

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 15 of 2000

ROYAL MEDIA SERVICES.....PLAINTIFF/APPLICANT

VERSUS

TELKOM KENYA LIMITED & THREE OTHERS.....RESPONDENTS

R U L I N G

Counsel for the second defendant whilst being supported by all the other defendants raised a preliminary objection against the plaintiff's application, dated 11th July 2005, for stay pending appeal.

The background of this matter is that the plaintiff's suit was dismissed by the Hon Justice Mugo on 24th November, 2004, for want of prosecution. The plaintiff filed a Notice of Appeal on 8th December 2004.

In submissions counsel for the second defendant said that the plaintiff in its request for proceedings for purpose of lodging an appeal, which was applied by, letter was not copied to the defendants. That according to the court of appeal rules the plaintiff ought to have filed its appeal within 60 days of filing the Notice of Appeal. That failure to file the memorandum of appeal within that period the appeal is deemed as withdrawn. Counsel further submitted that the plaintiff had not filed its memorandum of Appeal within that prescribed period and as a consequence its appeal is deemed as withdrawn and similarly by operation of law the Notice of Appeal is deemed as withdrawn. Counsel argued that Order 41 Rule 4 required this court to pay regard to the court of appeal rules in considering an application for stay; and that a Notice of Appeal was required to be filed in accordance with the court of Appeal Rules.

The other defendant's supported the second defendant's submission and further submitted that they were not served with the Notice of Appeal. The defendants cannot be correct to say that they were not served with the Notice of Appeal since all of them have filed Notice of Address for service. In any case that argument cannot be entertained as a preliminary point since preliminary point ought to only be on pure points of law or facts that are not in dispute; see MUKISA BISCUIT CO. – VERSUS WESTEND DISTRIBUTORS LTD [1969] E.A. 696 where Sir Charles Newbold P said

“A preliminary objectionraises 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.”

The preliminary objection was opposed by the plaintiff's counsel, who began by submitting that what the defendants sought was the striking out of the Notice of Appeal by oral application, which was not the way to conduct court business. Plaintiff counsel said that the preliminary objection flew against the provisions of statute. He relied on the case of CIVIL APPEAL NO. 122 OF 1992 YANI HARYNTO AND E.D.F. MAN (SUGAR) LIMITED, where it was held in regard to the provisions of order 41 Rule 4 (4) as follows: -

“For the purpose of this rule an appeal to the court of appeal shall be deemed to have been filed when under the rules of the court notice of appeal has been given.”

The crucial words in sub rule (4) are “for the purpose of this rule.” The use of these words make it crystal clear that what this sub rule has prescribed is exception to the rule relating to the actual filing of the appeal which is rule 81

(1) of the court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purpose of rule 4 of Order 41 only on the mere giving of the notice of appeal under court of Appeal Rules.”

That decision makes it quite clear that the duty of the High Court in hearing an application for stay pending appeal is to ensure that a notice of appeal is filed in accordance with the Rules of the Court of Appeal. In this case the Notice of Appeal was filed in accordance with those rules. I do not accept second defendant’s counsel’s argument that it is the duty of this court to ascertain whether the other process of filing the appeal have been followed. I think to do that this court would be intermeddling with an area that is not of its concern but it is for the court of the court of Appeal exclusively.

I find and hold therefore that the plaintiff has filed a Notice of Appeal in accordance with the court of Appeal Rules and that on its own gives this court jurisdiction to hear the plaintiff’s application for stay pending appeal.

The second defendant’s preliminary objection is therefore dismissed with costs to the plaintiffs.

Dated and delivered at **NAIROBI** this 22nd day of July 2004 .

MARY KASANGO

JUDGE