



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.1 OF 2018

BETWEEN

BULSHO TRADING COMPANY LTD.....APPELLANT

AND

ROSEMARY LIKHOLO MUTAKHA.....1ST RESPONDENT

BONVENTURE WIYEMA IMBAYI.....2ND RESPONDENT

RULING

1. The appellant/applicant herein, moved the court by way of Notice of Motion dated 16th July 2020 under sections 5 and 79G of the Civil Procedure Act and Order 42 Rules 1, 10(1) and (2) of the Civil Procedure Rules. The following orders are being sought:

1. That the purported memorandum of cross-appeal filed in court on 14th June 2018 be and is hereby struck out with costs for being an abuse of the court process;
2. Pursuant to (a) above, the court be pleased to give fresh and proper directions; and
3. That costs of the application be provided for.

2. The application was premised on the following grounds:

- a. That there is no provision for cross-appeal under the Civil Procedure Act and the Rules made thereunder;
- b. That the purported cross-appeal was, without prejudice to (a) above, filed out of time;
- c. That the cross-appeal is an abuse of the court process;
- d. That the cross-appeal was filed by a stranger to these proceedings; and
- e. That the court should cleanse the record to give way for the hearing of this appeal.

3. The application was opposed on grounds that:

- a. The firm of Wanyama & Company Advocates are properly on record; and
- b. The cross-appeal is properly on record.

4. The argument that the firm of Wanyama & Company Advocates are not properly on record was vehemently opposed. Order 9 Rule 9 of the Civil Procedure Code provides as follows:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

5. A consent dated 29th May 2018 signed by the firm of J.V Juma previously on record for the defendants (the respondents herein) was filed in court on the same date. Subsequently, on the same date, the firm of Wanyama & Company Advocates filed a Notice of Change of Advocate. I therefore find that the said firm of Wanyama & Company Advocates is properly on record.

6. The memorandum of appeal herein was filed on 19th January 2018. By the time the memorandum of cross-appeal was filed on 16th June 2018, the appellant had not complied with order 42 Rule 11 of the Civil Procedure Rules which provides:

Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.

I also note that the only record of appeal on record, is the one filed by the respondents.

Since no directions had been given as envisaged under section 79B of the Act, the respondents were not required to obtain leave of the court.

7. The applicant has contended that cross-appeals are not provided for under the Civil Procedure Act and the Civil Procedure Rules. Order 42 Rule 32 of the Civil Procedure Rules states as follows:

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents *although such respondents may not have filed any appeal or cross-appeal.* [Emphasis added]

8. In the case of **George Kianda & another v Judith Katumbi Kathenge & another [2018] eKLR** Odunga J stated:

Secondly, this Court is not aware of a procedure for filing of a cross-appeal in this Court as opposed to the Court of Appeal.

....

...

24. The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.

9. With respect, I disagree with this holding. If the law was to assume that a respondent's right to appeal is extinguished by the fact that he/she was beaten in time by the appellant, this would be a very unfair turn of events. This is however not the case. Order 42 Rule 32 of the Civil Procedure Rules in my view, clearly provides for cross-appeal but did not provide for the procedure to be followed. The route proposed by the learned judge Odunga would be time consuming and untidy without adding any value.

10. In the case of **Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi [2018] eKLR**, Njoki Mwangi J approached the case with the assumption (which I fully subscribe to) that cross-appeal is legal though the procedure has not been provided for. While referring to Order 42 Rule 32 of the Civil Procedure Rules this what she said:

13. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.

I therefore find that cross-appeal is provided for by the law but for the procedure.

11. In other jurisdictions, notably South Africa and India, the procedure for cross-appeal has been provided for. The South Africa **Uniform Rules of Court** also provides for the procedure for filing cross- appeals. under Rule 50 subrules (2), (3), (4), (5), (6) of the Uniform Rules of Court provides as follows:

(2)The prosecution of an appeal shall ipso facto operate as the prosecution of any cross-appeal which has been duly noted.

(3) If a cross-appeal has been noted, and the appeal lapses, the cross-appeal shall also lapse, unless application for a date of hearing for such cross-appeal is made to the registrar within twenty days after the date of the lapse of such appeal.

4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented. (b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner. (c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted. [Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R185 of 2 February 1990.]

(5) (a) Upon receipt of such application, the registrar shall forthwith assign a date of hearing, which date shall be at least 40 days after the receipt of the said application, unless all parties consent in writing to an earlier date:

(6) A notice of set down of a pending appeal shall ipso facto operate as a set down of any cross-appeal and vice versa.

12. In India, Order 41 Rule 22 of the **Code of Civil Procedure, 1908** provides:

Upon hearing respondent may object to decree as if he had preferred a separate appeal— (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [409][but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

13. It is my proposal therefore, that the Rules Committee takes up the matter and craft the procedural rules so as to breathe life to Order 42 Rule 32 of the Civil Procedure Rules.

14. The application is therefore dismissed with costs.

DELIVERED and SIGNED at BUSIA this 24th day of November, 2020

KIARIE WAWERU KIARIE

JUDGE