



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI 111 OF 1999 (43/99 UR)

YASHVIN A. SHRETTA .....APPLICANT

VERSUS

VADAG ESTABLISHMENT .....RESPONDENT

(An application for extension of time to file and serve a notice of appeal in an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Ole Keiwua J) dated 31st July, 1998

in

H.C. WINDING UP C.NO. 28 OF 1996)

**RULING:**

By this application expressed to be brought under rules 4, 42 and 81 of the Rules of this Court (the Rules) Yashvin A. Shretta, the applicant, seeks an extension of time to file and serve a notice of appeal and a record of appeal out of time from the ruling and order of the superior court (**Ole-Keiwua, J.**) dated the 31st July, 1998 in High Court Winding-up Cause No. 28 of 1996 in which the applicant who holds 10% of the shares allotted in Leisure Lodges Ltd (the Company) has petitioned for its winding up.

The applicant's notice of appeal from that decision and dated the 4th August, 1998 was struck out by the Court in **Civil Application No. NAI. 39 of 1999** as there was a failure on the part of the applicant to serve the notice of appeal on all interested parties in the matter.

Dr. Kuria, counsel for the applicant, contended that the failure to do so was occasioned by a misinterpretation on the part of the applicant's then counsel, of rule 76 of the Rules and by following the precedent set in **Civil Appeal No. 10 of 1997**. It was further contended that the applicant's counsel in construing rule 76 of the Rules adopted an approach identical to this Court in **Trade Bank Limited (In Liquidation) vs. L.Z. Engineering Construction Ltd, Civil Application No. Nai. 14 of 1998** in which the "pivotal issue" test was allegedly used to determine the person who is affected directly by an appeal.

\_\_\_\_\_ Rule 76 (1) and the proviso thereto of the Rules provides:-

***"76 (1)An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.***

***Provided that the court may on application, which may be made ex parte within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."***

On my own part, I do not see how this rule is capable of a misinterpretation such that persons directly affected by an appeal may not be served. It is manifestly clear that in a winding-up petition, the company is clearly the party directly affected. Also, so is a debenture holder of the assets of such company. The rule is explicit and clear and admits of no ambiguity. As was said by this Court in **Civil Application No. NAI. 39 of 1999** between these very parties:

*"We have said repeatedly that at least some of the parties the applicant says ought to have been served with the notice of appeal took part in the proceedings in the superior court at various stages. The respondent may have thought that they were or are not directly affected by the appeal he intends to file and which we understand has in fact been filed. Once again, on first principles, we would hold that even if the*

respondent thought so, it was not within his province to decide on the issue of who should or should not be served with the notice of appeal. The power to make that decision is given to the Court by the proviso to **rule 76**, which we have already set out in this ruling. That, we think, has been the position taken by the Court since 1981 when the case of **PETER MARTIN AHN VS WAIRIMU OPENDA, (CA NO. 7 OF 1981) (Unreported)** was decided. There, it was held that as the application to dispense with service upon a party directly affected by the appeal but who took no part in the proceedings in the superior court had been made way out of time, the appeal itself would be struck out.

*Madan, Kneller and Hancox, J.J.A., next put it in the case of **ROBOI HOLDINGS LTD VS KANTILAL HOLDINGS LTD, (CA NO. 50 OF 1983) (Unreported)** :-*

*"A similar situation arose in **Taracisio Githaiga Ruithibo V Mbutia Nyingi CA 21 of 1982 (Unreported yet)**. We then said that we considered the whole of the provisions of **Rule 76 (1)** are mandatory. We would add that an intending appellant is not excused from complying with all the requirements of **rule 76 (1)** even if there is "no grievance" between the parties directly affected by the appeal but not served. It also matters not that the respondent or any person directly affected by the appeal does not suffer any "grievance" or prejudice thereby. The notice of appeal must be served or dispensation obtained from the Court as laid down in **rule 76 (1)**."*

*These decisions have been consistently followed by this Court. They were followed in the case of **TRADE BANK LTD (IN LIQUIDATION) VS L.Z. ENGINEERING CONSTRUCTION LTD, (CA NO. 174 OF 1994) (Unreported)** where the Court said: -*

*"The appellant did not invoke this proviso to obtain relevant directions from the court. However, it is clear to us that Yaya took part in the proceedings before the superior court, through Mr. Ma nek."*

Further, I am least impressed by the alleged precedent relied upon in Civil Appeal No. 10 of 1997. The position was fully explained once again by the Court in the **Civil Application NO. NAI. 39 of 1999** (supra) where the Court expressed itself thus:

*"Against this line of authorities, Mr. Kamau Kuria could only cite the decision of this Court in the case of **TRADE BANK LTD (IN LIQUIDATION) VS L.Z. ENGINEERING CONSTRUCTION LTD, (Civil Appeal (Application) NO. 14 OF 1998) (Unreported)** where this passage is to be found: -*

*"... The third respondent took no part in the proceedings before the superior court, which led to the decision the subject matter of this appeal. The pivotal issue is of concern only to the appellant which is the only party directly affected by the appeals. The third respondent has no legal interest in the outcome of the appeal."*

*It matters not it has been served by the appellant with the notice of appeal, and the record of appeal, and has expressed interest to take part in the appeal."*

*Mr. Kamau Kuria took this passage to mean that it is for a party to an appeal to decide who is directly affected by the appeal and so long as "the pivotal issue" is only of concern to two parties, then only those parties need to be served. Of course this case is no authority for such a proposition.*

*(Emphasis added). The Court was then dealing with an application to strike out an appeal under **rule 80** because the appellant had given one composite notice of appeal contrary to the provisions of **rules 74 (1)** and **79 (1)**, which, according to the application in that application, required that separate notices of appeal be filed for each intending appellant. The application in that case had absolutely nothing to do with the provisions of **rule 76 (1)**. Indeed as is clear from the last sentence in the passage we have set out from the Court's ruling, all the parties, even those not directly affected by the appeal had been served with the notice of appeal and had expressed a desire to participate in the appeal. In those circumstances, we are at a loss to understand Mr. Kamau Kuria's contention that the decision in the **TRADE BANK LTD** case is in conflict with the previous decisions of the Court on the interpretation of **rule 76 (1)** and the proviso thereto. With due respect to Mr Kuria, there is absolutely no conflict between that decision and the others."*

I have reproduced the above passages in extenso to emphasise the point that there are no conflicting decisions of this Court as relates to the construction of **rule 76**.

In these circumstances and, in my view, it makes strange reading when the applicant says that he was under no obligation to serve the other parties. I can find no legal justification for so holding. The least that the applicant ought to have done was to seek directions under the proviso to **rule 76(1)** as to which of the parties ought not to be served.

His failure either to serve them with the notice of appeal or not seek dispensation to serve them makes this notice of appeal incompetent.

A close scrutiny of Dr. Kuria's submission shows that the applicant never alleged that there was any mistake on his part. Mistake is nowhere even mentioned. Counsel relies on misinterpretation of the rule and the new concept (pivotal issue) both of which issues I have dealt with as above and have been finally dealt with by this Court. I would think that by arguing now, as he does, the applicant is virtually seeking a reversal of the decision of this Court on this point. In this application it would amount to an attempt to review an earlier decision of this Court or to reverse it by a single judge, neither of which would be competent. If a mistake were alleged, the Court might feel compassionate. In this regard I was referred to **BELINDA MURAI & OTHERS VS AMOS WAINAINA Civil Application No. NAI 9 OF 1978** where Madan J.A. said:

*"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better."*

But here, the case is one of a deliberate omission to follow the Rules of this Court. Simply looking at the Rules would have put counsel right. It was not an error of judgment on the part of the counsel. Nor was it a slip on his part. It was purely and simply a refusal to follow the rule and that will not and cannot be condoned. As was said by this Court in **BABER ALIBHAI MAWJI & 2 OTHERS Civil Application No. NAI. 236 of 1992:**

*"We must and do draw the line between error of judgment or error of misreading some difficult point of law on part of counsel on one hand as against simple non-reading of rules .....*

*We think that the learned single judge was right when he said that ignorance cannot be equated to genuine mistake or error on the part of a legal adviser. What happened here was not a mistaken view of law or procedure."*

I am, therefore, satisfied that the contentions set out by the applicant as the basis for the grant of this application are misconceived and I reject them.

In the event that I am wrong I now turn to consider whether this is a case where I should exercise my discretion under rule 4 of the Rules to grant this application.

As was said by Lakha, J.A. in **MACCU MOTORS LIMITED VS. BIKABHAI MATHURBHAI PATEL & 3 OTHERS Civil Application No. NAI. 289 of 1997 (Unreported):-**

*"The starting point is, as it must be, rule 4 itself which confers the widest measure of discretion and makes no distinction between the various classes of cases. But like all discretion, it must be exercised judicially. The rule itself therefore specifies that the Court may make an order for extension of time on such terms as it thinks just. To me, that is an important provision. At the heart, therefore, of this discretionary exercise is the need to do justice. Justice has to be done both to the plaintiff, to the defendant and, of course, and especially in this day and age, to the whole process of the administration of justice in these courts."*

Suffice it to say, that in considering this application to grant an extension, the predominant consideration is not whether there was an omission to serve the party affected with the notice of appeal, but, I think, the reason why there was such an omission. If the omission was deliberate and not due to accident or mistake, the Court would, in my view, be unlikely to grant an extension. Other relevant considerations, in such an application, include whether the successful party would be prejudiced by granting an extension and allowing a re-hearing bearing in mind the public interest that there ought to be an end to litigation. It is trite that the company suffers prejudice upon the presentation of a winding-up petition and the losses suffered by the company consequent upon appointment of liquidators as in this case have been alluded to on behalf of the respondent in the replying affidavit filed.

As to public interest, the applicant is a 10% shareholder in the company. The winding-up petition was presented almost three years ago and remains undisposed of to date. For all that period, the applicant has kept out majority shareholders and has occasioned grave losses to the company. He is prevaricating and is prone to stalling the winding-up petition. Extensions entailing delays in hearing will be granted if justice of the case demands it particularly where there has been an accident or mistake (not relied upon here) but certainly not where there has been a deliberate act or wilful disobedience and conscious non-compliance with the Rules.

I think that in a case such as this, where a party has been clearly given an opportunity to present his appeal in accordance with Rules and by a deliberate act chooses not to do so, it is a most real consideration to be taken into account in assessing where the interests of justice lie. Certainly the interests of justice require that a man should have an opportunity of his case being heard on merits. But, if he chooses to ignore the opportunity given him, I see no manifest injustice in not offering him a second opportunity particularly where the omission was deliberate and not due to accident or mistake.

I agree with Mr. Oraro, counsel for the respondent, that the applicant's conduct is reprehensible and has sought right to the end to fault the decisions of this Court. The applicant certainly does not deserve the exercise of my discretion in his favour. I reach the conclusion that the interests of justice do not require that in the instant case, an extension should be granted.

Having carefully considered all the circumstances of this case, I am satisfied that it is not a fit and proper case for the exercise of my discretion. The application, therefore, fails and is hereby dismissed with costs.

**Made at Nairobi this 16th day of June, 1999.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**