



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Simpson CJ, Potter JA & Kneller Ag JA)**

**CIVIL APPEAL NO 7 OF 1981**

**BETWEEN**

**PETER MARTIN AHN .....APPELLANT**

**AND**

**JENIFER WAIRIMU OPENDA.....RESPONDENT**

**JUDGMENT**

**Potter JA** This appeal is described as an appeal from a ruling and order made in the High Court in Nairobi by Wilkinson-Guillemard J on May 22, 1980. The order was made upon the application by notice of motion under Section 3A of the Civil Procedure Act, Order L of the Civil Procedure Rules and Section 17 of the Married Women's Property Act, filed by the respondent who joined the appellant and her husband, Thomas Openda, as respondents. The purpose of the application was to protect the applicant's legal interest in the matrimonial home, Plot No LR 2951/62 at Lower Kabete, Nairobi and to restrain the applicant's husband from selling the Plot to the appellant under an agreement for sale made between the husband and the appellant on January 25, 1977. The applicant was successful and the judge made orders to the following effect:

1. That Thomas Openda holds one half interest in the Plot in trust for the applicant wife.
2. That the purported sale by Thomas Openda to the appellant is void and of no effect.
3. That Thomas Openda be restrained from transferring the Plot to the appellant.
4. That Thomas Openda be restrained from selling or alienating the Plot to anyone.

It will be observed that Thomas Openda is named in and affected by all these orders. The appellant filed notice of appeal under rule 74 of the Rules of this Court against the whole of the decision of the judge on June 3, 1980. Rule 76(1) requires service of the notice of appeal on all persons affected and is 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.”

The notice of appeal was served by the advocate then acting for the appellant on the respondent, Jennifer Openda, but was not served on the husband Thomas Openda. In July, 1980, Mr Nagpal was appointed to

act for the appellant in place of his previous advocate. On January 26, 1981, in Civil Application No 2 of 1982, Mr Nagpal obtained the *ex parte* order of Law JA under rule 76(1) dispensing with service of the notice of appeal on Thomas Openda on the ground that he had taken no part in the proceedings in the High Court. Mr Oraro, who appeared for the respondent on the hearing of this appeal on May 12, 1982, did not learn of this *ex parte* order until about three days before the hearing. By letter dated May 10, 1982, Mr Oraro gave notice to the Deputy Registrar of this Court and to Mr Nagpal of his intention to appeal to the full court against the *ex parte* order under rule 54(1)(b). Accordingly, we heard Mr Oraro's appeal against the decision of the single judge as a preliminary matter which might affect the competence of the appeal before the Court. Three questions on the construction of rule 76(1) arose out of Mr Oraro's submissions, namely:

- 1) Is Thomas Openda a person "directly affected by the appeal", so that an *ex parte* order had to be applied for?
- 2) If so, was Thomas Openda a person "who took no part in the proceedings" in the High Court, so that an order could properly be made in his case?
- 3) Must an application for an *ex parte* order be made before the time for serving copies of the notice of appeal has expired?

As to the first question, I think that there can be no doubt that Thomas Openda is a person directly affected by the appeal, since all four orders made by the Judge affect his actions or his property.

As to the second question, Thomas Openda was present at the proceedings but he did not address the Court. While I agree with Mr Oraro that a person may for some purposes be said to take part in proceedings if he is a party and he makes an appearance, I do not think that this rule should be construed so narrowly. In my view, Thomas Openda was a person who took no part in the proceedings.

As to the third question, I cannot accept Mr Nagpal's contention that an application for an *ex parte* order under the proviso to rule 76(1) can be made at any time. If that were the case, the rule would be ineffectual. In my opinion, the application under the proviso must be made before the time expires for lodging notice of appeal under the rule.

As it was, the application under the proviso to Law JA was made some two years out of time. It should have been made in June, 1980, and not in January, 1982. Mr Nagpal has argued that Law JA, by granting the exemption in January, 1982, impliedly extended the time for making the application. That cannot be so. It is evident that the single Judge was not made aware of the delay of the *ex parte* application. Mr Nagpal was at pains to explain that there was no deliberate concealment and I for my part accept that explanation unreservedly.

Alternatively, Mr Nagpal asks this court to grant an extension of time for the making of the application under the proviso, so that the order of the single judge may stand. We have power to do so under rule 4, but only for "sufficient reason". Mr Nagpal has not been able to offer us any sufficient explanation for the delay in applying for the *ex parte* order, either for the delay incurred before or after he took charge of the case. It is well settled that a party seeking an extension of time under rule 4 must explain the delay and in that respect the failure of advocates to construe the rules correctly or to observe them is not a sufficient explanation. See *Transport Commissioner v The Attorney General of Uganda and Another* [1959] EA 329 and *Kiboro v Posts and Telecommunications Corporation* [1974] EA 155. In my opinion, the order of the single Judge in Civil Application No 2 of 1981 should not have been made, and must be revoked. It follows that this appeal is incompetent for failure to comply with rule 76(1). I would strike it out as incompetent and award the respondent her costs of the appeal.

Mr Oraro raised another objection to the competence of the appeal. He submitted that leave to appeal was required under the provisions of the Married Women's Property Act, 1882, and that such leave has not been obtained. For the purposes of these proceedings, I assume that that Act is a statute of general application. It was contended in the appellant's Memorandum of Appeal that the Act was not such a

statute, but the point was not argued before us. There has been no decision of this Court on the point, but in *I v I* [1971] EA 278, Trevelyan J held that the 1882 Act was a statute of general application and that decision appears to have stood unchallenged to this day.

I do not find any merit in this submission of Mr Oraro. The effect of Section 3(1) of the Judicature Act is that the provisions of the Married Women's Property Act must be read subject to the written law of Kenya, and the provisions of the written law relating to appeals as of right from the High Court to this Court are to be found in the Civil Procedure Act and in the rules made there under. Section 66 of the Act provides for an appeal as of right from the decrees or any part of the decrees and from the orders of the High Court. I have no doubt that this appeal is an appeal from a decree of the High Court. A decree is defined by Section 2 of the Act to include

“the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit ...”

During the hearing, the question arose as to whether Section 75(1)(h) of the Act and Order XLII had any application to this appeal. I think it became clear finally that those provisions did not. An order is defined by Section 2 of the Act as “the formal expression of any decision of a court which is not a decree ...” The combined effect of rules 1 and 3 of Order XLII is that appeals lie as of right under that Order only in the case of decisions under the Orders specified which are “Orders” as defined in Section 2 of the Act and not “decrees” as so defined.

**Simpson CJ.** I agree that for the reasons given by Potter JA this appeal lay as of right.

I agree also that an *ex parte* application under the proviso to rule 76(1) must be made before the time expires for lodging notice of appeal under that rule. The application to Law JA was made two years out of time and it is I think clear that by inadvertence, he was not made aware of the delay.

I agree that the *ex parte* order must accordingly be set aside and since no sufficient reason has been shown for the delay in complying with rule 76(1), the appeal is incompetent and should be struck out.

Since Kneller Ag JA also agrees, it is ordered that the *ex parte* order of Law JA be set aside, that the appeal be struck out as incompetent and that the appellant do pay the respondent the costs of the appeal.

**Kneller Ag JA.** The appellant's advocate before or within seven days after he lodged his notice of appeal should have served copies on all persons directly affected by the appeal under the provisions of rule 76(1).

Mr Thomas Openda, the husband of the respondent, was a party to the action in the High Court and he entered appearance but no more. He was not represented at the hearing of the respondent's motion on notice and although present he said nothing. The orders made by the learned Judge on May 22, 1980 directly affected him and so would those sought in this appeal. He should have been served with copies of the notice of appeal before or by June 11, 1980 because it was filed on June 3 that year.

An application for leave to dispense with such service on a person who takes no part in the proceedings in the superior court should, in my view, be made, or otherwise before or within the same seven days: see the proviso to rule 76(1): and not later (and certainly not seven months or about two years later) without the time for doing so being extended under rule 4. When the application was made, it was very much out of time and Law JA was not asked to extend the time for making it and did not do so directly or by implication. The delay has not been explained satisfactorily so the time cannot be extended by the full court today which is what Mr Nagpal, who was not the appellant's advocate at the relevant time, asked us to do when on May 12, 1982, we heard Mr Oraro for the respondent argue his appeal from the order of Law JA. Nor could it have been extended by Law JA on January 26, 1981.

Alternatively, Mr Nagpal asked us, in the event of our setting aside the order of Law JA, to extend the

time for serving copies of the notice of appeal on Mr Openda. This application also is nearly two years out of time and no sufficient reason having been shown must be refused. Mr Nagpal also suggested that on our own motion we could order such service under the provisions of rule 87 but this rule is clearly inapplicable.

The motion on notice of the respondent was made under Section 3A of the Civil Procedure Act and Order L of the Civil Procedure Rules together with Section 17 of the Married Women's Property Act, 1882, of England, which by Section 3(1) of the Judicature Act (Cap 8) has been held by the High Court to be a statute that applies in this matter so it is read subject to the written laws of Kenya which brings in the Civil Procedure Act and its rules and their provisions relating to appeal as of right.

The result of the proceedings in the superior court conclusively determined the rights of the appellant, the respondent and her husband to at least some matters in controversy in the suit (eg the purported sale of the premises at Lower Kabete Nairobi by the husband to the appellant was declared to be null and void and, instead, they were to be held on trust by the husband in equal shares for himself and the respondent) so a formal expression of this adjudication is a "decree" under Section 2 of the Civil Procedure Act. It was not, therefore, an "order" and Order XLII rules 1 and 3 of the Civil Procedure Rules were irrelevant. This decree of the High Court is what the appeal was from so there was an appeal as of right. Section 66 (ibid).

Accordingly, I agree that the order of Law JA in Civil Application 2 of 1982 should not, with respect, have been made and should be set aside.

It follows that the appeal is incompetent and must be struck out with the costs of the appeal being awarded to the respondent.

**Dated and delivered at Nairobi this 10th day of June, 1982.**

**A.H SIMPSON**

.....

**CHEIF JUSTICE**

**K.D POTTER**

.....

**JUDGE OF APPEAL**

**A.A KNELLER**

.....

**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**