REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL 28 OF 2008

BRITISH AMERICAN INSURANCE CO. (K) LTD............APPELLANT

VERSUS

MALINDI WATER & SEWARAGE CO. LTD..........................PLAINTIFF

R U L I N G

By a Notice of Motion dated 21-4-09 made under section 25 proviso 1(a) and (b), 63(1), 67, 79(b), 79(g) and 3a of the Civil Procedure Act and Order VI Rule (1) and XLI Rule 3 Civil Procedure Rules, the applicant seeks that the memorandum of appeal filed herein dated 8th October be struck out.

Further that the court do summarily reject and dismiss the same memorandum of appeal filed here.

It is premised on grounds that:

(a) Appellant has filed the memorandum of appeal without extracting any proper decree such that the present appeal is incompetent ab initio.

(b) The appellant/respondent has not filed any record of appeal despite the passage of six months since the present appeal was filed in court.

(c) The chain of events as set out in the annexed supporting affidavit discloses a firm basis for reasonable inference that appellant/respondent does not have any serious intentions to timeiously prosecute their appeal.

(d) The respondent should not be kept out of its judgment for no justifiable reason.

The application is supported by the affidavit of Anthony Chitavi who depones that respondent sought to set aside the default judgment before the lower court, but this failed as the trial magistrate dismissed the application for setting aside – that was in September 2008.

By 30th September, respondent requested for certified copies of proceedings and ruling so as to prepare their intended appeal and undertook to pay the requisite charges as per letter annexed and marked AC1. Respondent then filed a memorandum of appeal on 9-10-08 and by 15-6-08, did a follow up on their request for typed certified copies of proceedings and ruling, still repeating the undertaking to pay the

requisite charges.

By 11-3-09, there was yet another request for the copies of proceedings and ruling. However it turned out that all the letters requesting for proceedings and rulings were not in the court file and there was no evidence of the requisite court charges for typing, ever having been paid and there was no decree. So the applicant's counsel supplied the Malindi Lower court registry with a copy of one of the letters requesting for the typed certified proceedings, and even paid for the typing charges as per receipt EX AC5. It is his contention that the appeal is irregularly before this court as no proper decree has been extracted as provided for under section 65(1) and 67 of the Civil Procedure Act. What's more, that the present appeal lacks merit as it is founded on false premises i.e that respondent/applicant ought to have proceeded for formal proof once default judgment was entered.

The application is opposed, and the respondent/appellant relies on replying affidavit sworn by Nelson Nyiro a clerk in its advocate's firm, who states that he filed the letters in the Malindi Court Registry copies are annexed and bear court registry stamp. He then paid Ksh. 600/- to the court, being deposit towards the charges for typing.

Later on 30-4-09, he paid a sum of Ksh 1050/- out of which 900/- was the balance due for the proceedings and certified copy of ruling and Kshs. 150 was for the decree – copy of the receipt is annexed and marked NMN 11. He obtained certified copies of the decree, ruling and proceedings (Marked NMN 12, 13, and 14) on the same date and filed the record of appeal on 7-5-09.

At the hearing of the application, Mr. Kithi submitted that the appeal is misfounded as it evinces a notion that where a suit seeks liquidated damages only, and where the defendant in that suit fails to appear in time, then the judgment was an interlocutory judgment.

He explained that the Civil Procedure Act is very plain and clear in section 25 at the proviso thereto, that where it is a liquidated claim, it is not necessary for court to hear the entire suit.

He points out that, out of the ten grounds of appeal, three of them are founded on error and its shame that people should come to court to litigate on what is abvious.

He insists that as at the date of filing the application, no decree had been extracted nor had the record of appeal been filed – all these were done after the application had been filed. Mr. Kithi urged this court to consider that respondent had been served with pleadings in the lower court and now they turn round to say an employee of the respondent failed to instruct their advocate on time – saying a party should not be allowed to benefit from its own omissions or mistake.

Mr. Chiggiti who argued that applicant on behalf of the respondent submitted that the decree shows that what was entered was an interlocutory judgment and insists that once the interlocutory judgment was entered, then it was incumbent for the applicant to list the matter for formal proof and so what was entered was not a final judgment of the court. He sought to rely on the second replying affidavit sworn by Mr. Gor (counsel for respondent), that despite efforts to get certified copies of the proceedings and ruling, (shown by letters he wrote) the same were only made available on 30-4-09.

Meanwhile he made requests to applicant's counsel to forward to him the decree, the same was not forthcoming and he eventually got a copy of the same on 30-4-09. He depones that the appeal has good chances of success and there is no irregularity nor delay on the part of appellant/respondent.

Mr. Chiggiti argues that there is no time limit within which to obtain the decree and that counsel for both parties reached a consent vide a letter SSG 11 in which it was agreed that defendant do file memorandum of appeal within fifteen days.

He argues that even if the decree was not extracted at the time the memorandum of appeal was filed, that is not fatal – reference is made to the case of **Old Mark Soap Factory Ltd V Gupta Sea Torus ltd CA 51 of 2004** where the Court found that such an omission was not fatal and that in any case, the respondent

has now filed a copy of the decree. It is his contention that there is no provision for any party to apply to the judge to dismiss the appeal even before the judge has perused the record and that this application is therefore misplaced and is simply intended as a shortcut to the whole matter.

The matter which was before the trial court was a claim by the applicant herein seeking liquidated damages in the sum of Ksh. 597,923/- with interest at court rates and costs.

On 17-3-08, the applicant herein requested for interlocutory judgment for special damages in the sum of Ksh. 597,923/- and the same was granted. An attempt to set aside this judgment failed.

Now the respondent being dissatisfied then filed an appeal – in the memorandum of appeal was filed without the decree then is that fatal? Does it render the appeal incompetent ab initio? Can a party apply for summary dismissal of an appeal even before the judge has perused it? Section 79B of the Civil Procedure Act provides:

"***Before an appeal from the sub-ordinate court is heard, a judge of the High Court shall peruse it, and if he considers that there is sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding section 79C, reject the appeal summarily"***

My comprehension of this provision is that, this is a function the judge performs without any prompting or motion by the parties. It would then appear that the application herein is misplaced and premature, as I had not even perused the same to direct whether it should be admitted or summarily rejected.

Section 79G provides for the time within which appeals from the subordinate courts should be filed – it provides that:-

"***every appeal from a subordinate court, to the High Court, shall be filed within a period of thirty days from the date of the decree or order applied against EXCLUDING from such period, any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order"***

The judgment was entered on 17-3-08, attempts to set aside were rejected on 26-9-08 and by 30-9-08, about four days later respondent had already requested for the lower court's record so as to prepare an intended appeal. There was delay in having the same made available until 30-4-09, BUT by 9-10-08, the respondent had filed its memorandum of appeal but without the decree, which apparently respondent sought to get from applicant's counsel. Did the respondent refuse or neglect to file the record of appeal six months after the appeal was presented to court. The failure in filing the record of appeal was caused by the delay in obtaining certified copies of proceedings and ruling from the lower court.

Of course the memorandum of appeal was filed without the decree and applicant does not deny that despite a request by respondent's counsel for a copy of the decree, he never furnished him with the same and from the copy of the documents respondent has, the decree was only made available on 30-4-09- certainly this was after the applicant had filed the present application. However that decree has now been extracted and forms part of the appeal record. **Order XLI Rule 1A directs that the appellant files a certified copy of the decree and rule 8B(4) requires that before admitting the appeal to hearing, the judge must satisfy himself/herself that the judgment, order or decree appealed from is on record.**

Which then causes one to ask the following

(a) Has the appeal been admitted yet?

(b) Have directions been taken

(c) Was this appeal already before court?

The answers to all three queries are in the negative and yes I concur with Mr. Chiggiti that this

application is a shortcut to finalizing the matter. It is applicant who has moved this matter to court prematurely.

As to whether there is an arguable appeal visa vis the proviso to section 25 of the Civil Procedure Act, is precisely what this court would be considering before giving directions on whether the appeal should be admitted.

The upshot is that the application is premature and has no basis. It is dismissed with costs to respondent.

Delivered and dated this 8th day of July 2009 at Malindi.

H. A. Omondi

JUDGE

Mr. Chiggiti for plaintiff and holding brief for Gor.

Mr. Mwadilo holding brief for Kithi for defendant