



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: PALL, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 258 OF 1997

BETWEEN

NORADHCO KENYA LIMITEDAPPLICANTS

AND

LORIA MICHELE.....RESPONDENTS

(APPEAL FROM THE RULING/DECREE of the High Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 31st July, 1996

In Civil Case INo. 157 of 1994)

RULING

This notice of motion is brought under rules 1 (2), 4, 74 and 81 (1) of the Court of Appeal Rules (the rules). Narodhco Kenya Ltd (the applicant) is seeking an order of the court to extend the time for filing the notice of appeal and the record of appeal. The facts giving rise to this motion are that in 1994 the respondent sued the applicant for goods sold and delivered amounting to Shs. 1,500,000/=. On 9.8.1994, the respondent was granted summary judgment against the applicant as prayed in the plaint. The applicant lodged notice of appeal and while that notice of appeal was still pending and effective, the applicant filed an application for review of the said summary judgment entered against it. On 31st July, 1996 Lady Justice Ang'awa dismissed that application for review with costs holding, in her own words, that: "Order 44 states a review can only be made where there is a mistake. In this situation no error or mistake has been made." The aforesaid notice of appeal in respect of the summary judgment was subsequently struck out by this court, upon an application by the respondent being Civil Application No. Nai 354 of 1996.

The applicant then filed Civil Appeal No 140 of 1997 from the said ruling and order of Lady Justice Ang'awa. The appeal was struck out on 25th July, 1997. According to a certified copy of the Order of the Court, produced by the applicant, the appeal was struck out as it did not include a certified copy of the order appealed from. But Mr. Ndubi who appeared for the respondent has produced a certified copy of the same order according to which the appeal was struck out as it did not include a certified copy of the order appealed from. But Mr. Ndubi who appeared for the respondent has produced a certified copy of the same order according to which the appeal was struck out by this court saying:

"An appeal to this court is commenced by the filing of a notice of appeal. The appellant having

filed such a notice, it meant that he had divested himself of the right under O.XLIV r 1 of the Civil Procedure Rules to apply for reviews which right is available to the parties who have either not exercised their right of appeal or those against whom decrees have been passed from which no appeal is allowed. In the circumstances it is quite clear to us that the application for review did not lie and the ruling appealed against is a nullity.”

Mr. Pandya for the applicant states from the bar that this point was never raised or argued before the court. I feel somewhat embarrassed as two divergent orders have been produced giving different reasons for striking out the applicant’s appeal. As the original file is not available here, I cannot determine the true position. However, I will deal with Mr. Ndubi’s argument that there is no point in granting extension of time to file a fresh notice of appeal when the applicant’s application for review did not lie. He has argued that when the applicant applied for review of the judgment, it had already lodged the notice of appeal against the judgment of the superior court and the notice of appeal was still effective and pending. He adopted the aforementioned reasoning of this Court and said that the notice of appeal was in fact tantamount to preferring an appeal itself and he further said under O.44 r. 1, a person who has preferred an appeal exercising his right to do so, has deprived himself of the right to apply for review of the judgment or order subject matter of the appeal. I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.

In HARYANTO VS. ED & F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992 The Court of Appeal comprising of Judges of Appeal Gicheru, Kwach and Cockar (as he then was) held:

“(1) There was jurisdiction to entertain an application for review, notwithstanding the filing of a notice of appeal under the court of Appeal Rules and

(2) for an appeal to be deemed to have been preferred for the purpose of review, there must be an appeal instituted in compliance with rule 81(1) of the Court of appeal Rules.”

Again in MOTEL SCHWEITZER VS. THOMAS EDWARD CUNNINGHAM and another (1955) 22 EACA 252 it was held that:

1. A notice of appeal is notice of intention to exercise a right of appeal and that
2. An appeal is not instituted in the Court of appeal until the record of appeal is lodged in its Registry, fees are paid and security lodged as provided in rule 58 of the Court of Appeal Rules.”

I am therefore unable to agree with Mr. Ndubi that as the applicant had lodged a notice of appeal which was pending when it applied to the superior court for review of the summary judgment, the superior court did not have jurisdiction to entertain the said application and that there was therefore very little chance of the applicant having a successful appeal from the order refusing the application which did not lie in law.

Annexed to the affidavit in support of this motion, Bharat Narandra Ruparelia, the managing director of the applicant, is the proposed Memorandum of Appeal. One of the grounds of appeal proposed is that the superior court failed to appreciate that there was a sufficient ground for review as the goods supplied by the respondent were uncustomed goods illegally imported into Kenya which fact, was not known to the applicant before or at the time when the summary judgment was given against it on 9th August, 1994. Another proposed ground of appeal is that the goods subject matter of the said judgment were seized and impounded by the custom authorities for non payment of custom duty by the respondent and that as such the consideration for the goods delivered by the respondent to the applicant totally failed and the applicant got nothing in return for the price of the said goods. It has also been alleged on behalf of the applicant that the respondent has already executed the decree and recovered the judgment debt and that it is only fair and just that it should be given an opportunity to seek appropriate redress to recover the same from the respondent.

I therefore agree with Mr. Pandya that the applicant has, at least, an arguable appeal, and that the appeal originally filed was struck out in Limini without it being on merits. I also agree with him that the applicant has not been guilty of inordinate delay in coming to the court with its present application. It would be injustice if the applicant is deprived of its right to prefer a valid appeal and have it determined on merits.

I invited Mr. Ndubi to address me on the issue of jurisdiction, whether or not I could extend the time for filing a fresh notice of appeal in the instant matter. However he chose to oppose the notice of motion on merit.

In the end, therefore, I grant the applicants notice of motion and hereby extend the time for filing the notice of appeal exercising my power under rule 4 of the Rules and order that the applicant shall file the notice of appeal within 7 days of this order and shall file the record of appeal within further 21 days of the filing of the said notice of appeal. I further order that costs of the notice of motion shall abide by the result of the intended appeal.

Dated and delivered at Mombasa this 23rd day of January, 1998.

G.S. PALL

JUDGE OF APPEAL

P.S. Since writing my ruling, I have been able to get the original record of the Civil Appeal No. 140 of 1997. The only order signed by the three Judges of Appeal is the one certified copy of which was produced by Mr. Pandya. There is no trace of the order produced by Mr. Ndubi.

G.S.PALL

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR