



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 624 of 2007

KANYOTTA HOLDINGS

LIMITED.....PLAINTIFF

VERSUS

KENYA SHELL

LIMITED.....DEFENDANT

RULING

1. This is a ruling on a preliminary objection raised by the Plaintiff against the Defendant’s Notice of motion dated 13th August 2012. The plaintiff

contends that the court has no jurisdiction to grant the orders sought in the defendant’s Motion, unless and until, there is a valid Notice of Appeal in terms of Order 42 rule 6(4) and Rule 75 of the Court of appeal Rules. That the application cannot be entertained by this court, for the reason that there is a pending application in the Court of Appeal namely **Civil Appeal Nairobi. No. 187 of 2012** filed before the Defendant’s Notice of Motion. That by allowing the present application as it is , the Plaintiff contends, that this has the potential to give rise to an absurd result, as the Court of Appeal may strike out the Notice of Appeal , whilst this Court may have extended time within which to validate the Notice of Appeal. Given this possibility, the Plaintiff submitted that the Defendant’s notice of motion should not be entertained until the Court of Appeal makes its decision. The Plaintiff also asserts that the prayer for leave is superfluous given that under Order 43 Rule 1 (1) (t) of the Civil Procedure Rules, an appeal lies as of right from an order pertaining to furnishing of security. It is on these grounds that the Plaintiff asks the Court to strike out the application.

2. In opposing the Preliminary Objection, the Defendant submitted that the Plaintiff had not satisfied the requirements of a preliminary objection, that there was no statutory bar to a party seeking two applications simultaneously. With regard to the validity of the Notice of Appeal, the Defendant’s counsel submitted that nowhere does Rule 75 of the Court of Appeal Rules or Order 42 Rule 6(4) mention the term “valid notice of appeal”, but merely requires a Notice of Appeal to be given. The Defendant further contends that the pending application in the Court of Appeal is no bar for the prosecution of their application. Consequently, there was no possibility of conflicting decisions between the High Court and the Court of Appeal. It was also submitted that Section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya confers jurisdiction on the High Court to extend time, notwithstanding the time for appeal having lapsed and that the prayers sought in the application are within the inherent powers of the court. Counsel for the Defendant therefore urged the court to dismiss the preliminary objection for the foregoing reasons and allow the parties to proceed with the hearing of the application.

3. I have considered the submissions made by Counsel on both sides. I will first consider the submission

by the Defendant's Counsel that the preliminary objection does not meet the essentials of a preliminary objection as set out in the celebrated case of **MUKISA BISCUITS VERSUS WEST END DISTRIBUTORS (1969) E.A. 969**, in that it does not raise pure points of law. In the said case, **Law JA** held that:-

“....so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....”

At page 701, **Newbold P.**, proffered the famous and poignant definition of a preliminary objection as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
(Emphasis supplied)

4. The Plaintiff's contention is that the application does not lie for the reason that there is no valid Notice of Appeal and that there is an application pending in the Court of Appeal for striking out the Notice of Appeal. My view is that these are pure points of law. There are no facts that remain to be established. Whether or not there is an application pending in the Court of Appeal is a fact that is not disputed. Indeed a copy of the same is on record. I am of the view therefore that the objection has been validly raised.

5. I now turn to the merit of the objection itself. It is the contention of the Plaintiff that a Notice of Appeal dated 3/07/12 and filed on 4/07/12 against a ruling by this court by my brother Justice Muga Apondi dated 14/06/12 was filed out of time. That this had led the Plaintiff to file an application in the Court of Appeal, that is **Nairobi Civil Appeal Application Number 187 Of 2012**, to have the Notice of Appeal struck out as it was filed out of time without leave of the court. It is on this contention that the Plaintiff states that this court has no jurisdiction to hear the Defendant's application as there is no valid Notice of Appeal on record. And that further, the defendant's application should not be heard until the outcome of their application in the Court of Appeal.

6. The jurisdiction to entertain applications for stay under Order 42 Rule 6 is the filing of a Notice of Appeal. Order 42 does not specify what a Notice of Appeal should look like whether in form or substance. This is to be found in Rule 74 of the Court of Appeal Rules. That Rule provides the nature of a Notice of Appeal, the timelines for filing and service among other things. My view is that once a Notice of Appeal has been filed, the jurisdiction of this Court under Order 42 Rule 6 is thereby invoked. It is not for this Court to inquire into the validity or otherwise of such a Notice. That is the preserve of the Court of Appeal. It is for this reason that I agree with the submission of learned Counsel for the Defendant that Order 42 Rule 6 does not require the filing of a “valid notice of appeal” but only a Notice of Appeal.

7. The other objection is that the application pending in the Court of Appeal is a bar to the prosecution of the present application. That if this Court gives a decision that will conflict with the decision of the Court of Appeal on that application will lead to an embarrassing situation. I agree with the submission that if this Court and the Court of Appeal were to arrive at two conflicting decisions on the same issue may be undesirable. In this case, what is pending in the Court of Appeal is an application to strike out the Notice of Appeal for having been filed out of time. Before me is an application expressed to be brought, inter alia, under, Section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya. That provides as follows-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired”

It is on the basis of this section that the Defendant intends to move this court to give an Order as to the extension of time for filing and serving a Notice of Appeal. Clearly, from the reading of the said section, this is a discretionary order given by the court upon the applicant's giving sufficient reasons. It is the only power donated to the High Court under Appellate Jurisdiction Act. It was so held in the Court of Appeal Case of **DT DOBIE & Co. (KENYA) LIMITED –VS- ALFRED MACHAYO (2005) eKLR** when the court stated that;

“the only power donated to the superior court under section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, is for “extension of the time for giving notice of intention to appeal from a Judgment of a High Court . All other procedures are governed by the Court of Appeal Rules” .

8. My view is that this is a power that emanates from the statute itself. It is not the Rules. The Section does not state when that power is to be exercised. The time limit for its exercise has not been specified. Can the pendency of an application under Rule 80 of the Court of Appeal Rules operate as a bar to an application under Section 7 of the Appellate Jurisdiction Act? I doubt. My reading of Article 159 (2) (d) of the Constitution, Sections 1A and 1B of the Civil Procedure Act and Sections 3A and 3B of the Appellate Jurisdiction Act requires that Courts move from the jurisprudence of technicality that ruled in the 1990's up to 2009! Courts are now called upon to look at substantive justice other than technicality. My view is that dealing with a matter under Section 7 of the Appellate Jurisdiction Act will be geared towards establishing the interests of the parties in a substantive manner than it is under Rule 80. I am aware that the Plaintiff has accrued rights by the filing of the aforesaid application that is now pending in the Court of Appeal. However, I do not think that if this Court were to allow the application for extension of time (supposing that the Defendant succeeded in convincing the Court), there would be any conflict with the pending application in the Court of Appeal.

9. To this end, I find that the Preliminary Objection fails and direct that the Defendant's Notice of Motion dated 13th August, 2012 be fixed for hearing on a date agreed by the parties. Costs to be in the application.

DATED and delivered at Nairobi this 21st day of November, 2012.

**A. MABEYA
JUDGE**