



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA)

CIVIL APPEAL NO. 229 OF 2010

BETWEEN

MALVA CONSTRUCTION LIMITED.....APPELLANT

VERSUS

EAST AFRICAN BUILDING SOCIETY.....1ST RESPONDENT

EABS BANK LIMITED.....2ND RESPONDENT

ECOBANK KENYA LIMITED.....3RD RESPONDENT

(Appeal from the Ruling/Order of the High Court of Kenya Milimani Commercial Court

at Nairobi (Koome, J.) Dated 23rd April, 2010

in

H.C. Misc. Cause No. 1535 of 2007)

RULING OF THE COURT

Before me is a Notice of Motion dated and lodged in the Courts’ Registry at Nairobi on the 6th day of November, 2017, through the firm of **Rajinder Billing & Company Advocates**. The following reliefs are sought:

“(1) That this Honourable Court be pleased to grant leave for the Advocates on record for the appellant, Messers R. Billing & Co. Advocates to cease acting on behalf of the said Appellant in this case.

(2) That this Court be at liberty either to grant or/ give further directions as it may deem just.

(3) That the costs of this application be provided for.”

It is expressed to be brought under sections **3A** and **3B** of the Appellate Jurisdiction Act [Cap.9] laws of Kenya and Rules **23 (2) 42** and **43** of the Court of Appeal Rules. It is grounded on the grounds in its body and a supporting affidavit. It was opposed through oral submissions by learned counsel for the respondents.

Learned counsel **Mr. Rajinder Billing**, relying on the content of the grounds in the body of the application, the supporting affidavit; an Affidavit of service together with the Annexures annexed thereto, deposed by a **Mr. Walter Onchuru Motari** on the 21st day of November, 2017, and filed in the Courts’ Registry on the said 21st day of November, 2017, and a supplementary affidavit deposed by **Rajinder Billing** and filed in the Courts’ Registry on the 13th day of March, 2018 pursuant to leave and or directions given by me on the 12th day of March, 2018, submitted that it was true his firm of advocates is seized of the appeal herein; that they had full instructions from the appellant to lodge the said appeal, which they lodged on the 3rd day of September, 2010; that they have even taken the requisite procedural steps to progress the appeal for hearing and disposal namely, attending Court for the pre-trial directions and have even filed written submissions on behalf of the

appellant.

Further that the application under review was precipitated by the existence of unreconcilable differences between his firm of Advocates and their client, the appellant over instructions to proceed with the appeal. It is therefore not prudent for his firm to continue acting for the appellant in the circumstances, hence the application to withdraw from acting. He urged me to grant the orders sought as the application was unopposed on account of lack of opposition from the appellant, after service upon them of the application by way of registered post at their last known address, and for the respondents' none compliance with the orders of the Court made on the 4th day of December, 2017, vide which the court allowed learned counsel for the respondents to file a replying affidavit in opposition to the application.

In response to the applicants' submissions, learned counsel **Mr. O.P. Nagpal** submitted that he has no instructions to file a reply to the application under review as all that he was objecting to was the fact that as per the content of the Return of service filed, the application was served on an individual and not on the company, and therefore this was not proper service in his view. The application should therefore be rejected on that account, opined counsel.

I have given due consideration to the record before me in the light of the brief rival submissions of the respective learned counsel highlighted above. It is not disputed that the firm of **Rajinder Billing**, had full instructions to lodge the appeal that is now pending disposal. It was also pursuant to the said instructions that they embarked on taking procedural steps in the appeal with a view to progressing it for hearing and disposal and have even filed written submissions with regard thereto. They have however, expressed inability to progress the appeal to its logical conclusion, citing unreconcilable differences between them and the appellant as their client, hence the presentation of the application under review.

The procedural provisions of the rules cited by the applicant allow the presentation of the application under review. I am therefore properly seized of the matter. The applicant has also invoked the aid of sections **3A** and **3B** of the Appellate Jurisdiction Act. These are the provisions that enshrine the overriding objective principle of the Court, which principle, has already been distilled and refined by the Court in numerous decisions. I take it from the case of **Abok James Odera T/ A.J. Odera & Associates' versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** where in, the Court had this to say with regard to the applicability or otherwise of the overriding objective principle.

“The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008). The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009. The application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness. (See the case of Kariuki (Supra). In applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepakc Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009). There is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004). The overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are “O2” compliant (see the case of Hunter Trading Company limited versus ELF Oil Kenya Limited Civil Application No. Nai 6 of 2010 (UR3 (2010)). The principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the “O2” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR)62 of 2010.”

I have applied the above principle both to the content of the record and the rival submissions set out above, **Mr. Walter Onchuru Motari** the process server, in his Return of Service alluded to above, clearly expressed inability to trace the physical address of the appellant, hence his recommendation that substituted service be resorted to. Learned counsel **Mr. Billing** stated in his submissions that, in fact the appellant had been served through substituted service as recommended for by the process server. Counsel went further to point out a document in the bundle of annexures annexed to the said Return of Service, namely a certificate of registered post as proof of substituted service.

Learned counsel **Mr Nagpal** took issue with the said certificate of registered post, for the sole reason that it bore the name of an individual and not the company and also that the name given for the addressee of the said mail was not that of any of the Directors of the company.

In response to the respondents' concerns, learned counsel **Mr. Billing**, sought leave of from me to file a supplementary affidavit to introduce the said document as proof of substituted service, and which leave he was granted. The supplementary affidavit was filed on the 13th day of March, 2018 and accordingly deemed properly filed for purposes of the drafting of this ruling.

My perusal of the supplementary affidavits' contents together with the annexures annexed thereto, revealed that the contents sent by the applicant to the appellant by way of registered post were not received by the appellant at the address given. Instead, these were returned uncollected. It therefore follows that as at the time the application under review came up for hearing and disposal the appellant had no knowledge of the existence of the same. It is my considered view that although the law allows counsel to seek the leave of the Court to cease acting in any matter for a client, it also requires that such a request to cease acting be brought to the attention of the instructing client. This is the reason as to why the applicant upon failing to receive instructions from his client to progress the appeal for hearing, sought the intervention of the Court to allow him cease acting in the matter. The respondent's main objection to the Applicant's request was limited to

them contending that there has been no proper service upon the appellant. The respondents concerns were well founded as on the basis of the contents of the supplementary affidavit and the annexures annexed hereto, the appellant had not been served with the application under review. The appellant therefore has no knowledge of either the stage at which the appellate process he initiated through the applicant have reached, nor the pendency of the application under review.

It is my considered view, that, granting prayer one of the application as prayed for and on the facts placed before me herein will defeat the overriding objective principle as it is likely to delay the speedy disposal of the appeal. Orders that commend themselves to me and which in my view will serve ends of justice to all parties involved in this application are therefore as follows:-

- (1) Determination of prayer 1, is deferred pending compliance with the directions that follow under prayer 2.
- (2) Prayer 2 of the application is therefore allowed. Directions be and are hereby given that the appellant be served with the notice for the hearing of the application under review by way of advertisement once in any daily newspaper of wide circulation.
- (3) The said notice to the appellant to contain an item indicating that both the application under review and the other attendant documents mentioned in the Return of Service of **Mr. Motari** are deposited in the Courts' Registry for collection.
- (4) That a return of service be filed upon such compliance with items 2 and 3 above.
- (5) That upon compliance with items 2 and 3 above, the file be listed for necessary orders to be made with regard to the disposal of prayer 1.
- (6) Costs of the application to abide the disposal of prayer 1.

Dated and Delivered at Nairobi this 19th day of March, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

Deputy Registrar