IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & PALL, JJ.A.)

CIVIL APPLICATION NO. NAI. 375 OF 1996

BETWEEN

RAFIKI ENTERPRISES LIMITED .....APPLICANT

AND

KINGSWAY TYRES & AUTOMART LIMITED ….....RESPONDENT

(Appeal from the Judgment and Orders of the High Court of Kenya at Nairobi

(Justice Hayanga) dated 4th October, 1995

in

H.C.C.C. NO. 220 OF 1995)

****

RULING OF THE COURT

Rafiki Enterprises Ltd, the applicant hereinafter, comes to this Court purportedly under sections 100, 63(e) and 34 of the Civil Procedure Act, section 3(2) and (3) of the Appellate Jurisdiction Act, Rules 1(3) and 42 of the Court of Appeal Rules, Order 50 Rule (1) and (2) of the Civil Procedure Rules and section 84(1) of the Constitution of Kenya. The application before the court is by way of notice on motion and we suppose that is why Rule 42 of the Court's rules is among the enabling provisions cited. Rule 42(1) of the Court's rules simply provides that-

"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, all applications

to the Court shall be by motion, which shall state the grounds of the application."

Rule 1(3) of the court's rules provides that

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make

such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

What sort of inherent power does this rule confer on the court? For an answer to that question, one must first of all look at section 64(1) of the Constitution which creates the Court of Appeal. That section provides:

"There shall be a Court of Appeal which shall be a superior court of record, and which shall have such

jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."

So that the inherent powers the Court of Appeal can have must be in relation to appeals from the High Court and such powers must be conferred on it by law. Contrast this with the provisions of section 60(1) of the Constitution which creates the High Court. That section provides:

"There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

The civil and criminal jurisdiction of the High Court is original and is unlimited. Subordinate courts in Kenya try various offences under the Criminal Procedure Code; appeals from the decisions of the subordinate courts go to and are heard by the High Court. But in law the High Court has itself got jurisdiction to try such offences because in criminal matters its jurisdiction is original and unlimited. Again subordinate courts try civil cases in which the value of the subject matter in dispute does not exceed Shs.500,000/=. Appeals from such decisions go to the High Court. But once again, there is nothing in law which would prevent the High Court from itself trying such claims, because its civil jurisdiction is both original and unlimited. The Court of Appeal, on the other hand, does not have original jurisdiction. The jurisdiction and powers it has are

"..... in relation to appeals from "the High Court ....."

and such powers must be conferred on it by law. So that when Rule 1(3) of the Court of Appeal rules confers

"inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court", such inherent powers must relate to the hearing of appeals from the High Court.

Section 3(2) and (3) of the Appellate Jurisdiction Act must be read and understood in the context of section 64(1) of the Constitution. Section 3(1) and (2) of the Act state:

3(1)"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.

3(2)"For all purposes of and incidental to the hearing and determination of any appeal in exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

It is clear from the provisions of the Appellate Jurisdiction Act that the only jurisdiction the Court of Appeal has is to hear appeals form the High Court and the powers it has can only be exercised during the hearing of an appeal from the High Court. Section 3(2) above opens with the words

"For all purposes of and incidental to the hearing and determination of any appeal ....."

and though the section concludes by saying that the Court shall have

"the power, authority, and jurisdiction vested in the High Court"

that cannot mean that the Court, for example, has original and unlimited jurisdiction like the High Court. If section 3(2) of the Appellate Jurisdiction Act were to purport to confer original jurisdiction on the Court of Appeal, it (section) would be in conflict with section 64(1) of the Constitution and in the event of such conflict the Constitution would prevail. But there is no such conflict because the provisions of section 3 give these powers to the Court of Appeal only in its appellate capacity. Similarly, the inherent powers conferred by Rule 1(3) can only be exercised within and in the course of hearing an appeal. And of course it is now trite law that a right of appeal must expressly be given by law and such a right cannot even be implied or inferred. In the High Court, if a situation arises which is not covered by the provisions of the Civil Procedure Act or the rules made thereunder, one can always invoke the inherent jurisdiction of that court created by section 3A of the Civil Procedure Act.

In the Court of Appeal, that is not possible because the Court's jurisdiction is limited to hearing appeals from the High Court and the right to appeal must be given by some law.

How are these considerations applicable to the application before us?

We said at the commencement of this ruling that the applicant has come before us by way of notice on motion and we set out the provisions under which the notice is purported to have been brought. Sections 100, 63(e) and 34 of the Civil Procedure Act cannot be of any help to the applicant in this Court. Under section 2 of the Civil Procedure Act, the word "court" is defined to mean

"the High Court or a subordinate court acting in the exercise of its civil jurisdiction."

The provisions of the Civil Procedure Act do not apply to the Court of Appeal and the reason(s) for that is not difficult to understand. The Court of Appeal has its own rules of procedure and those rules cater for virtually all situations which may arise during the hearing of an appeal. It is accordingly not necessary for the Court of Appeal to have recourse to the provisions of the Civil Procedure Act and the rules made thereunder. Nor can the provisions of section 3 of the Appellate Jurisdiction Act be of any assistance to the applicant. Those provisions merely set out the jurisdiction of the Court of Appeal and cannot provide the basis for making the kind of orders the applicant seeks from us.

We can now come to the orders which the applicant is seeking and the background facts and circumstances which the applicant says warrant the making of such orders.

By a plaint dated the 13th March, 1995, Kingsway Tyres and Auto Mart Ltd, the respondent in the motion before us, claimed from the applicant the sum of Shs.1,755,816.65 which was said to be the price of goods sold and delivered to the applicant by the respondent. For one reason or the other the applicant failed to enter an appearance or file a defence and ex parte judgment was entered against the applicant.

Thereafter the applicant filed an application for the setting aside of the ex parte judgment and by a ruling dated the 4th October, 1995, Hayanga, J. allowed the application and set aside the ex parte judgment. The respondent was dissatisfied with the orders of Hayanga, J. and it appealed to this Court.

The respondent's appeal to the Court was entered as Civil Appeal No. 220 of 1995, and was lodged in court on the 1st December, 1995. That appeal came up for hearing in this Court on the 6th November, 1996, and it was heard by a bench consisting of Gicheru and Lakha, JJ.A. and Bosire, Ag. J.A. The record of the Court shows that at the hearing of the appeal, the present applicant was represented by Mr. Muin Malik, an advocate of the High Court, while the present respondent who was the appellant was represented by Mr. James Ochieng Oduol. The applicant did not raise any objection as to the competency of the bench to hear its appeal. The Court reserved its judgment to the 14th November, 1996 and on that date the Court gave a unanimous judgment allowing the appeal of the respondent and restoring the ex-parte judgment. One would have thought that that should have been the end of the matter. But not so the applicant. It sought the opinion and learning of its current advocate Mr. Stephen M. Mwenesi and the result of Mr. Mwenesi's learning was the filing of this motion on the 27th November, 1996. What orders did the applicant apply for? We set them out verbatim as follows:

"1.This application be heard as an urgent application.

2.Pending the hearing and determination of this Application, there be a stay of the Judgment and subsequent process on this Appeal dated and pronounced on the 14th November, 1996.

3.The Judgment in this Appeal dated and pronounced on the 14th November, 1996 and any subsequent process be recalled and withdrawn.

4.The Appeal, Civil Appeal No. 220 of 1995 be re-heard and, if thought fit, by a full bench of the court."

A total of ten grounds are set out as warranting the making of the orders sought and the affidavit sworn in support of the motion contained a total of fifteen paragraphs. That affidavit was sworn by one Abdul Latif Yusuf Vaiani, who describes himself as the Chairman of the applicant company.

We can do no better than to quote the applicant's complaints as tabulated in Vaiani's affidavit. He swore as follows:-

"3.That I have read and had the judgment explained to me and I verily believe that it is a settled principle of law not to shut litigants from the corridors of justice, which said judgment, if enforced, will do to my company harm and unnecessary and irreparable loss.

"4.That I appointed my current Advocate on record to review the papers.

"5.That the Bench of this Honourable Court which heard this Appeal included Mr. Justice Samuel E.O. Bosire as an Acting Judge of Appeal.

"6.That I understand that Mr. Justice Bosire was appointed under Gazette Notice Number 4475 which appeared on the Kenya Gazette on the 9th August, 1996. I annex a copy of this Notice and mark it ALYV2.

"7.That I am informed by my Advocate and verily believe that the said appointment of Mr. Justice Bosire was made under section 61(2) of the Constitution of Kenya.

"8.That I am informed by my Advocate and verily believe that section 61(2) of the Constitution solely relates to the Judges of the High Court of Kenya and I am further informed that additional acting appointments can only be made for the purpose of the business of the High Court pursuant to the provisions of section 61(5) of the Constitution.

"9.That in any event even if the appointment is deemed to be regular under the Constitution the said appointment is in breach of section 64(2) of the Constitution, Section 7(2) of the Judicature Act, Chapter 8 of the Laws of Kenya, which states that "for the purposes of Section 64(2) of the Constitution the number of Judges of Appeal shall be eight.

"10.That I am informed by my Advocate and verily believe that there were already eight (8) substantive

Judges of Appeal, namely:-

(i) The Honourable Mr. Justice Gicheru.

(ii)The Honourable Mr. Justice Kwach.

(iii)The Honourable Mr. Justice Omolo.

(iv)The Honourable Mr. Justice Akiwumi.

(v)The Honourable Mr. Justice Tunoi.

(vi)The Honourable Mr. Justice Shah.

(vii)The Honourable Mr. Justice Lakha.

(viii)The Honourable Mr. Justice Pall, when Mr. Justice Bosire was appointed Acting Judge of Appeal.

"11.That I am informed by my Advocate and verily believe that there is a clear breach of Section 7(2) of the Judicature Act and section 61(5) of the Constitution.

"12.That I am further informed by my Advocate and verily believe that any provisions for appointing Acting Puisne Judges made under section 61(5) of the Constitution as read with section 64(3) of the Constitution and any such acting appointment must accord with section 7 (2) of the Judicature Act.

"13.That the denial of justice for my company has also raised serious Constitutional issues including, as I am further advised by my Advocate a breach of my company's right to protection of the law under section 77(9) of the Constitution which requires courts adjudicating and determining civil rights to be as established by law.

"14.That I am advised by my Advocate and I verily believe the advice to be true that the court which heard my Company's Appeal was not properly constituted as by law required and the ends of justice and the Constitution of Kenya necessitate a recall and setting aside of the judgment of the 14th November, 1996 and a re-hearing of Civil Appeal No. 220 of 1995."

So there it is, in black and white. The applicant has been advised by Mr. Mwenesi and that advice is verily believed to be true, that Mr. Justice Bosire who sat on the applicant's appeal was not qualified to sit on the appeal. The applicant asserts that the acting appointment of Mr. Justice Bosire was contrary to the Constitution and also contrary to section 7(2) of the Judicature Act which sets the capacity of the Court at eight Judges of Appeal. If the Judge's acting appointment was unlawful, then of course it would, follow that the Judge had no jurisdiction to sit in the Court of Appeal and the effect of that would be that only two Judges heard the applicant's appeal. Section 5(3)(i) of the Appellant Jurisdiction Act prescribes that uneven number of judges shall sit and the number shall not be less than three. That section is in conformity with section 64(2) of the Constitution which sets the quorum of the Court of Appeal at three, namely the Chief Justice and not less than two other Judges of Appeal. In view of these provisions if Mr. Justice Bosire was not entitled to sit in the Court as the applicant contends, then Gicheru & Lakha, JJ.A. could not lawfully constitute a quorum to enable the Court finally dispose of the applicant's appeal. We must therefore, turn to the determination of the issue of whether Mr. Justice Bosire is lawfully sitting in the Court of Appeal.

Our first reaction was that the issues raised by the applicant touch on the interpretation of the Kenya Constitution and as such, they should have been raised in the High Court. But in the end we have rejected that view as being untenable and impractical.

We have two reasons for saying so. The first is that the applicant was and still is questioning the jurisdiction of the bench which heard his appeal. He was saying that that bench had no jurisdiction to hear and determine his appeal because Mr. Justice Bosire was not constitutionally qualified to hear his appeal. The remaining two members of the Court would have no jurisdiction to sit without a third member. Looked at purely as a question challenging the Court's jurisdiction, the Court must have power to determine whether or not it has jurisdiction. Even assuming that it could, the Court of Appeal could not be reasonably expected to refer the matter to the High Court to determine whether or not it has jurisdiction to hear a particular matter. Every court has a duty to determine whether or not it has jurisdiction in a particular matter.

Secondly, it cannot be said that no issue touching on the interpretation of the Constitution could ever arise in the Court of Appeal. If and when such an issue arises, what is the Court of Appeal supposed to

do? In case of the subordinate courts, if an issue arises touching on the interpretation of the Constitution section 67(1) of the Constitution provides that the subordinate court shall refer such question to the High Court. There is no similar provision regarding what is to happen if such an issue arises in the Court of Appeal. The answer, then, must be obvious. If such a question arises in the Court of Appeal, the court itself must determine it. It would be ridiculous to argue that the Court of Appeal must refer the question to the High Court, wait for that court's determination and then determine the appeal in accordance with the High Court's determination on the constitutional issue. Hence our position is that if and when a matter touching on the interpretation of the Constitution arises in this Court, the Court must itself determine that issue as part of the problems of law it is called upon to deal with in the exercise of its appellate jurisdiction.

Back to the issue of the legality of Mr. Justice Bosire's acting appointment to this Court. Gazette Notice Number 4475 of 1996 under which the Judge was appointed says that the appointing authority was acting under section 61(2) of the Constitution. Perhaps the notice should have cited sections 61(2) and (5) and section 64(3) of the Constitution but we do not think there is any substance there. The appointment of acting judges in the High Court and in the Court of Appeal is provided for in section 61(5) of the Constitution. That section sets out the various circumstances which would necessitate the appointment of an acting judge, either in the High Court or in the Court of Appeal. Those circumstances are:-

(1) if the office of puisne Judge or a Judge of Appeal is vacant;

(2) If a puisne Judge or a Judge of Appeal is appointed to act as a Chief Justice.

(3) If a puisne Judge or a Judge of Appeal is for any reason unable to discharge the functions of his office.

And

(4) If the Chief Justice advises the President that the state of business in the High Court or in the Court of Appeal so requires.....

It is clear that the first three situations relate to where there is a vacancy in the Court, i.e when, in the case of the Court of Appeal, there are less than eight Judges of Appeal. Such a vacancy can be created when a Judge of Appeal has been appointed to act as a Chief Justice, or one has retired or been removed or when a Judge of Appeal is for some reason, e.g. ill-health, unable to perform the functions of his office. There was clearly no sort of vacancy when Mr. Justice Bosire was appointed to act in his present office, and that only leaves the fourth head, namely that the Chief Justice advised the President that the state of business in the Court of Appeal required it. If the number of Judges could never exceed eight, then there would be absolutely no need to have the fourth head regarding the state of business in the Court i.e. if the number must always remain eight, then the issue of the state of business in the court would be irrelevant and Parliament would not have added it to section 61(5) of the Constitution. We have no doubt in our mind that Mr. Justice Bosire's acting appointment must have been pursuant to the Chief Justice advising the President that the state of business in the Court of Appeal required such appointment. We reject out of hand the applicant's contention that no acting appointments can lawfully be made when there are eight substantive Judges of Appeal. That construction would render meaningless the provisions of section 61(5) of the Constitution and even if section 7(2) of the Judicature Act were to be read as constituting an absolute bar to acting appointments, it would be invalid as it would be in conflict with section 61(5) of the Constitution. Mr. Justice Bosire is lawfully in office as an acting Judge of Appeal and we reject the applicant's baseless contention to the contrary.

We have said enough to show that this application must fail. First, it must fail because as we have attempted to show, this Court does not have jurisdiction to make the kind of orders the applicant is asking us to make. We have no power to recall and nullify a judgment already delivered. The various sections of law quoted as enabling us to make the orders do not support anything of that sort. Secondly, even on merits, the application was doomed to fail. With all due respect to Mr. Mwenesi we cannot help but remark that the application was reckless and impertinent. We think it was only brought to enable the applicant avoid its obligations under the judgment they are challenging. Right from the beginning of the

appeal itself they saw Mr. Justice Bosire sitting and despite the fact that the applicant was represented by counsel, they never raised the issue of Mr. Justice Bosire not being qualified to sit. They only raised it after they had lost and we are far from convinced that the application was brought in good faith. As reasonable people, Mr Mwenesi and his clients must have known that the application would constitute a grave embarrassment to Mr Justice Bosire personally and to the Judicial Service Commission whose duty it is to advise the President on judicial appointments. We think, the application is simply and purely an abuse of the process of the Court. We order that it be and is hereby dismissed.

On costs, we think Mr. Mwenesi should personally take responsibility for them but before we make any order against him, we shall call upon him at a later stage to show cause why he should not pay them. For the present, those shall be our orders in this application.

Dated and delivered at Nairobi this 24th day of December, 1996.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

G.S. PALL

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR