**Kiboro v Posts & Telecommunications Corporation**

[1974] 1 EA 155 (CAN)

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 24 April 1974

**Case Number:** 50/1973 (56/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Kenya – Harris, J

*[1] Appeal – Record – Supplementary record – Cannot contain basic document – East Africa Court of*

*Appeal, r.* 89*.*

*[2] Appeal – Out of time – Sufficient cause – Misreading of rule – Not sufficient cause.*

*[3] Contract – Offer without consideration – Not relied on by offeree – Not binding.*

**Editor’s Summary**

The appellant filed a record of appeal which did not contain a certified copy of the decree appealed

against. Just before the appeal was to be heard, he filed a fresh record of appeal which contained the

decree, contending that he was entitled to file it as a supplementary record, alternatively that he should be

allowed to file it out of time. The reason given was that a clerk had mistakenly followed the High Court

rule.

The appellant wished to resign from the respondent corporation and was offered a gratuity. He

resigned and thereafter the respondent withdrew the offer of gratuity.

**Held –**

(i) a supplementary record cannot contain one of the basic documents required by the rules;

( ii) sufficient reason had not been shown for the granting of leave to file the decree out of time;

(iii) the appellant had not relied on the offer in acting to this detriment, so as to make the respondent

liable.

Appeal struck out.

**Cases referred to Judgment:**

(1) *Schweitzer v. Cunningham* (1955) 22 E.A.C.A. 252.

(2) *Hatimali Adamji v. Posts & Telecommunications Corporation*, C.A. 50 of 1972 (*T*) (unreported).

**Judgment**

The considered judgment of the court was read by **Law Ag V-P:** When this appeal came on for hearing

on 27 February 1974, Mr. Tibamanya for the respondent argued his application, filed on 21 February,

that the appeal be struck out as incompetent on the ground that no decree had been extracted and

included in the record of appeal, contrary to the requirements of r. 85 (1) (*h*) of the Rules of this Court.

Mr. Muite for the appellant conceded that the objection was valid, but produced an application filed by

him just before the hearing began, asking under rule 4 of the Rules of this Court for an extension of time

in which to file the missing decree. The hearing of the two applications was adjourned to 7 March 1974.

Mr. Muite by that date had extracted the decree and filed what he described as a supplementary record of

appeal, containing a copy of the decree, under r. 89 (3) of the Rules of this Court. This

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“supplementary” record of appeal was in fact a copy of the original record plus the extracted decree. Mr.

Muite also amended his original application, asking this time:

(*a*) for leave to extract the decree and/or file the appeal out of time;

(*b*) that the supplementary record of appeal with extracted copy of the decree do proceed for hearing.

On the adjourned hearing, dealing with (*b*) above, Mr. Muite submitted that r. 89 (3) entitled him at any

time before the hearing to file a fresh record of appeal, in the form of a supplementary record containing

any of the documents specified in r. 85 (1) which had been omitted from the original record, and that

having done so, the irregularity in the original record was cured and the appeal should proceed for

hearing on the basis of the supplementary record. As to this, Mr. Tibamanya submitted that a

supplementary record means one which supplements the original record. Mr. Muite then submitted that if

he failed on (*b*), he should be granted an extension of time under r. 4 to file a copy of the extracted decree

with the original record. We reserved our rulings on the two applications, and heard argument on the

merits of the appeal de bene esse. Before dealing with these merits, it is necessary to dispose of the

applications.

As regards (*b*) in Mr. Muite’s amended application, I have no doubt that Mr. Tibamanya’s submission

is correct. The meaning of a supplementary record of appeal is made clear in r. 89 (1). It means a record

containing copies of “further documents or any additional parts of documents which are . . . required for

the proper determination of the appeal”. The word “further” must, in my opinion, mean further to the

documents required by r. 85 (1) to be contained in the record of appeal. Any other construction would

mean that any appellant, who has filed a record omitting one or more of the basic documents required by

r. 85 (1) could, at any time before the hearing, file a fresh record containing those documents, without

having to apply to the Court for an extension of time under r. 4. If Mr. Muite is right, a record of appeal

could be filed in complete disregard of r. 85 (1), and the matter put right by filing a new record

complying with that rule at any time before the hearing. I cannot accept such a submission. I have no

doubt that the record filed just before the hearing of this appeal was not a supplementary record, but a

re-filing out of time of the original record containing one of the basic documents omitted from the

original record, and that the appeal is incompetent unless this Court extends time either for filing the

copy of the decree as part of the original record, or for filing the fresh record as the record of appeal in

place of the original defective record, as prayed in (*a*) of Mr. Muite’s amended application. Before the

Court can do this, it must be satisfied that there is “sufficient reason” for granting indulgence. As to this,

Mr. Muite informed us that the preparation of the record of appeal was entrusted to a clerk, and he relied

on an affidavit by the clerk in which the latter deposed that at the time he prepared the record he was

under the erroneous impression that O. 41, r. 1A of the Civil Procedure Rules applied to appeals to the

Court of Appeal and that consequently he did not consider it mandatory to file the decree. But r. 1A, even

if it had applied, makes it clear that where no copy of the decree or order is filed with the memorandum

of appeal, it shall be filed as soon as possible, so that the clerk was put very much on his guard as to the

importance of filing a copy of the decree. The memorandum and record of appeal in this case were filed

on 20 November 1973, and yet no steps were taken to file a copy of the decree until the hearing over

three months later, although the rule on which the clerk mistakenly relied stressed the necessity for filing

the decree “as soon as possible” if it did not accompany the memorandum. In my view, no sufficient

reason has been shown for extending time in this case. I would allow Mr. Tibamanya’s application, and

reject Mr. Muite’s amended

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application. I would order that the appeal be struck out as incompetent, with costs, including the costs of

both applications.

In the event of the other members of the Court being of a different opinion on these preliminary

matters, I will deal briefly with the merits of the appeal as I see them.

In November 1970 the appellant was in the employment of the respondent with which he had over

seven years’ service. He was a senior assistant telecommunications controller, earning £1,800 a year. He

answered an advertisement offering a post at an initial salary of £2,400 a year with a company known as

the East African External Telecommunications Company Limited, or “Extelcoms”. He was interviewed,

and selected for the post. By reason of his short service with the respondent, the appellant was under his

terms and conditions of service not eligible for a pension, nor did he qualify for a gratuity unless his

services were terminated in the public interest.

At sometime early in February 1971, the appellant had an interview with Mr. John Keto, the

Director-General of the respondent Corporation. The appellant was anxious to be paid a gratuity for his

past service, and Mr. Keto promised to see what could be done in this respect. Mr. Keto’s recollection

was that the appellant told him he was prepared to resign and take up his new appointment whether he

was granted a gratuity or not. In cross-examination he said he was not certain whether the appellant said

he would resign or would seriously consider resigning. Mr. Keto at once recorded a memorandum of

what took place at the interview and forwarded it to his Assistant Director-General (Administration). It

reads as follows:

“I saw Mr. Kiboro this morning and during our discussion he informed me that he would appreciate

‘termination of services in the public interest’ terms to be applied in his case if the Corporation so decided;

but he would understand if the decision was otherwise, in which case he would be prepared to resign.”

In due course a meeting of a sub-committee of the respondent’s General Purposes Committee was held

and it was decided to release the appellant with a gratuity. This decision was communicated to the

appellant by letter dated 4 March, and it was followed on 12 March, by a “Pension Computation”

showing that the gratuity would be £1,278-7-11. The appellant thereupon formally accepted the

appointment with Extelcoms, and took up his new post on 1 April. On the 23 April he was informed by

the respondent that the decision to grant him a gratuity had been rescinded by the Board of Directors, as

they did not agree with the General Purposes Committee’s decision to treat him as having had his

services terminated in the public interest. The appellant filed a suit against the respondent in the High

Court of Kenya to recover the gratuity, the ground of claim being stated in the plaint as follows:

“4. In or about February and March, 1971, in consideration of a sum of K£1,278.7.11 to be paid by the

defendant to the plaintiff, the plaintiff’s employment was terminated by mutual consent.

5. D espite demand and notice of intention to sue in default the defendant has refused and/or neglected to

pay the said sum of K£1,278.7.11 or any part thereof.”

The claim thus appears to be for damages for breach of contract, although the words “breach of contract”

appear nowhere in the plaint. The position was however clarified in the course of the trial and the appeal,

and it now appears that the appellant’s case is that the letter of the 4 March, in which he was told he

would be treated as if his services had been terminated in the public

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interest and he would be granted a gratuity, was relied on by him and caused him to act to his detriment

by resigning and that this constituted and enforceable contract under which the respondent was bound to

pay the gratuity promised in its letter. According to the appellant, this letter was, in terms of the law of

contract, an “offer” which he accepted by resigning and taking up the Extelcoms post. The detriment

consists of the loss of about 8 years’ pensionable service, and of prospects of promotion in the

Corporation. The “offer” was, in my view, the granting of the appellant’s request for favourable

treatment. A somewhat similar position arose in the case of *Hatimali Adamji v. Posts &*

*Telecommunications Corporation*, C.A. 50 of 1972 (T.), (unreported). In the course of his judgment,

Spry, V.-P. said:

“The corporation might, of course still have been bound if, between the granting of the request and its

withdrawal, the appellant relying on it had acted to his detriment.”

Accepting this as a statement of the principle to be applied in this case, has the appellant (upon whom the

burden lay) discharged the onus of proving that, relying on the granting of his request, he acted to his

detriment? The judge held that the appellant’s decision to leave the service of the respondent was in no

way dependent upon his being awarded a gratuity. He would have resigned, and accepted the Extelcoms

post which involved an immediate salary increase of £600 a year, whether he got the gratuity or not. He

made this clear to Mr. Keto on 10 February 1971. He agreed that Mr. Keto’s memorandum of the same

date correctly recorded what was said on that occasion. In these circumstances it seems to me that the

judge was fully justified in holding, as he did, that the appellant would have resigned and taken up the

Extelcoms post whether awarded a gratuity or not. In these circumstances the appellant has, in my

opinion, failed to establish that it was in reliance upon the letter of 4 March that he resigned and took up

the Extelcoms post. For these reasons I consider that, in any event, this appeal would have failed on the

merits.

**Sir William Duffus P:** I have had the advantage of reading the judgments of Law, Ag. V.-P. and

Mustafa, J. A.

The appellant brought this action to recover a specific sum of £1,287.7.11 for an amount agreed to be

paid by the respondent corporation on the termination of his appointment. The action was dismissed and

the appellant brought this appeal. The appellant duly completed the preliminary formalities and filed his

record of appeal but he did not in accordance with the provisions of r. 85 (1) (*h*) of the Court of Appeal

for East Africa Rules, 1972 file a copy of the decree: at that stage no decree had in fact been extracted.

The appeal came up for hearing on 27 February 1974 and the respondent raised the preliminary issue that

the appeal was incompetent, in that it did not comply with r. 85 and should be struck out. The application

was made under the provisions of r. 80. Mr. Muite for the appellant applied for an adjournment to

consider the position and to enable him to apply for an extension of time to file the decree.

The appeal again came before the Court for hearing on 7 March 1974. In the meantime the appellant

had had the decree extracted in the High Court. It was issued on 1 March 1974. The appellant then filed a

supplementary record of appeal on 5 March 1974 in accordance with r. 89 (3). This supplementary record

contained a copy of the decree. Mr. Muite then applied asking for: (1) an extension of time within which

to extract the decree and file the appeal out of time or in the alternative, and (2) that this Court proceed to

hear the appeal using the supplementary record of appeal containing the decree.

The Court heard both the respondent’s preliminary objection and the appellant’s application together

and then reserved its ruling and proceeded to hear

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the substantive appeal de bene esse. Mr. Muite argued *inter alia*, that the appellant was entitled to

proceed with the appeal without extracting the decree and that accordingly he could file the decree under

r. 89 as there was no decree in existence when the record of appeal was filed. He relied on the proviso in

the definition of a “decree” in s. 2 of the Civil Procedure Act (Cap. 5) which states:

“Provided that for the purposes of appeal the word ‘decree’ shall include judgment and a judgment shall be

appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been

drawn up or may not be capable of being drawn up.”

He submitted that the appeal lay not withstanding the fact that the decree had not been extracted and that

as the decree had not been extracted it was impossible to file a copy of the decree in accordance with r.

85.

I would refer here to s. 25 of the Civil Procedure Act which makes a decree mandatory after a

judgment has been pronounced. This section states *inter alia*:

“25. The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree

shall follow:”

O. 20 r. 7 provides fully for the preparation of a decree. This is done both in the 1972 amendment and in

the former existing rules. A decree sets out the formal expression of an adjudication and it follows as of

right in accordance with the procedure set out in O. 20 and does not require any further adjudication.

R. 56 of the former East African Court of Appeal Rules specifically required that a decree be

extracted before the appeal was lodged. This rule has not been re-enacted in the present rules but the

effect of that rule was to ensure that the record was completed in order to comply with the former r. 62

(4) (*e*) which is similar to the provisions of our present r. 85 (1) (*h*). The effect of r. 85 (1) (*h*) is that a

decree must be extracted and filed with the record of appeal.

The proviso to s. 2 of the Act does provide that a judgment “shall be appealable notwithstanding the

fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be

capable of being drawn up” but as this Court pointed out in the case of *Schweitzer v. Cunningham*

(1955), 22 E.A.C.A. 252, the requirements of our rules are procedural. Under the municipal law of Kenya

a right of appeal exists as soon as judgment is delivered, but in order to pursue that right the appellant has

to comply with the procedural requirements contained in the rules of this Court. These rules are prepared

by virtue of and under the authority of s. 8 of the Appellate Jurisdiction Act of Kenya. The preparation of

a decree is a procedural requirement, just as are the other conditions which an appellant has to carry out

in order to pursue his right of appeal. The proviso to s. 2 of the Civil Procedure Act does not allow an

appellant to pursue his right of appeal without regard to procedure.

I agree therefore with the Acting Vice-President that the omission to file a decree is an irregularity

which cannot be cured by filing the decree in a supplementary record but that the Court does have the

power to allow this to be done under r. 4. I also agree that the appellant has not given sufficient reason

for an extension of time under r. 4. This Court heard the appeal de bene esse and I agree that in any

event, there has been no failure of justice in this case and the trial judge came to the correct decision.

As Mustafa, J. A. also agrees and in accordance with the order of Law, Ag. V.-P. the preliminary

objection is sustained and the appellant’s applications

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are refused. The appeal is struck out as incompetent with costs to the respondent, both on the appeal and

on the appellant’s application.

**Mustafa JA:** I have had the advantage of reading the judgment of Law, Ag. V.-P. in draft.

The appellant did not file a copy of the decree with his record of appeal, and the respondent applied

for the appeal to be struck out as incompetent. Mr. Muite for the appellant, at the hearing of the

application, applied for extension of time to file the omitted decree. The hearing of both the applications

was adjourned, and in the meantime the appellant filed a supplementary record of appeal, under r. 89 (3)

of the Rules of this Court, which contained a copy of the omitted decree. At the adjourned hearing Mr.

Muite applied for the Court to proceed to hear the appeal on the basis of the supplementary record which

contained the decree.

I am satisfied that a supplementary record, in terms of r. 89 of the Rules, can only include additional

or further documents, which are, in the opinion of an appellant or respondent, required for a proper

determination of an appeal. It supplements the original record of appeal, which has to be filed within the

prescribed time, and which has to contain the basic documents as provided in r. 85 of the Rules. If a basic

document, like a copy of the decree, is omitted from the original record of appeal, that cannot be

introduced into the record by filing a supplementary record of appeal, when the prescribed time has

expired. In this case the appellant could only file the omitted decree out of time with leave. He has

applied for such leave under r. 4 of the Rules. To succeed he must show “sufficient reason”. Mr. Muite

has given the reason. He stated that the clerk in his firm entrusted with the preparation of the record of

appeal was under the mistaken impression that the provisions in O. 41, r. 1A of the Civil Procedure Rules

applied to appeals to this Court. Even on a cursory reading it is clear that O. 41, r. 1A deals only with

appeals to the High Court, not this Court. Apart from that, except for the omission of the copy of the

decree, the contents of the record of appeal filed comply with the requirements of r. 85 of the Rules, not

with the provisions of O. 41, r. 1A of the Civil Procedure Rules. I am not satisfied that that was an

adequate explanation, and, in my view, no sufficient reason has been shown for the Court to extend time

for the appellant to file the copy of decree. I would strike out the appeal as incompetent.

I am fortified in this view as I am also satisfied that the appeal, which was argued before the Court de

bene esse, has no merits.

I concur in the order of Law, Ag. V.-P. striking out this appeal as incompetent with costs.

*Order accordingly.*

For the appellant:

*PK Muite* (instructed by *Waruhiu & Waruhiu*, Nairobi)

For the respondent:

*ASJ Tibamanya* (Principal Assistant Counse