**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.*

**RULING**

**GICHERU, BOSIRE and O’KUBASU JJA:** When compiling its record of appeal against the decision of the Superior Court dated 2 August 1999 in its civil case number 1803 of 1985, granting the Respondent leave to amend its plaint, the Appellant, Commercial Bank of Africa Limited (which we shall hereafter refer to as CBA) omitted the trial Judge’s notes of proceedings in the suit for the period between 19 August 1985 and 15 September 1998; amended defence and counterclaim which was filed on 23 August 1999 which was long after the order appealed against was made and the reply thereto; two rulings by Lady Justice Owuor (as she then was) dated 2 July 1997 and 26 February 1998 respectively; an expert’s report on the financial affairs between the parties herein; a copy of the general terms and conditions governing the opening and operation of a bank account with the Appellant; a copy of the request for particulars of the amended plaint, the application for the particulars etc; a copy of proceedings after 2 August 1999 and a copy of a consent order dated 16 May 1994. On that account, the Respondent, Isaac Kamau Ndirangu, who for convenience’s sake we shall hereafter refer to as Ndirangu, moved this Court by motion under Rule 80 of the Court of Appeal Rules, for an order that the notice of appeal dated 3 August 1999 which the Appellant timeously filed pursuant to Rule 74 of the Rules, and the record of appeal aforesaid, be struck out on the ground that their omission from the record rendered it incurably defective in view of the provisions of Rule 85(1) of the Court of Appeal Rules (the Rules). CBA concedes that the documents enumerated above were indeed omitted from its record of appeal. It was, however, contended on its behalf that the documents were not only unessential in the determination of its appeal but also that by their nature their inclusion in the record of appeal is optional and would only be included at the discretion of the Appellant. Besides, that if Ndirangu considered the documents essential he was at liberty to file a supplementary record of appeal pursuant to the provisions of Rule 89 of the Rules. In his submissions, Mr *Fraser* for CBA, urged the view that rules of procedure are merely handmaids of justice and should therefore be liberally construed, more so where they are not worded in mandatory terms. In support of that proposition, he cited two cases, namely, *Iron and Steel Wares Ltd v CW Martys and Co* (1956) 23 EACA 175 and *Brickfield Properties Ltd v Newton* (1971) WLR 862. Additionally, he submitted that it would be wrong to overload the record of appeal with documents which, even though they may have been referred to at the trial they were not specifically exhibited and urged us to rule that their omission from the record of appeal is inconsequential. For that proposition he cited the case of *Dhanji v Malde Timber Co* (1970) EA 422. CBA’s appeal challenges the exercise of judicial discretion by the trial Judge (Oguk J) in granting Ndirangu leave to amend his plaint, over four years after the date of his suit and after trial of the suit had commenced. We have no hesitation whatsoever, in ruling that any documents filed after that decision are neither material in the appeal nor can the Appellant be faulted for excluding them from the record of appeal. They were not before the trial Judge when he gave his decision, and their inclusion in the record of appeal would, in the circumstances, be superfluous. It is, however, trite law that for an appellate court to interfere with the exercise of judicial discretion of a trial court all the material that was before that court, except such material as is excluded by a direction or an order given under Rule 85(3) of the Rules, should have first been looked at and the court after doing so comes to the conclusion that the Judge erred in principle or that he was plainly wrong. We, however, agree with Mr *Fraser* that not all documents placed before the trial court are essential for the determination of an appeal against a decision of that court. But the question which immediately arises, an answer to which we think, is central in coming to a decision in the matter before us is, who has the power to decide which documents, other than primary documents which must be included, are essential and should therefore form part of the record of appeal. Mr *Fraser* for the Appellant urged the view that for non-primary documents the parties to an appeal decide which documents they would want to use in the appeal and, accordingly, take appropriate steps to bring them on record. Mr *Gatonye* for Ndirangu did not think that, on the facts and circumstances of this case, any of the documents could properly be excluded without rendering the case unintelligible. Rule 85(1) above, enumerates documents to be included in a record of a first appeal to this Court. The documents are of two categories, primary and secondary. The omission of any or parts of a document in the primary category renders an appeal incurably defective and therefore incompetent. We have already held that documents which were filed in court after the ruling appealed against are superfluous. Among those documents are the amended defence and counterclaim, the reply thereto and defence to the counterclaim. The trial court’s notes whether or not either party considers them relevant and essential to the determination of the appeal, provided they were made before the decision appealed from, are primary documents and unless specifically excluded by a judge’s direction given under Rule 85(3) aforesaid, their omission from the record, as is the case here, render the appeal incompetent. Likewise all interlocutory applications and orders made pursuant thereto, and all exhibits, must be included in the record of appeal unless excluded as aforesaid. A party in a suit has no discretion to exclude from the record of appeal any document, whether primary or otherwise in view of that provision. Had the rules-making authority thought otherwise, there would have been no necessity of specifically vesting the power on the Superior Court to give a direction in that regard. Besides, the enactment of Rule 89 does not confer on this Court the power to excuse the exclusion of any document from a record of appeal, but merely creates an opening for bringing on record, with the leave of the court, certain essential documents which, by an oversight or inadvertence, were excluded. We wish to observe that the cases cited on interpretation of rules of procedure would only apply in cases where there meaning is doubtful but not where they are clear, as here. The authorities are of no assistance to the Appellant’s case. There was debate as to whether certain bundles of documents, which were exchanged between counsel and which were put to witness who partly testified before the application for leave to amend the plaint was filed, and which the trial Judge might have looked at before granting the leave to amend, could be considered as exhibits within the meaning of Rule 85(1)( *f* ) of the Rules. Mr *Fraser* expressed the view that because the bundles were not formally tendered as exhibits, they should be disregarded, more so, he said, because they were not an agreed bundle or bundles. He cited the case of *Dhanji v Malde Timber Company* (*supra*) as authority for the proposition that unless documents are specifically put in evidence, they should not be looked at. In reply, Mr *Gatonye* submitted that as the trial Judge was given copies of those documents and he had an opportunity of looking at them, they might have influenced his decision. Besides, he said, the documents were put to his client for comment during his oral testimony in the court below. As we stated earlier, this appeal challenges the exercise of judicial discretion. The bundles of documents in issue were among the documents the trial court had before it and it is possible that court relied on them to come to the decision appealed against. As both counsel in this mater were in agreement that the documents were given to the trial Judge, in support of the parties’ respective cases, they were in our view, exhibits and should have, therefore, formed part of the record of appeal, in absence of any direction in that regard under Rule 85(3) aforesaid. In the result and for the foregoing reasons, we are satisfied that CBA’s record of appeal is incurably defective and that renders its appeal incompetent. We accordingly allow Ndirangu’s application dated 24 May 1999 strike out CBA’s appeal and award the costs both of the appeal and the application to the

Applicant.

For the Applicant:

*K A Fraser* instructed by *Hamilton Harrison and Mathews*

For the Respondent:

*C W Gatonye* instructed by *Waweru Gatonye and Co*