



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 356 OF 1999.

CENTURION CONTRACTORS & AGENCIES (K) LTD.....PLAINTIFF

=VERSUS=

1. NORTHLAKE NURSERIES LIMITED.....1ST DEFENDANT

2. JONAH STEPHEN NG'ANG'A.....2ND DEFENDANT

R U L I N G

By a Notice of Motion dated 4th March 2003, the 2nd Defendant/Applicant sought under Order XLI rule 4 of the Civil Procedure rules for a stay of execution of the judgment of this court delivered on 3rd February, 2003 pending the hearing and determination of an intended appeal. The applicant obtained exparte orders before the Honourable Mr. Justice Onyango Otieno on 6th March 2003. The application was then fixed for interpartes hearing on 13.3.2003. The application sets out the grounds in support and also that the same is based on the affidavit of Jonah Stephen Ng'ang'a sworn on 4th March 2003.

The Respondent was served with the interim orders with the application and the supporting affidavit on 11.3.2003. The Respondent immediately filed a preliminary objection against the above mentioned application. The preliminary objection had to be dealt with first before the hearing of the substantive application. There were two major grounds of objection so to speak. First, that the Notice of appeal dated 3rd February 2003 and filed in court on 4th March 2003 was filed out of time in contravention of rule 74(2) of the court of Appeal Rules and secondly, that the applicant has not complied with the consent order made on 18.2.2003 before the Deputy Registrar of this court requiring him to deposit a sum of KSh.10,000,000/= as security for costs.

The applicant opposed the preliminary objection and proposed to this court to reject the same on the grounds that, first, this court lacks jurisdiction to decide on the validity of the Notice of appeal and secondly, that the consent orders recorded on 18.2.2003 before the Deputy Registrar of this court were overtaken by the orders of the Honourable Mr. Justice Onyango Otieno made on 6th March 2003. Further to that was that the time fixed to deposit the aforesaid amount had not lapsed.

From the pleadings placed before me and the submissions of both Counsel, two issues arise for this court to decide: first, is whether this court has jurisdiction to determine the validity of a Notice of Appeal pursuant to Rule 74(2) of the Court of Appeal Rules and two, as to whether the consent orders before the Deputy Registrar of this court were stayed by the orders of the Honourable Mr. Justice Onyango Otieno.

On the first issue, perhaps it is important to look at the appellate Jurisdiction Act Chapter 9 of the laws of Kenya. At the preamble it states:-

“An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the

High Court and for purposes incidental thereto.”

Under section 2:-

“The court of Appeal means the Court of Appeal established by Section 64(1) of the Constitution.”

Under Rule 2 of the Court of Appeal Rules “Court” means the Court of Appeal and includes a division thereof and a single Judge exercising any power vested in him sitting alone. “Notice of Appeal” under rule 2 also means a notice lodged in accordance with rule 74.

The Notice of Appeal complained of is a creature of Court of Appeal Rules embodied in the Appellate Jurisdiction Act chapter 9 of the Laws of Kenya. I have come to the conclusion that I have no jurisdiction to determine the validity of a notice of Appeal issued pursuant to the provisions of the Appellate Jurisdiction Act. The Jurisdiction is only conferred to the court of Appeal. I therefore overrule the Respondent on the first ground. I can only under exercise Jurisdiction under rule 85(3) of the Court of Appeal rules.

On the second, issue, I agree with the Counsel for the applicant that the orders of Mr. Justice Onyango Otieno issued on 6th March 2003 stayed execution of the judgment in this suit. The consent orders recorded by the Deputy Registrar of this Court on 18/2/2003 were stayed hence the applicant is entitled to be heard.

From the foregoing, I dismiss the preliminary objection and make no orders as costs.

Dated at Mombasa this 20th day of March 2003.

J.K. SERGON

J U D G E