IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Kneller JJA & Chesoni Ag JA)

CIVIL APPEAL 21 OF 1982

BETWEEN

RUITHIBO.....APPELLANT

AND

NYINGI.....RESPONDENT

(Appeal from the High Court at Nyeri, O'Kubasu J)

RULING

This is an appeal against the order of the High Court sitting at Nyeri (O'Kubasu J) in objection proceedings made under order XXI of the Civil Procedure Rules.

Mr Lee Muthoga who acted for the respondent in the High Court, also appearing before us, has raised a preliminary objection to say that the appeal is incompetent for at least the following four reasons:

1. Notice of appeal was not served upon the respondent as required by rule 76(1); consequently,

2. The respondent was unable to comply with the mandatory provisions of rule 78(1)(a) which requires that every person on whom a notice of appeal is served shall within fourteen days after service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service. The respondent therefore was prevented from protecting his rights in the appeal, said Mr Muthoga.

3. The objection proceedings in the High Court being under order XXI rule 53 *et seq*, the judgment-debtor whose property was the subject matter of the attachment was not served with notice of appeal as a person directly affected by the appeal, again as required by rule 76(1), the court also not having directed under the proviso to that sub-rule (1) that service need not be effected on the judgment-debtor as he took no part in the proceedings in the superior court.

4. There was a failure to comply with rule 86(2) as the order against which it is desired to appeal does not include a statement that leave to appeal was given by the superior court. Mr Muthoga told us that his address to serve him with the record of appeal was taken from the proceedings in the lower court; hence his appearance in court before us.

We will first deal with the third and fourth objections. As regards the failure to serve notice of appeal on the judgment-debtor Mr Satish Gautama for the appellant submitted that the judgment debtor did not

show any interest in the proceedings in the superior court, and judgment was entered against him in default of appearance. The appellant might have been mulcted in costs if he had served the judgment-debtor with notice of appeal. 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 service is retained in the court, under rule 76(1). Rule 86(1) requires that where leave to appeal has been given or refused by the superior court immediately following the delivery of the decision against which it is desired to appeal, a statement that leave has been given or refused shall be included in the decree or order.

Mr Gautama spent a considerable amount of time in arguing irrelevantly that, in this instance, it was unnecessary to include a statement in the order that leave to appeal had been given as an appeal lies as of right and without leave of the court against an order made under order XXI rule 57. We do not find it necessary to decide today whether the order against which it is desired to appeal was made or is capable of being made under rule 57 or even that an appeal lies as of right therefrom. If an appeal does not lie without leave, it would have been incompetent in any event. The real issue before us is whether the order should have included a statement that leave to appeal had been given. We consider rule 86(2) is also mandatory, and the required statement should have been included in the order.

The irrelevant debate to which we were subjected would have been avoided if rule 86(2) had been complied with. The failure to do so also introduced another inaccuracy in the record of appeal making wrong the certification of its correctness as required by rule 85(5).

Although rule 76(1) is mandatory, Mr Gautama said even so the appeal is not incompetent because the respondent has not suffered any prejudice. He said the object of serving notice of appeal is to inform the respondent that an appeal is intended to be lodged. He pointed out that a copy of notice of appeal is included in the record of appeal which was served upon the appellant, and in addition he was aware that this appeal had been filed from the correspondence exchanged between the deputy registrar of this court and the appellant’s advocate which was copied to the respondent’s advocate. Neither of these methods is the mode of service for notice of appeal envisaged by rule 76(1). This kind of relaxation of the rule could also be extended to include a casual conversation that an appeal is intended to be filed, or has been filed, between the advocates of the parties when meeting together for their evening beer in a pub. It is pointless to dissertate upon this argument any further. The damage that Mr Gautama’s proposition could cause, if accepted, is demonstrated by what we say next.

Rule 78(1)(a) imposes a duty upon a respondent, but only if he has been served with notice of appeal, to lodge in the appropriate registry and serve the intended appellant with notice of a full and sufficient address for service. The respondent is entitled to say that in the circumstances of this appeal there was no failure on his part to comply with rule 78(1) (a). A respondent who fails to do so after he has been served with notice of appeal, however runs the risk of having the appeal determined to his detriment without being heard. He incurs no such risk even if he becomes aware howsoever that an appeal has been filed or is intended to be filed.

Mr Gautama correctly pointed out that Mr Muthoga had raised his objections informally. Quite so. Rule 80 lays down 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 the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time. The respondent not having been served with notice of appeal, he could not

have moved the court to strike the appeal under rule 80. The respondent having been served with the record of appeal, it cannot be that he is without a remedy. Such a respondent, and also any person who becomes aware howsoever otherwise than being served with notice of appeal, may apply to the court either informally or under rule 42(1) to strike out the notice or the appeal, as the case may be, for the reasons set out in rule 80. In this later type of case the court could and would act under rule 1(3) which states that nothing in the rules of court shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the court. The court must so act particularly in a case where the appeal is incompetent as the present appeal is, in our opinion, by virtue even alone because of non-compliance with the requirements of rule 76(1).

Finally, Mr Gautama informally asked for extension of time to serve notice of appeal. Notwithstanding rule 42(1) we allowed him to do so. He had first to show under rule 4 that there is sufficient reason to extend the time limit, *Abdul Aziz Ngoma v Mungai Mathayo and another* [1976] KLR 61. The former Court of Appeal said in *The Commissioner of Transport v AG of Uganda and Another* [1959], EA 329, at page 335 that the fact that the respondent may not have been prejudiced is not in itself “sufficient reason” for granting extension. Nothing has been so shown to us, not even a plausible excuse offered. In fact, all these arguments have been advanced, we think in awareness of several decisions of the court to the contrary, to induce us to accept that careful compliance with the rules of court is a formality and a technicality and they need not be strictly enforced. No court, least of all this one, could wash away the rules of court so ignobly. For these reasons we order the appeal to be struck out as incompetent, with costs.

Dated and Delivered at Nairobi this 19th day of October 1983.

C.B.MADAN

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JUDGE OF APPEAL

A.A.KNELLER

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR