



REPUBLIC OF KENYA

Sanitary Equipment & Builders Ltd v Nairobi City Commission

Court of Appeal, at Nairobi
March 20, 1991

Hancox CJ, Masime JA, Omolo Ag JA

Civil Application No NAI 24 of 1991

(Intended appeal by the respondent against the ruling of Mr Justice Porter

in the High Court Miscellaneous Case No 10 of 1988)

Civil Practice and Procedure - appeals – notice of appeal – copies to be served on all persons directly affected by the appeal.

Civil Practice and Procedure – parties to appeal – whether proper to pray for an order directed at a person who is not a party to the suit.

The applicant sought to strike out a notice of appeal filed by the respondent against the High Court's ruling whereby the applicant was denied a stay of execution of a decree which had been filed for the purpose of enforcing an arbitration award.

After several unsuccessful attempts to set aside the arbitrator's award, the respondent filed a Notice of Appeal to the Court of Appeal and concurrently therewith sought stay of execution under rule 5(2)(b) of Court of Appeal Rules. The Court granted a stay but on condition that the respondent deposits a bankers bond.

Apart from attacking the competency of the appeal, the applicant argued that the Notice of Appeal was incompetent as it was not served on all parties directly affected by it and more particularly in this case the applicant.

The applicant thus sought that the notice of appeal be struck out because there was no right of appeal, and on account of the failure to serve the notice of appeal. It also prayed that the stay order of the Court of Appeal be vacated and Kenya Commercial Bank, the issuer of the bond but which was not a party to the suit, be ordered to release the value of the bond to the applicant.

Held:

1. Rule 76(1) of the Court of Appeal Rules required that copies of the notice of appeal shall be served on all persons directly affected by the appeal.
2. It was a fundamental error to attempt to implead the Bank in the appeal as it was not a party thereto.
3. Under rule 80 the Court of Appeal has discretion whether or not to strike out the notice of appeal on the

ground of the omission of some essential step in the proceedings but in view of the impossible order which the applicant sought the Court would grant limited indulgence.

Application dismissed.

Cases

1. *Sheikh v Sheikh* [1985] KLR 649; [1982 – 88] 1 KAR 661
2. *Cassam v Sachania* [1982–88] 1 KAR 24

Statutes

1. Arbitration Act (cap 49) section 27
2. Court of Appeal Rules (cap 9 Sub Leg) rules 5(2) (b), 76(1), 80, 81

Advocates

Mr Kiome for the Appellants

Mr Ojwang for the Respondent

March 20, 1991 the following Ruling of the Court was delivered.

The instant application before this Court seeks the striking out of the Notice of Appeal filed on 22 January 1990, by the respondent City Commission against the ruling of Porter J, whereby he refused a stay of execution of the decree which had been filed for the purpose of enforcing an arbitration award.

The dispute which gave rise to the arbitration related to the performance of contracts of work by the applicant with the Nairobi City Commission for extension to 12 primary schools. These contracts were awarded to the applicants in 1981, and it was alleged that the commission wrongly terminated them on 8th March 1983, after the extensions in question had been completed or substantially performed.

On 16 September of that year, Mr Nathaniel Kihui was appointed as sole arbitrator and he embarked on the preliminary hearing on 16 November. However, as the details in his affidavits on 15 March 1988, and 16 September 1988, this proved to be a frustrating experience. He attempted to resume the proceedings on numerous occasions and finally did so *ex parte* on 21 December 1987, after notifying the City Engineer of his intention by a letter dated the 10th of that month. His award was made on 31 December 1987 and, the Commission were ordered to pay Shs 3,648,275/65 to the applicants, plus half the arbitrator's costs of Shs 216,526/40.

The Commission protested through its then secretary and various allegations were made against the arbitrator and the matter even reached the portals of the CID. Eventually the applicants applied, on 17 February 1988, under 27 of the Arbitration Act, cap 48, for leave to enforce the award of the arbitrator as a decree of the High Court and this was granted by Akiwumi J, *ex parte*, on 23 February 1988. It was not, however, issued until 24 January 1990 and appeared at page 32 of the record, five days after the application to Porter J, as a result of which, in a reasoned ruling, he refused the stay of execution sought and declined to set aside the award itself on the ground of misconduct alleged against the arbitrator. In April Porter J, in a second ruling, refused a stay of execution pending the appeal (for which, as we said, notice had been filed on 22 January) and, *inter alia*, expressed doubts as to the competency of the appeal. Nevertheless, this Court granted a stay of execution under rule 5 (2) (b) on 20 April 1990 (also, as this application is, under a certificate of urgency) but as a condition required the deposit of a banker's bond in the sum of Shs 4 million, to be realised if the Commission lost the appeal. This bond was deposited on 18th May 1990, within the period ordered, so that the stay of execution then became operative.

Apart from the alleged incompetency of the appeal itself, a point which Mr Wambaa also took at the first hearing before this Court, Mr Kiome, on behalf of the applicants, submitted that the Notice of Appeal is invalid and should be struck out because the only persons on whom it was expressed to be served were Rimui and Mubia, who were the advocates for the arbitrator, who was not, and could not be a party to the appeal. Rule 76(1) of this Court's Rules states that copies of the Notice of Appeal shall be served on: "all persons directly affected by the appeal."

Who could be more affected by the appeal, Mr Kome asked, than the other party to the dispute, namely the claimant before the arbitrator and the present applicant? We note that the former advocates for the Commission, Messrs Khaminwa and Khaminwa, made the same error in the High Court when seeking leave to appeal and a stay of execution upon which Porter J gave this second decision in this case on 5 April 1990.

We agree with Mr Kiome that the firm of Rimui and Mubia have never been properly on the record, and this was such an elementary and obvious mistake on the part of the Commission's advocates that we wonder why the point was not taken before Porter J, on the second hearing before him, and indeed as Mr Ojwang pointed out, before this Court on the previous hearing, when Mr Khaminwa appeared for the Commission.

The prayers now before this Court are: first, to strike out the Notice of Appeal on the ground we have stated; secondly to vacate the April 1990 order of this Court granting the stay; and thirdly to compel the Kenya Commercial Bank to pay to the applicant the Shs 4 million represented by the banker's bond. The grounds are that no right of appeal exists, that no-or no proper- Notice of Appeal has been filed and that no appeal has been filed (by which is meant 'instituted') within the prescribed time.

Mr Ojwang, in his reply concentrated only on the third of those grounds, and relied on the affidavit of the acting chief counsel, filed only the day prior to the hearing, to which is exhibited the various requests to the Deputy Registrar for certified copies of the High Court proceedings. Those requests are dated 29 June and 19 July 1990 not, we observe, within the 30-day period laid down by the proviso to rule 81 so as to exclude the time taken for preparation of the record.

It would be difficult, in outlining the sorry history of events leading up to the present application, to envisage a greater incompetence on the part of the commission and its advisors in dealing with the whole affair. But the incompetence is not all one sided. In the applicants' Notice of Motion there is a prayer in effect impleading the Kenya Commercial Bank by asking that it pay Shs 4 million to the applicant. How can this be? It is not a party to the main appeal or this application and could not be heard thereon. Are we supposed to accede to this prayer and make an order against the Bank without even hearing it? This motion offends against even the most elementary principles of justice and we express surprise that a supposedly competent firm of advocates should have drawn the application to include this prayer, which we unhesitatingly reject. In the unlikely event of the Bank not honouring the bond on the dismissal of the appeal, then the applicants' remedy is to sue the Bank, not to attempt to implead it in an appeal to which it is not, and cannot be, a party.

As we read rule 80 we have a discretion as to whether or not to strike out the Notice of Appeal on the ground of the omission of some essential step in the proceedings. It cannot be denied that service on the opponent of the Notice of Appeal is an essential step. In *Abdul Waheed Sheikh v Abdul Shakoor Sheikh* (1985) 1KAR 661 the full Court struck out an appeal for failure to serve all the persons held to be directly affected by the appeal. In the earlier case of *Cassam v Sachana* (1981) 1 KAR 24 a single judge, Madan JA, did not take that drastic step but granted additional time.

After much hesitation, particularly in view of the impossible order which the applicant sought, we have decided to grant limited further indulgence. The respondent Commission is to have leave to file a fresh Notice of Appeal containing the correct names and address of the party to be served within seven days from today, and shall serve that party within a further seven days. They shall then institute the appeal within 60 days thereafter. On failure to comply with any part of the order the Notice of Appeal shall be struck out.

In giving this decision we are not to be taken as agreeing with the submission in the affidavit of Mr Othoro that the giving of leave to appeal (which Porter J did after much hesitation) does imply or carry with it a proposition that the appeal itself is competent. That will be a matter for decision in the main appeal.

Orders accordingly.