REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 617 of 2006

TRISHUL CONSTRUCTION CO. LTD…….APPELLANT

VERSUS

TIMONA AGAL JOHANA……..1ST RESPONDENT

BEATRICE INJEHU SHAVULIMO…...…2ND RESPONDENT

R U L I N G

Before me is a notice of motion filed on 19th August, 2008, brought under Sections 67, 79A, 79B of the Civil Procedure Act; and Order XLI Rules 13(1)(b), (c) & (d), and Order XLIV Rule 7 of the Civil Procedure Rules. The motion has been brought by the respondents Timona Agal Johana and Beatrice Injehu Shavulimo who are seeking to have the appeal filed by the appellant, Trishul Construction Co. Ltd struck out for being frivolous, scandalous, vexatious, and an abuse of the court process. The respondents also seek to have the appeal dismissed pursuant to Section 67 of the Civil Procedure Act and Order XLIV Rule 7 of the Civil Procedure Rules. In support of the application, the respondents' advocate has sworn a supporting affidavit in which she contends *inter alia* that the appellant has acted in contravention of Order XLIV Rule 7 which bars a review of an order made pursuant to a review application. The advocate further contends that the appellant in seeking a review was merely trying to circumvent Section 67 of the Civil Procedure Act which bars appeal from orders made by consent of the parties. It is therefore submitted that the appeal against the ruling of the lower court dismissing the application for review is a frivolous appeal merely calculated to prejudice, embarrass or delay the fair conclusion of the action, and should therefore be struck out as an abuse of the process of the court. Counsel for the respondents has submitted that the respondents should not be kept away from the fruits of a consent judgment by a frivolous appeal. Counsel urged the court to exercise its powers under Section 79B of the Civil Procedure Act and summarily reject the appeal.

The application was opposed through a replying affidavit sworn by the appellant's advocate Jackson Omwenga and filed on 27th October, 2008. Although the replying affidavit was filed outside the time given by the court, and no effort was made to have the same admitted out of time, I have decided to admit the replying affidavit so as to facilitate a just and speedy conclusion of this matter.

In his replying affidavit the appellant's counsel maintains that the application before the court is an abuse of the court process as the applicant is not coming to court with clean hands. The counsel depones that a consent was entered into by the parties that a stay pending appeal do issue on condition that the appellant deposits the decretal sum in a joint interest earning account within 30 days. However, contrary to the agreed consent, the respondent's counsel unilaterally banked the bankers cheque issued by the appellant

and took the proceeds.

Mr. Omwenga submitted that Section 67 of the Civil Procedure Act was not applicable as the appeal was neither from an order made *ex parte* nor from a decree passed by consent. He maintained that Section 79B of the Civil Procedure Act has been improperly invoked as parties cannot move the court to summarily reject an appeal but the court must move on its own motion. Counsel further submitted that the respondent had not demonstrated that the appeal was frivolous, scandalous, or an abuse of the court process as to bring Order VI Rule 13(1)(b), (c) & (d) of the Civil Procedure Rules into play. Mr. Omwenga contended that Order XLIV Rule 7 is also not applicable. He maintained that there was no appeal before the court and the orders sought were therefore not available. He explained that what was before the court was a memo of appeal and that an appeal was a record of appeal containing all necessary documents. He submitted that in the absence of a record of appeal and an order admitting the appeal, there is no proper appeal before the court and the application cannot stand.

Addressing first, the last point taken by the appellant's counsel, the record before me shows that the appellant filed a memorandum of appeal on the 12th September, 2006. In the memorandum of appeal the appellant indicated that it was appealing to this court against an order of the magistrate in CMCC No.1887 of 2005 delivered on 4th September, 2006. In the memorandum the appellant has listed four grounds and has prayed as follows:

(a) That the appeal be allowed,

(b) The order dismissing the application be set aside, vacated and or replaced with a just order which the court may deem fit and or an order allowing the defendant's application dated 3rd August, 2006 and filed in court on 12th August, 2006.

Order XLI Rule 1(1) of the Civil Procedure Rules which provides for the form of an appeal states as follows:

"*Every appeal to the High Court shall be in the form of memorandum of appeal signed in the same manner as a pleading.*"

Clearly, the memorandum of appeal filed by the appellant conforms with Order XLI Rule 1(1) of the Civil Procedure Rules and is an appeal which is pending before this court. Counsel for the appellant is therefore wrong in submitting that there is no proper appeal before the court.

With regard to the substantive issues raised by the respondent concerning the merit of the appeal, it is necessary first to consider whether the application before me is proper. That is whether this court can be moved by the respondent to exercise its powers under Section 79B of the Civil Procedure Act to dismiss an appeal summarily on the grounds that the same is frivolous, vexatious, scandalous, and an abuse of the court process.

Section 79B of the Civil Procedure Act states as follows:

"*Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.*"

That section empowers a judge acting on the court's own motion to peruse the appeal for purposes of admission to hearing. As was held by the Court of Appeal in *Orero vs Seko (1984) KLR 238*:

"*The power granted by the Civil procedure Act Section 79B to a judge of the High Court to summarily reject an appeal should be used most carefully and only in the clearest case such as an appeal based wholly on matters of fact upon which proper findings will have been made.*"

The respondent herein is challenging the appellant's appeal on the grounds that it has been brought in contravention of Section 67 of the Civil Procedure Act and Order XLIV Rule 7 of the Civil Procedure Rules. Those are issues of law which this court cannot deal with summarily under Section 79B. Moreover, the facts upon which the appeal is based are in dispute. The record of appeal has neither been filed nor served nor has this court had the benefit of getting the original file from the lower court. In the circumstances, this application is improperly before me as the issue of the merits of the appeal cannot be determined at this stage. Moreover, it would not be appropriate for me to make definitive findings regarding the issues of law raised by the respondent as those will obviously be subject of determination at the hearing of the appeal. For the above reasons, this application must fail. It is accordingly dismissed.

Those shall be the orders of this court.

Dated and delivered this 26th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Muturi for the appellant

Ms Matunda H/B for Omwenga for the respondent