REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU & TUNOI JJ.A & BOSIRE AG. J.A)
CIVIL APPLICATION NO. NAI. 253 OF 1997 (UR. 111/97)

BETWEEN

CAPTAIN (RTD) J.N. WAFUBWA

T/A RED IMPEX GENERAL SERVICES ..... APPLICANT

AND

DAVID ANUNDA T/A DAVANU ENTERPRISES .....IST RESPONDENT

MBWIKA MWAMBU T/A UNITY TYRE EXPRESS ..... 2ND RESPONDENT

PERMINDER S. VIRDI

T/A JASWINDER SINGH ENTERPRISES..... 3RD RESPONDENT

(Application to strike out the record of appeal lodged on 9th September 1997 from the ruling of the High Court of Kenya at Nairobi (Mr Justice Hayanga) dated 18th April 1997 in
H.C.C.C. NO.2725 of 1994)
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RULING OF THE COURT

The applicant, Capt. (RTD) J.N. Wafubwa, is the respondent in this court's Civil Appeal No. 206 of 1997, in which the Ist respondent herein is the appellant. In this application which is expressed to be brought under rule 80 of the rules of this court and section 5(d) of the Court of Appeal Rules (but we think the Appellate Jurisdiction Act was intended) he asks this court to strike out the above appeal on the ground that, besides it having been instituted out of time, it is frivolous, vexatious and that it was brought for the purposes of delaying the expeditious disposal of his suit before the superior court, to wit Nairobi High Court Civil Case No. 2725 of 1994, which is still pending before that court.

It is important to state at the outset that section 5 (d) of the Appellate Jurisdiction Act, while donating the power to make rules providing for the summary determination of any appeal which appears to the court to be frivolous, or vexatious or brought for the purposes of delay, does not empower the court to summarily determine an appeal before it. The Rules Committee to which section 5 of that Act gives the power to make rules has not made rules in that regard.

Consequently, to the extent that the applicant asks us to, in effect, determine the respondent's appeal summarily we are of the view and so rule that we lack the jurisdiction to do so except as provided under

rule 80 of the rules of this court. Besides rule 5(2) of the rules of court cited in the application is inapplicable.

An appeal may be struck out under rule 80, above, on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time. In this application, besides the merits of the appeal, the applicant contends that it was filed out of time. Rule 81 of the rules of this court prescribes the period within which an intending appellant should institute his appeal namely, within 60 days of the date the notice of appeal was lodged. The notice of appeal respecting Civil Appeal No. 206 of 1997 was lodged in the superior court on 23rd April, 1997, about four days after the decision appealed against was given. The appeal was not instituted until 9th September, 1997, clearly over 60 days from the date the notice of appeal was lodged.

Mr Buti for the Ist respondent, in his affidavit in reply to the application has deponed, inter alia, that he applied for copies of proceedings on 23rd of April, 1997, but that he was not advised to go for them until 11th July 1997, when he received from the High Court Registry, a letter dated 3rd July, 1997 asking him to do so; that he collected the copies of proceedings on 15th July 1997, and thereafter, on 9th September, 1997, he lodged the record of appeal in court.

In his view if the period which was required for the preparation and delivery of the copies of proceedings is excluded from computation in terms of the proviso to rule 81, above, the appeal was instituted timeously. Such period may however, only be excluded from computation if the registrar of the superior court has so certified. Neither the applicant nor the respondent's advocate exhibited a copy of such certificate but during the hearing of the application it was common ground that such a certificate had been given.

The applicant, however, contends that the certificate of delay, a copy of which he had and read a part of it to us, is invalid in as much as it covered the period between 3rd and 11th July, 1997. In his view it was incumbent upon the Ist respondent or his counsel to check at the court registry on a regular basis, to find out whether or not the copies of proceedings were ready for collection, and that having not done so the period between the date of the letter advising them that copies of proceedings were ready for collection and the date they were actually collected was improperly excluded from computation. He, however, appeared to concede that if that period is excluded the appeal was instituted in time.

There is no material on record on the basis of which we can impuign the validity of the certificate of delay, which in any event was not placed before us for purposes of scrutiny.

The onus was on the applicant to place such material before us. Having failed to do so it should not lie in his mouth to challenge its validity in this application. Prime facie, therefore, the appeal sought to be struck out was filed in time.

There is one other matter which was raised by the Ist respondent's Counsel which touches on the **bona fides** of the applicant in bringing this application. On 11th July 1997, the applicant brought before this court an application under rule 80 of our rules, asking the court to strike out the notice of appeal earlier on referred to, on the ground that the Ist respondent had not instituted his appeal within the time prescribed under rule 81, above. That application (No. 72 of 1997) was dismissed, but the reasons for its dismissal are not before us. On 11th September 1997, he filed a similar application, to wit Civil Application No 238 of 1997. That application was, on 26th September, 1997, also dismissed. Likewise, the reasons for its dismissal are not before us.What is, however, clear is that both applications were fully heard but were dismissed for lack of merits. Counsel for the Ist respondent, has deponed in his affidavit herein, that the grounds which were relied upon in both applications were the same as those relied on in this application, a fact the applicant did not dispute. In those circumstances it is quite clear to us that besides what we stated earlier on its merits his application is clearly an abuse of the process of the court and it appears to us to have been filed purposely to vex the Ist respondent. We think that had the applicant been minded, as he says he is, to have his suit in the High Court disposed of without undue delay, he would not have brought these many applications, because by doing so he delays the determination of the appeal against him and eventually his suit.

In the above circumstances and for the reasons we have given, this application lacks merit and is dismissed with costs to the Ist respondent.

Dated at Nairobi and delivered this 18th day of November, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR