



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2054 of 1993

MOHAN GALOT
PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL CORPORATION.....
DEFENDANT

RULING

This is an application for directions on the appeal lodged by the Defendants on 28th January 2006, by way of a Chamber Summons.

The said appeal was said to be in relation to the ruling which the learned Deputy Registrar, Hon. Mr. El Kindy delivered on 27th August 2004.

It is the case of the defendant/Appellant herein that it had filed and served all the necessary documents which would be required for purposes of an adjudication on the appeal. It is for that reason that the defendant was now asking the court to give directions pursuant to the provisions of Order 41 rule 8B(3) of the Civil Procedure Rules.

That rule provides as follows:

“The judge in chambers may give directions concerning the appeal generally and in particular direction as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.”

In seeking the court’s directions, the defendant submitted that it had a competent appeal.

However, the plaintiffs hold a contrary view. They say that pursuant to the provisions of Order 48 rule 5 (3) of the Civil Procedure Rules, the defendant ought to have filed a Memorandum of Appeal within 7 days of the decision by the Deputy Registrar. It is also said that the grounds of appeal should have been contained in the Memorandum of Appeal, as opposed to the Chamber Summons, as in the present case.

The plaintiffs submitted that the defendant had failed to comply with the provisions of Order 41 rule 8 (2) of the Civil Procedure Rules, by failing to file a Memorandum of Appeal thus rendering the appeal herein, incompetent. Therefore, the plaintiffs contend that the court cannot give directions on an appeal which was not valid.

It is noteworthy that the present application first came up before my brother, the HON. WAWERU J. on 15th May 2006. On that date, Mr. Odero advocate is on record as stating that the plaintiffs had no objection to the court giving directions. However, Mr. Kabue, advocate for the defendant then sought an adjournment for purposes of checking whether or not there was a competent appeal before the court. At that point in time, Mr. Odero notified the court that the defendant would raise the issue of jurisdiction, on the grounds that there was no appeal properly before the court.

When adjourning the matter, the learned judge directed that the issue as to whether or not there was a competent appeal was to be canvassed on 26th June 2006. It is in those circumstances that the application was listed before me, on 26th June 2006.

On an earlier occasion, the plaintiffs had raised a preliminary objection, on the grounds that the defendant did not have a right of appeal. That objection was heard and determined by the HON. WAWERU J. on 13th July 2005, whereupon he held that the defendant had a right of appeal, under Order 48 rule 5 (2) of the Civil Procedure Rules.

In the light of that decision, it must be appreciated that I am not now required to revisit the issue as to whether or not the plaintiffs had a right of appeal. My sole role is now to determine if, in pursuance of its right of appeal, the defendant had filed a competent appeal, for which directions could issue.

According to Mr. O.P. Nagpal, advocate for the Plaintiffs, there was no competent appeal before the court, as the defendant had not filed any Memorandum of Appeal pursuant to Order 41 rule 8 (2) of the Civil Procedure Rules. The subrule (2) of rule 8 reads as follows:

“Every memorandum of appeal to be filed shall be presented to the registry during office hours together with any fee payable on its filing and each and every memorandum shall be date-stamped with the date on which it was so presented, which shall be the date of filing the appeal notwithstanding any dispute as to the amount of the fee payable.”

There is no doubt that subrule makes reference to the filing of a Memorandum of Appeal. Similarly Order 41 rules 8A and 8B both make reference to **“memorandum of appeal.”** In particular rule 8B stipulates that the appeal is to be listed for the giving of directions by a judge, after not less than twenty-one days from the date of service of the memorandum of appeal.

As no such memorandum of appeal has been served in this matter, it is clearly premature for the defendant to have sought directions of the court.

Pursuant to the provisions of Order 41 rule 8B(2):

“Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.”

Therefore, the plaintiffs were right to have raised the issue at this stage.

And to put the matter beyond any doubt, the provisions of Order 41 rule 1(1) of the Civil Procedure Rules expressly provides that **“Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”**

That requirement is couched in mandatory terms, and is in relation to every appeal. As there is no memorandum of appeal yet filed by the defendant, I hold that there is no competent appeal, in respect to which directions can be given. The application dated 31st March 2006 is accordingly struck out, with costs to the plaintiff.

Dated and Delivered at Nairobi, this 28th day of September 2006.

FRED A. OCHIENG

JUDGE

oweever,