



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 72 of 2008

**CITY COUNCIL OF
NAIROBI.....APPELLANT/APPLICANT**

VERSUS

**SATO PROPERTIES LIMITED.....1ST RESPONDENT
MOSES AFANDA.....2ND RESPONDENT
MARY ABUSO AFANDA.....3RD RESPONDENT
JOHN MAGERE KAZIMBI.....4TH RESPONDENT**

RULING

1. The Appellant/Applicant in this case filed the Notice of Motion dated 21/04/2009 on the same date seeking ORDERS THAT:-

1. *The time fixed for the filing and serving of the record of appeal be and is hereby extended.*
2. *The record of appeal filed herein be deemed as duly filed.*
3. *The order of stay made on 18th July 2008 by Hon. Lady Justice H.M. Okwengu be extended until the disposal of the appeal herein or further orders of the court.*
4. *The costs of this application be provided for.*

On the grounds that:-

(a) *The deadline of filing and serving the record of appeal as ordered on the 18th July 2008 has since lapsed.*

(b) *The failure to file and serve the record of appeal as ordered was due to circumstances beyond the Appellant's control.*

(c) *The delay is excusable and not in any manner deliberate*

(d) *Unless the orders sought herein are made the Appellant stand to be greatly prejudiced. (sic)*

(e) *It will be equitable and in the interest of justice to grant the orders sought herein.*

(f) *It is fair and just that the order of stay in force be extended as prayed herein.*

2. There is also an affidavit in support of the application sworn by Edward N. Omotii, an advocate of this Honourable Court and dated 21/04/2009. The deponent sets out at paragraph 3 of the affidavit the orders made by Okwengu J on 18/07/2008, by which, inter alia, the Appellant/Applicant was required to file and serve a record of appeal within 90 days from the date of the order, that is to say 18/07/2008. The deponent says that there was a delay in getting the typed proceedings from the trial court, hence the Applicants failure to file the record of appeal within 90 days as ordered by Okwengu J, hence this application, which is expressed be brought under Order XLIX Rules 5, Order L Rules 1 and 6 of the Civil Procedure Rules and Sections 3A and 95 of the Civil Procedure Act, Cap 21.

3. Before the application could be heard, the 1st Respondent through the firm of Ahmednasir, Abdikadir & Company Advocates filed a Notice of Preliminary Objection on a point of law dated

28/09/2009 on the grounds that:-

1. *The Interested Party being a party not recognized in the Civil Procedure has no locus to file an appeal against the decision of the lower court. The Interested Party is neither a Plaintiff nor a Defendant and filed no pleadings before the lower court.*

2. *The Interested Party has not complied with the court order as it relates to the guarantee it was ordered to file.*

4. This ruling relates to the Preliminary Objection. Mr. Ahmednasir argued the Preliminary Objection on behalf of the 1st Respondent and submitted as follows:-

a. *the suit in the lower court was commenced by 3 Plaintiffs against the Defendant, Sato Properties Ltd. who is the 1st Respondent herein.*

b. *The Applicant herein was allowed to come into the matter as an Interested Party on 7/12/2007.*

c. *The 1st Respondent applied for and obtained summary judgment against the 2nd – 4th Respondents herein on the 15/02/2008.*

d. *The 2nd – 4th Respondents have not appealed against the judgment.*

e. *The Applicant/Interested Party never filed any pleadings in the suit before the lower court.*

5. On the basis of the above, Mr. Ahmednasir contended that the Applicant herein cannot appeal against the judgment of the lower court and that even more importantly, Order 41 of the Civil Procedure Rules makes no mention of an Interested Party; that the parties specifically mentioned under that Order are Plaintiffs and Defendants. Counsel submitted that the Applicant has laid no basis for the intended appeal since it did not file any pleadings before the lower court.

6. Counsel for the 1st Respondent relied on two authorities in support of his arguments. In **Civil Appeal No. 154 of 1992 between M. Charles C. Sande (Appellant) and Kenya Co-operative Creameries Limited (Respondent) [1992] KLR 314 (CAK)**. In the case, the Appellant failed to amend his plaint so as to include a claim for a substantial amount of money from the Respondent. Though that issue had not been raised the trial Judge proceeded to take evidence on it. On appeal, Court of Appeal stated, inter alia at page 135 of the judgment;

“We would endorse the well established view that a judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a judge is through pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallize the issue which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are. ----- In our view, it is a perversion of reasoning by the Appellant to now turn around and blame the Judge for deciding his case on an issue not before him when the Appellant whose duty it was to raise the issue in the first place, failed to raise it properly. As we have already said, the Respondent could not have raised in its pleadings the issue of the sum of Kshs.14,151,650/70 because their (sic) was no way in which it could have known that that sum would be claimed.”

7. The second case cited by counsel for the 1st Respondent is **Nairobi City Council –vs- Thabiti Enterprises Ltd. [1995-98] 2 EA 231**, in which it was held that “a Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended”. (See **Sheikh v Sheikh and Others [1991] LLR 2219 (CAK); Sande v Kenya Co-operative Creameries [1992] LLR 314 (CA)**).

8. At page 238 of the **NCC –vs- Thabiti case** the court referred to **Bullen and Leake (12 edn)** under the rubric “**Nature of Pleadings**” and said

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus served the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

9. Mr. Ahmednasir argued that it was only in Judicial Review Proceedings that an Interested Party has a voice to be heard. He contended that in cases commenced by plaint, a party coming into the suit must do so either as a co-Plaintiff or as a co-Defendant. He also contended that any grievance against the judgment of the lower court should have been raised by the 2nd – 4th Defendants/Respondents and not the

Appellant/Applicant herein. Mr. Ahmednasir urged the court to dismiss the appeal **in limine**.

10. Mr. Omotii, advocate appeared for the Appellant/Applicant and contended that since the 1st Respondent did not raise any objection to the Applicant/Appellant coming into the matter as an Interested Party, it should not be heard to complain that the Applicant has no locus to bring this appeal. Mr. Omotii referred the court to Order 1 Rule 10(2) of the Civil Procedure Rules which provides for joinder of parties. The sub rule reads:-

*“10(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, **whether as Plaintiff or Defendant**, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

11. Mr. Omotii further argued that the Appellant/Applicant raised issues before the court below, and in particular that the Applicant opposed the 1st Respondent’s application for summary judgment and that in the circumstances, the Applicant is properly before this court on an appeal by virtue of the provisions of section 65 of the Civil Procedure Act and Order 41 Rule 4 of the Civil Procedure Rules. Counsel for the Applicant also submitted that counsel for the 1st Respondent had not cited any authority to support his contention that an Interested Party cannot be enjoined in a civil suit. Counsel also submitted that the authorities cited by the 1st Respondent’s counsel are not applicable since the matters in those cases had gone to full trial as opposed to the interlocutory judgment in the instant case.

12. In reply, Mr. Ahmednasir argued that the 1st Respondent’s complaint is not against the procedure by which the Applicant came into the case in the lower court, but that the 1st Respondent’s position is that an Interested Party in a suit is like an observer without a voice; that such a party neither loses nor wins in the contest between the Plaintiff and the Defendant as he has no claims before court.

13. Before determining the issues at hand, there is need to look at some definitions. **BLACK’S LAW DICTIONARY** defines an **“Interested Party”** as—

“A party who has a recognizable stake (and therefore standing) in a matter.”

In Halisbury’s Laws of England, Third Edition Vol. 9 at page 171, paragraph 340 – Definitions – the term “party” is defined by the country courts to include —

“every person served with notice of, or attending, any proceeding, whether named as a party to that proceeding or not.” “Proceeding” includes both actions and matters and for the purposes of the Country Court Rules “Plaintiff” includes Applicant, Petitioner and Appellant and “Defendant” included “Respondent”. “Matter” means every proceeding in a country court which may be commenced as prescribed or otherwise than by plaint”.

14. The court has now considered the arguments for and against the preliminary objection raised by the 1st Respondent herein. The court has also considered the definitions above given. The question that arises for determination is whether in light of the arguments for and against and the definitions given, the Applicant is barred from bringing this appeal.

15. At the hearing of the application, neither counsel put before court authorities dealing with the real issue at stake, that is to say whether an interested party can appeal against a judgment obtained against a third party. In a North Carolina Court of Appeals case – **Bobbie J. Ricks**, Guardian of the Person and Desegnee or Payee of any benefits check, on behalf of **Sylvester David Jr**, an incompetent Plaintiff –vs- **Leray Davis – Case No. COA08 – 1600**, filed 7/07/2009, in which the Defendant appealed against an interlocutory order, the court held that :—

“Generally, there is no right to immediate appeal from an interlocutory order. --- A party may never the less immediately appeal from an interlocutory order when it affects a substantial right of the party. --- A substantial right is “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right naturally affecting those interests which [a party] is entitled to have preserved and protected by law: a material right. --- The burden of showing an interlocutory order affects a substantial right and thus immediately appealable is on the Appellant, and this court will not “construct arguments for or find support for [an] Appellant’s right to appeal.”

16. In the same judgment in the **Sylvester case**, the court discussed the issue of who may appeal from an order or judgment of the trial court. The court said that only “a party aggrieved” may appeal from an order or judgment of the trial division. An aggrieved party is one whose rights have been directly or injuriously affected by the action of the court.” In the case, the court found that the order appealed against

did not directly and injuriously affect the rights of the Appellant (holding a Plaintiff-husband was not an aggrieved party with standing to challenge on appeal an order by the trial court appointing a guardian ad litem to the Defendant-wife in a case involving the equitable distribution of marital property).

17. In the local case of **Abercrombie & Kent Limited & Another –vs- Republic Civil Appeal No. 195 of 1994 – Court of Appeal at Nairobi**, the interested parties (in a Judicial Review Application) asked the superior court for various orders, among them an order that the notice of motion dated and filed in court on 18/03/1994 be struck out as leave to apply for the same had been obtained out of time and that the application for leave as well as the application for an order of certiorari had both been made out of time. The superior court was also asked to discharge and set aside the leave already granted to the Respondent on allegations that the Respondent had not made certain disclosures during the hearing of the exparte chamber summons for leave. The superior court refused the application on the ground that the fact that the grant of leave exparte may have been wrongful did not constitute a ground for striking out the notice of motion and setting aside the grant of leave itself". On appeal, the learned Judges of the Court of Appeal thought that the superior court was probably right on the decision it made, and said that under Order 42 Rule 1(ee) which deals with appeals from orders made under Order 53 of the Civil Procedure Rules (prerogative powers) the served Interested Party was entitled to appeal as of right and without leave against the exparte grant of leave, but that it chose not to exercise its right. Of course, the matter in hand in that appeal was under Order 53 of the Civil Procedure Rules with which counsel for the 1st Respondent agrees interested parties have a right to appeal.

18. Order 42 Rule 1(v) allows an aggrieved party the automatic right of appeal from orders made under Order XXXV Rules 5, 7 and 10 (summary procedure cases). The issue here is whether the Applicant is entitled under the said procedure to bring the instant appeal.

19. From the law as set out above, and on the authorities cited herein, the court is of the view that the Applicant has a standing to bring the appeal herein. In the circumstances, it would not be in the interests of justice to strike out the application dated 21/04/2009 nor the whole appeal. The court takes the view that the applicant had a recognizable stake in the matter before the lower court and therefore had a standing. The fact that the Applicant filed no pleadings would not in my view bar him from filing the appeal, but whether or not the appeal succeeds is a different matter. Further, whether the application dated 21/04/2009 succeeds or not must await the outcome of the arguments to be adduced and the hearing thereof. The court has looked at the pleadings and in particular the 1st Respondent's defence and counterclaim. The court has also seen the lower court's order dated 22/01/2008 and is of the view that such an order may injuriously affect the Applicant/Appellant.

20. In the result, the court declines to grant the preliminary objection. The same is dismissed with costs to the Applicant/Appellant.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of December, 2009.

**R.N. SITATI
JUDGE**

Delivered in the presence of:-

Mr. Omotii (present) For the Appellant/Applicant

Mr. Martin Onyugo for Ahmednassir For the Defendant/Respondent

Weche – court clerk