



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(Coram: Honcax, J A, Chesoni and Platt, Ag. JJ.A)

G E OKIRO.....APPELLANT

AND

EQUATOR BOTTLERS LTD.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Schofield, J) dated
22nd

August , 1983)

in

High Court Civil Case No 17 of 1983

JUDGMENT

On the 18th June this year a single Judge of this Court granted the Appellant's application to extend the time limited for instituting the appeal and gave leave for this to be done within thirty days, that is to say by the 25th July, 1984. Leave was also given to serve the Notice of Appeal on the Respondent out of time, by the 25th June 1984. This indulgence was made subject to the condition that the Appellant should pay all the costs therein stated within thirty days of taxation.

Though the Notice of Appeal was served and the Record of Appeal filed by the dates stated, it is not in dispute that the Appellant did not fulfill the condition, and indeed, did not pay the costs until 1st December, 1984, after the present Notice of Motion to the court was filed, taxation having taken place on 24th July, 1984. This is the subject of Mr Raichura's first application on behalf of the Respondent to strike out the appeal. In a notice of preliminary objection filed on 28th November, 1984, which Mr Ombogo complained was not served on him, (indeed he said he received a document in which the only common denominator with the application was the advocate's costs) the Respondent takes two other points, the first having been abandoned, namely that the Records defective in several respects, and that the appeal is not filed within thirty days of the service of the Notice of Appeal.

Some of the documents produced as exhibits in the High Court, it is said, were not included in the Record of Appeal, while others purported to be include dare not accurate reproductions of the exhibits-produced. Examples of the first category are the documents containing known signatures of the Appellant, which do not appear in the Record of Appeal an example of the latter is the guarantee giving rise to the suit which does not, at page 3 of the Record, show that it is stamped, while the original, which is on the High Court file but is not stamped as a Court exhibit clearly shows revenue stamps to the value of shs.10. Finally in one instance an affidavit included in the record next to the chamber summons seeking a stay of execution is a copy of the one filed in support of the Application granted by this Court

on June, and is clearly not the one filed in support of the chamber summons, contrary to the proviso to Rule 85(4) of this Court's Rules.

Mr Ombogo, on behalf of the Appellant, strenuously resisted the application to strike out. If the objection is under Rule 80, he said, then there were only two essential steps capable of being taken, namely the service of the Notice of Appeal and the institution of the Appeal, both of which had been done within the time ordered. The payment of the costs, which was admittedly not done in time, was not an essential step, but a breach, of an order which was enforceable by action, as is shown in the 1982 ANNUAL PRACTICE, Order 42 R Kb) of the English Bul's. of the Supreme Court. Secondly, as the deadline for the institution occurred of this appeal was the 25th July, and the taxation of the costs only occurred on the 24th, the period of extension allowed by the Court was spent immediately after the time prescribed in the condition, namely 30 days from the date of taxation, commenced, so that there was an inconsistency

in the Order and therefore the condition attached to it could no longer apply" Furthermore, if the court were to accede to the application it would frustrate the exercise of the discretion (to extend time) already granted under Rule 4. Finally, the guarantee upon which the whole action was based was void ab initio as it was not signed (according to the Appellant's case), and was in any event given for past consideration, as

the contract for the supply of the goods had already been completed. This was shown by the fact that the appearance in High Court Civil Case 21 of 1982, in which the Respondent sued Mirera Enterprises Ltd. in the original suit, was entered on the 2nd March, 1981, suggesting that the action was filed on about February the 20th, which was before the guarantee was allegedly executed on the 24th February 1981.

To some extent these arguments of Mr Ombogo, ingenious though they are, tend to beg the questions to be decided. We do not agree that the admitted breach of the Court order as regards the payment of the costs is something which cannot be visited by an order of striking out. Court orders are made to be obeyed, and not observed merely in the breach, even if they can be enforced aliunde. As to the second point, it is wrong to suggest that the conditions could not attach because the time for instituting the appeal had already expired. Obviously no Court order can be effective as regards the payment of costs until the process of taxation has been carried out, so that there can be no failure to pay the and costs until they have been quantified/the amount known see Thames .Investment and Securities pie v., Benjamin Law Society's Gazette , 7th November 1984, p 3099. Therefore no condition regarding their payment can take effect until such period as the Court allows thereafter. Neither could the extension of time granted be terminous with the date of the fulfilment of the condition as to payment of the costs, for this is not known until the taxation has taken place. We do not therefore agree with Mr Ombogo's second submission that the condition imposed for the extension of time granted in the order of the 18th June, 1984 was inconsistent therewith or incapable of fulfilment.

The third point taken by Mr Ombogo is, we think, part and parcel of the first. The main extension sought was granted subject to a specified condition. The condition was the payment of the costs within a certain period. In our view, once the condition was imposed it became an essential step in the proceedings, the failure to observe which can result in an order to strike out. Whether it is looked at in this way, or in the way that the Application to extend time was granted subject to the condition, so that .if the condition is not fulfilled the Application itself automatically fails, leaving the Appellant out of time in instituting his appeal (so that that essential step has not been taken in time) matters not in our judgment.

The last point argued by Mr Ombogo was as to the guarantee. The Appellant has all-along, in his pleading and in his evidence, denied signing this guarantee.. Obviously if the guarantee was not signed by the Appellant he could not have been liable on it. Had there been such a finding of fact then doubtless the action would have been dismissed, and we should not have been troubled with the present application. But www.kenyalawreports.or.ke the Judge resolved this issue in favour of the Respondent. Was it given for past consideration, and therefore invalid, as Mr Ombogo submits? True the goods had been supplied by the time the action was filed on 10th January 1983, and the transaction was in that sense over. The Appellant was one of the managing directors of MIRERA ENTERPRISES. This is something going to the merits of the appeal itself, and is thus not strictly a matter for us on this application. However we

observe that there is no indication on the record of the subject matter of the suit between the Respondent and MIRERA ENTERPRISES. That was settled by judgment being entered for the respondent on 6th May, 1981. Whether or not the guarantee was relevant to the subject matter of that action, it is evident on the face of the guarantee that it was given in consideration of the Respondent supplying goods and/or giving credit to MIRSRAF SNTESPSISES L2D., and of its granting to MIRERA ENTERPRISES such extension of credit, time for payment or other indulgence as it might think proper. What more natural than that the Respondent should insist on a guarantee signed by the managing director rather than, as Mr, Desai, their manager, in evidence, one of his workers? It is a common practice to do so in the ordinary course of business and commerce in this country. We do not therefore think that there is any validity in the part of Mr Ombogo's submissions so far as this application is concerned. We would add that although it may be that the guarantee was not produced as an exhibit but, as the original case file shows, was attached to the summons for directions before the hearing, this does not mean that it did not need to be included in the record because, even though not a document produced specifically at the hearing, as stated in paragraph (f) of But a- 85(1), it would fall within "such other documents as may be necessary for the proper determination of the appeal." in paragraph (k). We therefore consider that the points taken by Ombogo in his argument fail, and that non-compliance with the order for payment of the costs must, on its own, result in an order striking out the appeal. In addition there remain the defects in the record to which Mr Baichura drew our attention. These are, as stated at the beginning of this Ruling, the omission of the specimen signal and writing of the Appellant, the Affidavit erroneously included as supporting the chamber summons seeking a stay of execution, and the fact that many of the documents that are included are not certified copies as required by Rule 83(1). Unless the Rules of this court are properly and regularly complied with there can be no uniformity as regards appeals and the Rules themselves will lose their force and effect.

For these reasons we allow the application made on behalf of the respondent to strike out this appeal. It is ordered to be struck out with costs to the Respondent.

Dated and delivered at Kisumu the 10th day of December, 1984.

A B HANCOX

JUDGE OF APPEAL

Z. R. CHESONI

AG. JUDGE OF APPEAL

H G PLATT

AG JUDGE OF APPEAL