



REPUBLIC OF KENYA
COURT OF APPEAL AT NYERI

civil appl no.nai.286 of 97

TREE SHADE MOTORS LIMITED.....APPELLANT

AND

JOSEPH RADING WASAMBO.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ole Keiwua, J.) dated 30th June, 1995 in H.C.C.C. NO. 3764 OF 1994)

RULING OF THE COURT:

This is an application brought under rule 80 of the Court of Appeal Rules (the Rules) by Joseph Wasambo (the respondent) to strike out the Notice of Appeal dated 4th July, 1995 and the appeal subsequently filed by Tree Shade Motors Ltd (the appellant), on the ground that the appellant did not serve the Notice of Appeal on D.T. Dobie & Co. (K) Ltd (D.T. Dobie) a party directly affected by the appeal within the meaning of rule 76(1) of the Rules.

The respondent sued the appellant and D.T. Dobie in the superior court seeking the return of his motor vehicle Nissan Sentra KXT 657 which he had taken to D.T. Dobie on 20th January, 1992 to be repaired. D.T. Dobie did not repair the vehicle but sold it to the appellant to recover what they called "work done on the motor vehicle and storage charges."

D.T. Dobie filed a defence to the suit but the appellant did not with the result that the respondent obtained a default judgment against it. The appellant then applied to set aside the default judgment but the application was dismissed as the Judge was satisfied that the judgment had been regularly obtained. It is against that decision that the appellant has now appealed to this Court. The appellant's Advocates did not serve the Notice of Appeal on D.T. Dobie and this is conceded by Mr. Waweru Gatonye, for the appellant but he submits that D.T. Dobie was not a party directly affected because it did not take part in the proceedings that is to say, the application to set aside the default judgment. But this submission cannot be correct because D.T. Dobie is a named defendant and on the authorities of this Court it is a party directly affected by the appeal notwithstanding that it did not take part in the application to set aside the default judgment. If the appellant felt that D.T. Dobie was not a party directly affected by the appeal, its Advocates should have taken advantage of the proviso to rule 76(1) of the Rules to dispense with service. This was not done. Mr. Gatonye submits that we can grant the dispensation at this stage but as the rule specifies the time within which the application has to be made, it would be unjust to the respondent at this stage because it would deprive the respondent of its right under rule 54 to challenge the decision of the single Judge of this Court who would ordinarily deal with such an application.

For these reasons, we grant the application and strike out the Notice of Appeal dated 4th July, 1995 and also this appeal. The respondent will have the costs of the motion and the appeal.

Dated and delivered at Nairobi this 6th day of February, 1998.

R.O. KWACH

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR