of Africa filed a record of an appeal against a ruling of the superior court granting Isaac Kamau Ndirangu leave to amend its plaint which did not include the following documents – trial judge’s notes of the proceedings for the period 19 August 1995 to 15 September 1998; amended defence and counterclaim; two rulings of the High Court; experts’ report on parties dealing with each other; copy of general terms and conditions; request for particulars; application for particulars; consent order dated 16 May 1994; proceedings after 2 August 1999. On Isaac Kamau Ndirangu’s application for the notice of appeal and the record of appeal to be struck out.

**Held** – Documents filed after the decision appealed from has been delivered are not material in the appeal and need not be included in the record of the appeal. The omission of primary documents renders an appeal incurably defective and incompetent. Some of the documents omitted from the record, for example the trial Judge’s notes of the proceedings before the decision appealed from, all interlocutory applications and orders made thereon and the bundle of documents before the court (as they were exhibits), should have been included unless directions otherwise had been given under Rule 85(3) of the Court of Appeal Rules. A party has no right to decide which documents to exclude. Application granted and appeal struck out.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Dhanji v Malde Timber Co* [1970] EA 422

*Iron and Steel Wares Ltd v CW Martys and Co* (1956) 23 EACA 175

***United Kingdom***

*Brickfield Properties Ltd v Newton* (1971) WLR 862