IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox & Nyarangi JJA)

CIVIL APPEAL NO. 12 OF 1984

Between

SHAKOOR SHEIKH .....APPELLANT

RAOOF SHEIKH.....APPELLANT

AND

WAHEED.....1ST RESPONDENT

HAMEED.....2ND RESPONDENT

CITY DEVELOPMENT.....3RD RESPONDENT

PICKWELL.....4TH RESPONDENT

(Appeal from a ruling and order of the High Court at Nairobi (Platt J) in Civil Suit No 2842 of 1981 dated May 17th of 1983)

JUDGMENT

March 1, 1985, **Kneller JA** delivered the following Judgment.

Four Sheikh brothers are locked in litigation over two of their companies, City Development and Pickwell Properties. Shakoor and Raoof, in their plaint in September 29, 1982, want Waheed and Hameed to be made to hand back the companies properties which they are said to have fraudulently converted to their own use, to account for their income from and expenditure on them between 1972 and 1980 and render what is due to Shakoor and Raoof, the appointment of a receiver and manager of those properties appointed and their costs. Shakoor and Raoof claim they also act on behalf of Ghafur and Majied who are two more Sheikh brothers.

Shakoor and Raoof are the first and second plaintiffs and Waheed, Hameed, City Development and Pickwell the first, second, third and fourth defendants respectively. Appearances were entered for each of them.

Waheed only, by a motion on notice of November 3, 1981, applied under section 6 of the Arbitration Act (cap 49) for an order of stay of all further proceedings because the plaintiffs, by an agreement in writing set out in signed resolutions passed in 1979, agreed to refer to arbitration the matters covered by the plaint and it had begun before Mr. M Z A Malik.

Waheed claimed, in his supporting affidavit, Hameed, the companies and Ghafur and Majied, supported him in this application and they were not behind Shakoor and Raoof. Ghafur, on his own behalf and that of Majied in New York, said in his second affidavit Waheed was right about their stand in the matter. He swore in his first affidavit that the companies of which he was a director had authorized their advocates to enter appearance, attend the hearing of the motion and also ask for a stay.

Shakoor's answer to the application for a stay was to deny there was any agreement or that any of the matters raised in the plaint were within the scope of any arbitration agreement between the parties or that arbitration proceedings had begun. There were, he continued, some negotiations between the advocates for Waheed, Hameed and some members of City Development but no more. Mr. Malik was acting for Ghafur and might come in on them.

If there were any agreement to arbitrate, it had been abandoned, waived or rescinded and the defendants were estopped from claiming the opposite. Mr. Malik had by his conduct disqualified himself from being an arbitrator. He had acted for Waheed.

The application came before Mr. Justice Platt and he noted the following appearances:-

> "D N Khanna with SS Dhanji for - 1st defendant Nowrojee - 2nd defendant Knox -3rd and 4th defendants Oraro and Nagpal - plaintiffs"

and no objection was taken to any of them being there or taking part in the proceedings.

Mr. Khanna opened the application for Waheed, and among the submissions he made were the following. Shakoor and Raoof claimed they acted for Ghafur and Majied, and therefore, City Development.

Reliefs were claimed in the prayers of the plaint against Pickwell. The application was for a stay for ever. Arbitration proceedings between all those Sheikhs and the companies had begun and Mr. Justice Platt should make them carry on with it since they had all agreed to this. The action was for accounts of the companies, restoration to them of what belongs to them and a decision on which brother had shares in which company. Mr. Nowrojee for Hameed adopted all Mr. Khanna's arguments. So did Mr. Knox for the companies.

Mr. Nagpal for Shakoor and Raoof wanted to cross-examine Waheed on his affidavits on February 1, 1982 but Mr. Justice Platt ruled against him on October 10, 1982 having heard submissions from the advocates for each party in the action. Mr. Nagpal then opposed the application for a stay and subjected the affidavits and their annexures to minute analysis and he also dealt with the delay that had occurred and Mr. Malik's position.

Mr. Nowrojee and Mr. Khanna replied on October 1, 1982 and March 28, 1983 exhaustively on the same issues and on May 16, 1983 Mr. Justice Platt delivered an order.

In it he found, in brief, that Waheed, Hameed, City Development and Pickwell all sought a stay. Ghaful and Majied were not affected by this litigation in their personal capacity but as shareholders in the companies and Ghafur like Waheed, Shakoor, Raoof and Hameed as directors of both.

He also found, for the purposes of the application, there had been no delay and there was an agreement to refer to the totality of the accounts of the companies and any issues arising from the accounts to arbitration but not the exact terms and the construction of the agreement. Mr. Malik, he declared, was not disqualified by anything he did before his appointment nor after it. Questions of law, such as the construction of the agreement, however, had not been referred to the arbitrator and they might affect all Mr. Malik had done up to June 1979 and if the learned judge resolved them in his order another tribunal might resolve them another way or when Mr. Malik's arbitration was done there would probably be a case stated on the proper construction of the agreement and it would be futile to stay an action that might bob back as a case stated. He had a discretion under section 6(1) of the Arbitration Act to stay or not to stay the action and for those reasons he decided not to stay it.

He gave leave to appeal to Waheed and Hameed. He refused it for City Development and Pickwell saying they were not strictly involved in the arbitration.

Mr. Khanna then drew up and filed a memorandum of appeal with twelve grounds for Waheed. Shakoor and Raoof were named as the respondents to the appeal and duly served with it. They were the only ones to have been served with the notice of appeal.

Shakoor and Raoof's advocates filed a motion on notice under rules 76 and 80 of the Court of Appeal Rules asking for the appeal to be struck out.

Mr. Oraro, a partner in the firm of advocates Shakoor and Raoof have briefed, put in an affidavit in support, pointing out the firm acts for Shakoor and Raoof and not Hameed, City Development and Pickwell, so the notice of appeal had not been served on Hameed, City Development and Pickwell as it should have been.

Mr. Lakha appeared for Mr. Oraro for both respondents and submitted that Hameed, City Development and Pickwell should have been served since they entered appearance, appeared by their advocates, supported and took part in the application for a stay, filed affidavits and asked for leave to appeal.

Mr. Khanna's reply was that it was Waheed alone who applied for a stay and he served it on only Shakoor and Raoof. Hameed, City Development and Pickwell sent along their advocates but they were allowed to take part not by right but because Mr. Justice Platt allowed them to do so which together with Mr. Lakha's point gave them no standing in the appeal.

In my view the words of rule 76(1) govern the matter. They oblige the appellant(s) to serve copies of the appeal on all persons directly affected by it. This court can direct that service need not be affected on any person who took part in the proceedings in the High Court.

This court did not make such a direction and could not do so because there was no application to it to do so and because Hameed, City Development and Pickwell took part in the proceedings.

Furthermore, whether or not the suit of Shakoor and Raoof is stayed (for ever) or not stayed affects, for better or for worse, Hameed, City Development and Pickwell otherwise they would never have taken any stand on Waheed's application.

The prayers of the plaint and those in the second and third paragraphs of the memorandum of appeal affect them. So did the consequences of Mr. Justice Platt's order. They affect their actions or property. See Potter JA in *Ahn v Openda* Court of Appeal 7 of 1981 Nairobi June 10, 1982 (Simpson CJ, Potter JA and Kneller Ag JA)

The point is this. The object of the rule and of the proviso is that the rights of a party likely to be directly affected by the result of an appeal should not be affected without the party being provided with an opportunity of being heard. *Ruithibo v Nyingi* Court of Appeal Civil Appeal 21 of 1982 October 19, 1983 (Madan, Kneller, Hancox JJA).

And it does not matter that Hameed, City Development or Pickwell, or parties affected by the appeal do not nurture any grievance or suffer any prejudice by not being served with the notice of appeal or appeal. The requirements of rule 76(1) and its proviso are mandatory. *Roboi Holdings Limited v Shah* Court of Appeal Civil Appeal 50 of 1982 November 2, 1983 (Madan, Kneller, Hancox JJA). So I would strike out the appeal with costs and as Hancox JA and Nyarangi Ag JA agree it is so ordered.

Hancox JA. The arbitration agreement, which is said to have given rise to the motion for the stay of proceedings before the High Court, is contained in the minutes of the meeting of shareholders of the third and fourth defendant companies held on July 29, 1979, and exhibited to the affidavit of the first defendant, who is the intending appellant in this court, in support thereof. He was the only one out of the four defendants who moved the court for a stay, no doubt when Mr. DN Khanna was representing him in

that court he had in mind the case he cited to us, namely *Willesford v Watson* [1873] LR 8 Ch 473, where only two out of the three lessees of the nine concerned sought an order for stay of the court proceedings for the purposes of arbitration under section 11 of the Common Law Procedure Act, 1854 Lord Selborne LC said, at page 480:-

> "The only other argument appears to be that under the Act it is a condition precedent to such an order as this that every defendant must, before the suit began, have been willing, and still continue willing, to go to arbitration. I do not think it is so according to the true construction of the Act."
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> ".. in substance the Act clearly gives a right to one of several defendants to make the application to the court, taking notice that there may be more than one defendant. That by itself tends to show that the legislature did not intend to make it necessary that all parties should concur in the application."

The 1854 Act contained a provision that the defendant should be ready and willing to join and concur in all acts necessary and proper for the matter to be decided by arbitration, and there is a similar, though shorter, provision in section 6(1)(b) of the Arbitration Act, cap 49 of the Laws of Kenya. It is therefore clear that all four defendants in this case were not required to join in the application to the court for the stay of proceedings.

However, that is a very different thing from the issue as to whether or not the three defendants who are not, as yet, parties to this appeal from the order refusing the stay, are "persons directly affected by the appeal" within the meaning of rule 76(1) of the Court of Appeal Rules, so as to necessitate their being served with the notice of appeal. It is common ground that they have not been so served. If they are directly affected then the requirements of the sub-rule are mandatory; as Madan, JA in delivering the ruling of the court, held in *Taracisio Githaiga Ruithibo v Mbuthia Nyingi* Civil Appeal 21 of 1982, and reiterated in *Roboi Holdings v Kantilal Chandulal Shah* Civil Appeal 50 of 1982. The former case, and the other one cited to us by Mr. Lakha, *Peter Martin Ahn v Jennifer Wairimu Openda* Civil Appeal 7 of 1981, were obvious cases where the person in question was directly affected by the appeal.

So, in this case, Mr. Lakha was able to point to a number of instances in the record where the other three defendants appeared by counsel during the course of the application, and where Mr. Abdul Ghafur Sheikh, a director of the third and fourth defendants, swore an affidavit which was clearly put forward in reference to the arbitration. Moreover, the first defendant (the appellant) and the second defendant were directors of the other two defendants and were involved as such as many of the allegations made in the plaint. In my opinion they were all inextricably interwoven in the issues which are brought before the court. As Platt J said, it was a close knit situation. The affidavit says that:

> "On behalf of the third defendant company and fourth defendant company I confirm that these companies have also bound themselves to take part in the arbitration."

That shows a direct nexus between all the defendants as regards the arbitration. Accordingly, even though they did not formally join or concur in the application for the stay of proceedings, on the grounds that there was a valid reference to arbitration, the second, third and fourth defendants are in my judgment persons directly affected by the appeal and should have been served with the notice of appeal. As they were not served an essential step was not taken. If follows that the appeal should be struck out under rule 80.

Nyarangi JA. I agree with the judgment prepared by Kneller JA which I have had the advantage of reading in draft.

Dated and delivered at Nairobi this 1st day of March , 1985.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR