Gichuki v Nangurai

Court of Appeal, at Nairobi March 7, 1984

Potter, Kneller & Hancox JJA

Civil Application No NAI 25 of 1983

Appeal - striking out - consideration before grant of the application. Civil Practice and Procedure - locus standi - whether an applicant who is not a party to the appeal can successfully apply for appeal to be dismissed.

The respondent filed a notice of appeal and failed to file his appeal within the time prescribed by the rules or expeditiously per the terms of a valid consent order. The applicant therefore sought to have the notice struck out since an essential step had not been taken. The applicant was the beneficiary of a judgment of the High Court though he was not a party to the proceedings. The respondent not being pelased with the finding of the High Court sought to appeal against the judgment which the applicant had become entitled to.

Held:

1. The applicant lacked locus standi and as he had not made a poper application to be joined the court would not therefore accede to the applicant's applicantion to strike out.

2. The requirement as to locus standi in an application for prerogative order is dealt with more liberally than it is in inter partes proceedings. Application dismissed with costs.

Cases

1. Gouriet v Union of Post Office Workers, (1978) AC 435

2. Royal College of Nursing of the United Kingdom v Department of Health and Social Security (1981) 1 All ER 545, 551 (QBD)

Statutes

Court of Appeal Rules rules 42, 80, 82(a), 76(1)

Advocates

Machira for Applicant.

P Nowrojee for Respondent.

Kembi-Gitura for Interested parties. **March 7, 1984, Kneller JA, delivered the following Judgment.**

We have before us a motion of notice filed on June 2, 1983 by the advocates for James Macharia Gichuki

(the appellant) expressed to be brought under Rules 42, 80 and 82(a) of the Court of Appeal Rules asking this court to strike out the notice of appeal filed by the advocates for Harry Lewis Nangurai (the respondent) on March 18, 1982 because the respondent has failed to file his appeal within the time prescribed by those Rules or "expeditiously" in obedience to a consent order made by this court on October 29, 1982 in Civil Application 42 of 1982. The applicant also asks for the costs of and incidental to this motion on notice. All this is resisted by the respondent.

Rule 42 states that all applications to this court shall be by motion and the grounds for them must be specified in the motion and the applicant has conformed to this rule.

Rule 80 declares that a person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to this court to strike out the notice or the appeal on the grounds that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time so this application is rightly brought under this rule.

Rule 82(a) provides that after a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs of any person on whom the notice of appeal was served.

The background to this was set out in an affidavit of the applicant which was filed in support of the motion. He said he was the beneficiary or an assignee of a judgment delivered on March 15, 1982 by Muli J in Nairobi High Court Civil Suit 1038 of 1974. It concerned a parcel of land Ngong/ Ngong/289 which had been divided into two portions, according to the terms of the judgment, and one, Ngong/Ngong/4975, was awarded to the applicant but the respondent and his family are still living on it because by an order of this court in Nairobi Civil Application 42 of 1982, a stay of execution was made with the consent of the respondent and George Roine Tito and Daniel Ndichu until the intended appeal had been heard and determined. Meanwhile, according to the applicant, the respondent and his family are cutting down the trees on the applicant's portion and selling them.

The respondent's advocate filed his notice of appeal on March 18, 1982 which is three days after Muli J delivered his judgment so there was no dilly-dallying there.

On October 26, 1982 the respondent's advocates filed his application (Nai 42 of 1982) asking for a stay of execution and that was about seven and half months after the date of judgment so there was some delay in making that application.

Three days later, this court made the consent order with no order as to costs on the undertaking of the respondent's advocate, Mr Nowrojee, that he would prosecute the intended appeal expeditiously.

When we heard this motion on notice on June 29, 1983 the respondent had not filed his appeal within the time stipulated by the Rules of this court. June 29, 1983 was just over fourteen months from the date of the judgment of Muli J and almost seven months from the date of the consent order made by this court. The applicant also said that Mr Nowrojee for the respondent had failed to prosecute the intended appeal expeditiously or at all. There was no affidavit in reply to all this but the facts set out in the applicant's affidavit are not the only basis for this order.

Other matters which emerged in the submissions of Mr Machira for the applicant and Mr Nowrojee for the respondent were these. Mr Nowrojee annexed to his application for the stay of a copy of the proceedings before Muli J in the High Court but twenty five pages were imperfect because the copy-typists could not read the handwriting of Muli J. There has been no difficulty with the handwriting or typing in the actual judgment in the High Court Civil suit. Mr Nowrojee says he will apply for a certificate of delay setting out that the deputy Registrar of the High Court did not tell him the judgment and proceedings were ready until April 11, 1983. The certifying fee was paid at the end of the next month which meant that Mr Nowrojee and the respondent had wasted one month when he discovered the copy had these imperfect pages. Thereafter no-one in the typing-pool knew how to fill in any of the missing words because in the meantime Muli J had been appointed Attorney General.

Mr Machira for the applicant and Mr Kembi Gitura for George Roine Tito and Daniel Ndichu submitted that Mr Nowrojee had not accounted for the very great delay which was very prejudicial to the applicant who could not enjoy the fruits of the judgment of Muli J by entering upon the portion awarded to George Roine Tito and Daniel Ndichu. There was also an attempt to explain how it was that the applicant had any standing in this matter. The original suit was between the respondent and George Roine Tito and Daniel Ndichu who were the plaintiffs before Muli J but they assigned their interests in the judgment before Muli J delivered it. Mr Machira appeared for the applicant when Mr Nowrojee for the respondent asked this court for the stay and Mr Nowrojee did not object to Mr Machira appearing for the applicant, and Madan JA suggested that the applicant should apply to be a party in the appeal. The plaintiffs were still represented by Mr Kembi Gitura and Mr Machira appeared for the applicant on October 26, 1982 for the application for a stay because Mr Nowrojee sent his copy of that Motion on Notice.

Mr Nowrojee submitted that the plaintiffs could not assign their interest in a judgment before it was delivered and Mr Machira asserted that they could be but neither produced any authority on the point one way or the other.

During the course of the hearing Mr Machira made an informal application under rule 76(1) of the Rules to be made a party to the appeal but that rule does not avail him at all but we dealt with the application de bene esse.

The requirement as to locus standi in an application for a prerogative order is dealt with more liberally by a court than that it is in inter parties proceedings: see Lord Wilberforce in Gouriet v Union of Post Office Workers, (1978) AC 435 but it cannot be overcome by consent of the parties. Woolf J in Royal College of Nursing v Department of Health and Social Security (1981) 1 All ER 545, 551 (QBD).

So, in the motion before this court, the applicant appears, at this stage, to have no locus standi because he has not made an application in proper form to be joined as a party in the appeal and he has not been given leave to appear in the appeal. Until he does so, he has no interest in whether the appeal has been filed in time or is being prosecuted expeditiously. The application must be dismissed and the applicant must pay the cost of it.

Mr Nowrojee can probably have the twenty to twenty five pages for the proceedings photocopied with the permission of the deputy registrar of the High Court and soon discover what Muli J wrote, prepare the pages for the certification by the same Deputy Registrar within a few days and then proceed to fulfil his undertaking to prosecute the appeal expeditiously. Hancox JA agrees so these are the orders of the court.