IN THE COURT OF APPEAL

AT KISUMU

(Coram:Hancox,Nyarangi, JJA, and Platt, AgJA,)

CIVIL APPEAL 33 OF 1985

BETWEEN

ONJULA ENTERPRISES.....APPELLANT

AND

R.K.SUMARIA.....RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya at Kakamega (Gicheru, J.) dated 13th December, 1984

in

Civil Appeal 24 of 1982)

JUDGMENT OF HANCOX, J.A.

The respondent sued one John Kialemoi Kilel in the Resident Magistrate's court at Kisumu for Shs 10,380.00 said to be due on five dishonoured cheques for Shs 2,000.00 each, plus interest, and duly obtained judgment for the that amount. It is relevant to state that the respondent also held a chattels mortgage over the Peugeot car KDZ 799, which was the subject of the original transaction between the parties. No decree was included in the record of appeal but no objection has been taken by the respondent to this appeal on that ground.

After judgment was entered the appellant company filed objection proceedings under Order 21 rule 53 (which again, are not all included in the record of appeal, though this is a ground of objection) to the attachment of the vehicle by the respondent in execution of the decree, on the grounds that it had purchased it from Kilel at some stage during the case. This objection was dismissed and the objector unsuccessfully appealed to Gicheru J who dismissed the first appeal on December 13, 1984. The objector then appealed to this court on several grounds relating the validity of the title of a *bona fide* purchaser of the vehicle for value, which the objector claimed to be.

The matter has come before this court on at least three occasions, and the delay in the hearing of the present application to strike out the appeal has been caused partly by the death of the late Mr Raichura, though Mr Omondo, for the objector has on two occasions applied for an adjournment, on the last of which he indicated that the possibilities of settlement were "more than 50".

It is perfectly plain that there were scant, if any, chances of a settlement, even though the decretal sum in the Resident Magistrate's court was but a fraction of the value of the vehicle.

The respondent's main objection, on this application to strike out the appeal, is that all persons directly affected, meaning Kilel, the original defendant and judgment debtor, have not been served with the notice of appeal as required by Rule 76(1) of the Court of Appeal Rules.

Mr Menezes, who now appears on behalf of the respondent, was able to cite a wealth of authority by this court to the effect that the provisions of Rule 76(1) are mandatory and that once a person is shown to be directly affected by the appeal, then service on him must be effected, for instances *Openda v Ahn* Civil Appeal 7 of 1981, *Taracisio Githaiga Ruithibo v Mbuthia Nyingi* Civil Appeal 21 of 1982, *Rodoi Holdings Ltd v Kantilal Chandulal Shah*, Civil Appeal 50 of 1982, and *Abdul Waheed Sheikh v Abdul Gafoor Sheikh & another*, Civil Appeal 12 of 1984. In *Taracisio's* case Madan JA, as he then was, in delivering the judgment of the court, was emphatic that the judgment debtor in a land case was a person directly affected by the appeal and should have been served, and that a failure to do so rendered the appeal incompetent under rule 76(1) so that it was struck out.

So in this case there is no doubt in my mind that Kilel, as the judgment debtor is demonstrably shown on the material we have to be a person directly affected by the appeal as, in the words of Potter JA, in *Openda v Ahn*, the court orders "affected his actions and his property. I am reinforced in my conclusions so far by the language of the sub-rule which states that "all persons", not merely "the persons", directly affected must be served.

There is, however, a complication in this case which, as Mr Omondo, for the appellant, pointed out, was not present in any of the other cases to which we were referred, and it is that in all the other cases the appeal came directly from the trial court to this court on a first appeal. What happens, however, when there is an intermediate or, as it were, an intervening court, between the trial court and this one? The matter is of importance in this case because the judgment debtor was never served with the appellate process in the High Court, was never a party to it, and Mr Raichura, who then appeared for the respondent, never took any objection such as is now being taken. The judgment debtor, therefore, never had any opportunity of putting his case, or any submission he wanted to make, before the High Court, where it must be remembered there are no rules such as the one now under consideration.

The primary and essential object of a requirement of service of any proceedings must be that they are to be brought to the attention of the person concerned so that he has an opportunity of putting his case, if he wants to, before the court. Mr Omondo's argument now is that the judgment debtor had, by his conduct in transferring the ownership, relinquished all interest he had in the vehicle, that it is manifest that he had no interest in the first appeal and that the objector should not now be able to raise a technical objection, under the special rules applicable only to this court, that he should now suddenly become an interest party.

The answer to all these submissions is, in my opinion, clear. The sub-rule has been held to be mandatory and all parties directly affected must be served. We are bound by our own authorities on this point. It is impossible to say at this stage that the judgment debtor, to whom the vehicle still technically belongs, inasmuch as the objection proceedings failed, and therefore the previous registered owner, namely the judgment debtor, remains the owner according to the Log Book, is not a person directly affected by the appeal. In any event, if the appellant had thought otherwise he had a remedy by way of *ex parte* application under the proviso to rule 76(1) which says:-

> "Provided that the court may on application, which may be made *ex parte*, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

This proviso was considered at some length in *Openda v Ahn (supra)* but it cannot be denied that no such application has been made. It was in my view, incumbent on the appellant to do so as soon as he was faced with the present striking out application, if he really felt that Kilel had no interest in the proceedings.

For these reasons I would strike out the appeal on the first ground stated in the Notice of Motion filed on

June 12, 1985. I do not therefore need to consider whether it should also be struck out on the grounds of the noninclusion, in the Record of Appeal, of the attaching creditor's notice of intention to proceed under Order 21 rule 56, and of the court's direction consequent thereon under the same rule. It is presumably contended on behalf of the respondent that these are documents necessary for the proper determination of the appeal, or that they are relevant interlocutory proceedings under sub-paragraph (k) of our rule 85(1).

As Nyarangi JA agrees with my main conclusion it is ordered that the appeal be struck out with costs to the respondent.

Nyarangi JA I agree completely with the judgment of Hancox JA and with his conclusion that the appeal should be struck out and I only venture to add a few paragraphs because the authorities of this court that the provisions of rule 76(1) are mandatory have stood unchallenged since 1981. The classical method of construction – that is, to look for the ordinary meaning of the words – persuades me to unreservedly accept that the words,

"shall …… serve copies thereof on all persons ……."

are *ipsissima verba* with the mandatory tone of rule 76(1). It is clear beyond argument that rule 76(1) is mandatory. The words

"all persons directly affected by the appeal"

properly understood would include more persons than it the words were, "the persons directly affected by the appeal". The persons directly affected by an appeal need not be only those who were parties to the proceedings. So, an intended appellant who sees no necessity for serving copies on any person(s) directly affected by an appeal would invoke the proviso to rule 76(1) for an appropriate order. In *Ahn v Openda* Civil Appeal No 7 of 1981, it was held that Thomas Openda, the husband of the respondent who took on part in the proceedings in the High Court was a person directly affected by the appeal since orders made by the judge would affect his actions or his property. That being the case then a fortiori it was all the more necessary for the objector who took part in the proceedings in the High Court to be served with a copy of the notice and that way to inform him of the steps underway concerning property about which he litigated in the superior court. It is irrelevant that a party so served takes no further step. The purpose of the rules is to alert or to inform in good time.

The appellant's submission as was urged by Mr Omondo was that the objector took no part in the High Court and that by the very conduct in removing his name from the Log Book and causing the property to be transferred to the appellant, he the objector, had indicated that he did not wish to be concerned with the matter any further. That submission rests on an attractive foundation and sets out the entirely new feature, to wit, that the objector was not a party to the proceedings in the High Court. Nevertheless that contention takes no account of the mandatory nature of Rule 76(1) and of the dire necessity for the objector to be made aware that notwithstanding his decision about the Log Book and the material vehicle, a final irrevocable decision was about to be taken on the whole matter.

The rules of this Court must be adhered to strictly. If hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of this court as of no substance. In *London Association for Protection of Trade & another v Greenlands Limited* [1916] 2 AC 15 at page 38, Lord Parker of Waddingston had this apposite message.

"My Lords, the irregularities which characterized the pleadings in the present case and the unusual course taken (apparently without objection from anybody) by the trial judge, have, in my opinion, considerably obscured the real issue. In some cases no doubt a waiver of technical points may be condusive to substantial justice being done between the parties. In others, again, it may be dangerous if only because the dividing line between technicality and substance is not always clearly defined. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to a disregard of the principle involved." (my own underlining).

I agree with the order proposed by Hancox JA on costs.

Platt JA. The appellant in this appeal was the objector in execution proceedings in the court of the Resident Magistrate in Kisumu. The objector having had its objection dismissed in that court, then appealed to the High Court where the appeal was dismissed. He now appeals to this court but a preliminary point was taken, namely, that the appellant had failed to serve the judgment-debtor who appeared in the trial court (isumu RM's Civil Case No 73 of 1981). The judgment-debtor being a person directly affected by the appeal, it was argued, was a person who was required to be served with the notice of appeal under rule 76(1) of the Court of Appeal Rules.

I gather that the majority of this court are in favour of striking out the appeal, but I would wish to reconsider the rule and the authorities before taking that step.

The 20th century has been noted for the shift of opinion in preferring to get at the substance of matters rather than to rely on mere formality. The right of appeal is a constitutional right, which should not be debarred by mere rules of procedure unless that is necessary. The rules of procedure are there to see that constitutional rights are exercised with due order and fairness. They have no other value. They ensure that each litigant has an equal chance and that the rules of natural justice have been observed. Rules of procedure do not affect the jurisdiction of the court, which is provided by the legislation establishing the court, except for such matters as limitation when it has been decided by Parliament that the court should not act in certain matters after specified periods of time.

One of the rules of natural justice is that the parties who have a dispute, should be present and be able to present their side of dispute when it is being determined. It is not surprising therefore that various rules of civil procedure make provision for the determination of disputes in the presence of the parties. But there sometimes arises a difference of opinion as to how a matter shall be heard and determined. The parties may wish to limit the scope of the inquiry by the court to certain issues involving only certain parties. If, of course, that has the effect of limiting expense and time, that is a praiseworthy approach; yet as order 1 Rule 10 of the Civil Procedure Rules indicates it may be necessary for the court to strike out or join other parties in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

There is therefore the overriding jurisdiction of the court to make sure that the parties have presented their dispute with due regard to the matters in issue. When such matters are then taken on appeal from magistrate's court to the High Court, the appeal may not be against the whole of the decree and not all the parties may be impleaded. Order 41 rule 3 of the Civil Procedure Rules deals with the case of common ground between more plaintiffs or more defendants than one. On the other hand, order 41 rule 17 provides that when it appears to the court that at the hearing of an appeal, any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to be fixed by the court and direct that such person be made a respondent. Once again one observes that the parties have a chance to determine the presentation of the appeal, subject to the overriding jurisdiction of the court to make sure that all necessary parties are before it.

It is no doubt in this spirit that rule 76 of the Court of Appeal Rules came to be promulgated. It provides as follows:

"76. (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal: Provided that the court may on application, which may be made *ex parte*, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

This rule was given extensive consideration in *Taracisio Gathaiga vs Mbuthia Nyingi,* Civil Appeal No 21 of 1982. Madan J (as he then was) with concurrance of the other members of the Court of Appeal laid down the following interpretation of it:-

"We consider that the whole of the provisions of rule 76(1) are mandatory, including the proviso thereto which lays down an alternative to meet a situation such as the one in which the appellant found himself. Either all persons directly affected by the appeal must be served with notice of appeal, or the court asked upon application, which may be made *ex parte*, to direct that service need not be effected on any person who took no part in the proceedings in the superior court. The appellant did not take either of these two steps.

The judgment-debtor was a person directly affected by the appeal. The land, the subject-matter of the attachment, is still registered in his name. The object of the proviso partly is that the court should act according to the rules of natural justice so that the right of a party directly affected is neither deprived, nor whittled down, without being provided with an opportunity of being heard. It is for this reason that service of notice of appeal is mandatory, and the power to dispense with service is retained in the court, under rule 76(1)."

That approach binds this court in matters of a first appeal taken by an objector in execution proceedings. As the reasoning explains, the parties had not thought it necessary to give notice to a judgment-debtor when the issue for decision lay between the decree-holder and the objector. I am not able to find out whether order 21 Rule 57(2) of the Civil Procedure Rules had been operated. For all I know, the court may have directed that the judgment-debtor's presence was not necessary at the hearing of the objection proceedings. But in view of the judgment, it may well be that he was present. It is nevertheless, important to ascertain in objection proceedings, whether at any stage the judgment-debtor was a party whose presence was needed, because if he were not required to be present, it can hardly be argued that he was a person directly affected, at least on a second appeal.

In this case, the objection proceedings were taken without the presence of the judgment-debtor. Although as Mr Menezes has pointed out, the directions under order 21 Rule 57 of the Civil Procedure Rules are not on the record, it is clear that the objection was entirely conducted between the objector and the Decree-holder.

When this matter came to the High Court on first appeal, the parties involved were simply the present appellant and the respondent as objector and Decree-holder respectively. The respondent took no objection to the absence of the judgment-debtor. The court did not consider the judgmentdebtor an interested party under order 41 Rule 17 of the Civil Procedure Rules. Yet, now the respondent complains that the judgment-debtor was not served as a party to this appeal. That is surely taking advantage of the process of the court, for the judgment-debtor has never been present at any stage. In these circumstances, unless some point is taken in the appeal, which indicates that the judgment-debtor is a person directly affected by the appeal, I would have thought that on this second appeal, the persons to be described as directly affected, are primarily those who took part in the first appeal.

It is urgued by Mr Menezes that ground 3 in particular dealing with the value of the car which was sold brings in the judgment-debtor. Ground 3 only deals with the objector-purchaser's interest in the vehicle. There is no issue in these objection proceedings between the purchaser and the judgment-debtor. In any event, the judgment-debtor has lost the car which was sold. Ostensibly that defeats the Decree-holder's claim to execution. There are no grounds of appeal which require the judgment-debtor's presence.

Alternatively, if it is thought that *Taracisio's* case still applies to a second appeal, in view of the fact that the judgment-debtor was not thought to have been an interested person at first instance and first appeal, and it has not been demonstrated that he is directly affected in this appeal, or in any way interested in the outcome of the appeal, it would have been proper to have allowed the appellant time in which to seek to dispense with the judgment-debtor's presence. Accordingly, I would not strike out the appeal at this stage, but I would at least allow time for the proviso to be operated which, on the matters before the court at present, would apparently have ended in leave being granted to dispense with the presence of the judgmentdebtor.

The other objections taken would not have proved fatal. The documents said to be missing could have formed part of a supplementary record of appeal under rule 85(2A) of the Rules of the Court of Appeal.

Dated and delivered at Kisumu this 13th day of May, 1986

A.R.W. HANCOX

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JUDGE OF APPEAL

J.O. NYARANGI.

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JUDGE OF,APpEAL

H.G. PLATT

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AG. JUDGE OF APPEAL

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