REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPLICATION NO. NAI 142 OF 1997 (60/97 UR)
BETWEEN

PELICAN ENGINEERING & CONSTRUCTION COMPANY LIMITED ..... APPLICANT

AND

NAIROBI GOLF HOTELS (KENYA) LIMITED ..... RESPONDENT

(An application for extension of time within which an application for leave to appeal has to be brought in an intended Appeal from the decision of the High Court of Kenya at Nairobi (Justice Githinji) dated the 8th May, 1997 in H.C.C.C. NO. 706 OF 1997)
****

R U L I N G

The present application filed on 12th June, 1997 and which has been brought under rule 4 of the Rules of this court, is intriguingly that:

> "***leave be granted to the Applicant to file an application for leave to appeal to the Superior Court out of time in respect of the decision of the High Court ... at Nairobi by Honourable Justice E. M. Githinji dated 8th May, 1997.".***

The present application has been objected to on three grounds namely, that no Notice of Appeal has been filed by the applicant, that the Notice of Motion is silent on the grounds on which the reliefs sought are based, and that I have no jurisdiction to entertain the application. The decision concerned was an order granting an interlocutory injunction against the applicant which had been sought under Order 39 of the Civil Procedure Rules. This being an order in respect of which according Order 42(1) of the Civil Procedure Rules and which is derived from section 75(1) of the Civil Procedure Act, an appeal lies as of right, the present application is an abuse of the process of this Court and incompetent. But what would be the case if leave to appeal was required? The rules of procedure that apply are to be found in rules (2), (3) and (4) of Order 42 of the Civil Procedure Rules which are that:

> ***"(2) An appeal shall lie with the leave of the Court from any other order made under these Rules.***
>
> ***(3) An application for leave to appeal under section 75 of the Act shall in the first instance be***

made to the court making the order to be appealed from.

(4) Applications for leave to appeal shall be by summons or orally at the time of the making of the order.".

Since these rules do not prescribe the time within which an application for leave to appeal may be made, I have to seek guidance from section 58 of the Interpretation and General Provisions Act (Cap 2) which is in the following terms:

> ***"Where no time is prescribed or allowed within which anything shall be done, such things shall be done without unreasonable delay, and as often as due occasion arises."***.

Thus the applicant could not only seek leave from the superior court without unreasonable delay, but also as often as might be required. The present application was filed some 34 days after the order granting the interlocutory injunction was made and the reasons for this delay according to the supporting affidavit are, inter alia, that the typed ruling was not received until 30th May, 1997, that the applicant was uncertain whether to appeal against the interlocutory order or to wait until a final injunction order had been made, and that after studying the ruling, it became apparent that the injunction would be superfluous if the applicant won its appeal. The applicant would seem to have the option of seeking leave from the superior court on the ground that his application has been made without undue delay.

The applicant, however, chose not to apply for leave to appeal under Order 42 as it could have done and rather sought by its present application, my leave to file an application for leave to appeal before the superior court as if that were necessary. In his judgment in ***Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi and Electoral Commission and The Attorney General Civil Appeal No. 179 of 1993***, (unreported) Omolo, J.A. in considering the exercise of the discretion of Pall, J. as he then was, to extend time for the filing of an application for leave to appeal, put the position succinctly thus:

> ***"Applying for leave to appeal does not involve any technicalities. It can be done orally at the time when the decision is delivered and if it is made orally, it can only be made to the judge or judges making the decision. So that the advocates for the Respondent could have applied for leave to appeal to the election court when it delivered its "Decision" on the lst July, 1993. The Respondent's advocates did not so apply. Having failed to do so, the Respondent was bound to do so by chamber summons. The Rules do not set a time limit within which the application by chamber summons was to be made and I entirely agree with Mr. Kariuki that as the Rules do not set a time limit then pursuant to section 58 of Cap 2, the Respondent was obliged to apply for leave "without unreasonable delay.".***

The basis of the applicant's present application seems to be this, that since Rule 39(a) of our Rules lays down time limited by that Rule to fourteen days for the making of an application in the superior court for leave to appeal, such time can be extended by Rule 4 of our Rules. But would a subsidiary legislation like Rule 39(a) which is only a part of the Rules of this Court affect principal legislation like section 75 of the Civil Procedure Act and section 58 of Cap 2? I would say not. The opposite view appears to have been expressed by this court recently in the case of Carmella Wothugu Karigaca v Mary Nyokabi Karigaca, Civil Appeal No. 30 of 1995 (unreported), which I venture to say might not only have been different if the Matiba case (supra) had been brought to the attention of the court as well as the provisions of section 58 of Cap 2, but would also not have differed from the ruling of Shah, J.A. sitting as a single judge in that matter.

And now, looking at the application itself, which as is provided in Rule 42 of our Rules, must be by motion, it does not comply with the mandatory provisions of sub-rule (1) of that Rule which provides in the first place that such a motion

: ***"..... shall state the grounds of the application.".***

This mandatory requirement is also reiterated in sub-rule (2) of the same Rule which provides that the notice of motion shall be substantially in Form A in the first schedule to the Rules, and which form, contains a substantial prerequisite that the grounds for which relief is sought, be stated in the notice of motion.

Since the applicant's notice of motion does not contain the grounds on which the orders sought therein are being sought and indeed, no mention of the grounds are even made by cross reference to the supporting affidavit, the notice of motion is incompetent and is for this reason also struck out.

I will now consider the submissions made on whether failure on the part of the applicant to file a notice of appeal is fatal to its present application. Sub-rules (1) and (2) of Rule 74 of our Rules provide that anyone who wishes to appeal to this Court should file a notice of appeal within fourteen days of the date the decision to be appealed against, was given. This is an essential step in the proceedings which if not taken, may upon application being made as regards the validity of an appeal, cause the notice of appeal or the appeal itself, to be struck out. Where an appeal lies only with leave, sub-rule (4) of Rule 74 provides that it shall not be necessary to obtain such leave before lodging the notice of appeal. This means that in such a case, as in cases where no leave to appeal may be necessary, a notice of appeal must be filed as provided by sub-rules (1) and (2) of Rule 74 if the intended appeal is not to be struck out on the ground that an essential step has not been taken. But the stage has not yet been reached where a notice of appeal or an appeal can be said to exist which can be struck out and I would rather make no decision on this issue.

As I have already indicated the present application will be struck out, and with costs for the respondent. It is so ordered.

Dated and delivered at Nairobi this 19th day of June, 1997.

A. M. AKIWUMI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.