



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, M'INOTI & ODEK, J.J.A.)

CIVIL APPEAL NO. 66 OF 2015

IN THE MATTER OF NGOMENI SWIMMERS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 LAWS OF KENYA

(An application to strike out the record of appeal filed on 22nd September 2015 against the ruling and order of the High Court of Kenya at Malindi, (Chitembwe, J.) dated 11th June 2015

in

Winding Up Causes Nos. 1 and 2 of 2014)

RULING OF THE COURT

Before us are two applications seeking to strike out the notice of appeal lodged on 9th June 2015 and the record of appeal filed on 22nd September 2015 by *Ngomeni Swimmers Limited (the Company)*. The applications are by creditors of the Company who had petitioned the High Court for its winding up. The applicant in the first application is *St Patrick's Hill School Limited*, which filed against the Company *Winding Up Petition No 1 of 2014* while the second application is by 12 applicants responsible for filing *Winding Up Petition No. 2 of 2014*. For convenience we shall refer to St Patrick's Hill School Ltd as the *1st applicant* and the other applicants collectively as the *2nd applicant*.

The short background to the applications is that in February 2013 the Company took out Originating Summons in the High Court against the 1st and 2nd applicants, among others, seeking determination of a boundary dispute. Upon dismissal of the suit, the 1st and 2nd applicants respectively taxed their costs at *Kshs 2,400,000/-* and *Kshs 2,590, 113/-*. Subsequently they filed the two petitions to wind up the company for non-payment of those sums.

On 11th February 2015 the company applied to strike out the winding up petitions for noncompliance with provisions of the *Companies (Winding Up) Rules* and on the further ground that court had stayed execution for the sums claimed by the applicants. *Chitembwe, J.* heard and dismissed that application on 11th June 2015, prompting the Company to lodge a notice of appeal on 19th June 2015 and the record of appeal on 22nd September 2015. It is that notice of appeal and the record of appeal that the two applications before us seek to strike out.

Mr. Kang'ethe, learned counsel for the 1st applicant urged us to strike the record of appeal on three grounds. The first was that the record of appeal was filed out of time without leave of the court. The second ground was that there was no automatic right of appeal to this Court and the 1st applicant had not obtained leave to appeal from either the High Court or this Court. Lastly it was contended that the appeal was incurably defective for failure to comply with **rule 87(5)** of the **Court of Appeal Rules**, which requires an appellant or an advocate to certify that the record of appeal is correct.

Mr. Sumba, learned counsel for the 2nd applicant supported the striking out of the record of appeal on the ground that there being no automatic right of appeal, the Company had failed to first apply for and obtain leave to appeal.

Mr. Gicharu Kimani, learned counsel for the Company opposed the two applications and urged us to dismiss them for lack of merit. Counsel contended that the Company had a right of appeal and did not need to apply for leave to appeal, and further that the appeal was filed on time. He relied on a letter dated 18th June 2015 bespeaking copies of the proceedings and ruling and the certificate of delay in the record of appeal dated 3rd September 2015 to support the contention that the appeal was filed on time.

We have duly considered the application and submissions of learned counsel. The objection taken by the 1st applicant regarding noncompliance with rule 87(5) is a mere technicality. All that the rule requires is certification that the record of appeal is correct. The 1st applicant has not identified what aspect of the record of appeal is incorrect or the manner in which lack of certification has affected the competence of the appeal or otherwise occasioned it prejudice. We are satisfied that in the circumstances of this application, breach of rule 87(5) is a technicality which does not go to the root of the appeal and is therefore curable under **Article 159 (2) (d) of the Constitution** and the overriding objective in **sections 3A and 3B** of the Appellate Jurisdiction Act.

As the Supreme Court stated in **LAMANKEN ARAMAT V. HARUN MAITAMEI LEMPAKA, SC PETITION NO. 5 OF 2014:**

“A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court’s jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character.”

As regards whether the appeal was filed out of time without leave, we agree with counsel for the Company that there is no merit whatsoever in that ground. The ruling of the High Court was delivered on 11th June 2015. The notice of appeal was lodged on 19th June 2015, which is within 14 days of the ruling as required by **rule 75(2)** of the **Court of Appeal Rules**. The company subsequently applied, by a letter dated 18th June 2015, for certified copies of the ruling and proceedings. That letter was served upon counsel for the 1st applicant on 23rd June 2015 and upon counsel for the 2nd applicant on 19th June 2015. The application by the company bespeaking proceedings was made in writing within 30 days of the ruling and was served upon counsel for the intended respondents as required by the proviso to **rule 82** of the Court of Appeal Rules.

Having duly complied with the requirements of the proviso to rule 82, the 60 days within which the Company was required to file the record of appeal started running from the date the Company was notified by the Registrar that the certified copies of the proceedings were ready for collection. (See **BENEDICT MWANZIGHE & ANOTHER V. GASPER WALELE & 2 OTHERS, CA NO. 255 OF 2010 (MOMBASA)** and **DEVELOPMENT BANK OF KENYA & ANOTHER V. FRANCIS NDEGWA T/A MURUGURU HOLDINGS LTD, CA NO. 28 OF 2013 (NYERI)**).

According to the certificate of delay in the record of appeal, the Company was notified of the availability of certified proceedings on 25th August 2015. Since the record of appeal was filed on 22nd September 2015, it follows that it was filed within 60 days from the date when the certified proceedings were available. Accordingly the appeal was filed well within the prescribed time and the second ground is therefore equally bereft of merit.

The last ground relates to the right of appeal and whether the Company was obliged to obtain leave to appeal. Although counsel for the applicants referred us to the **Civil Procedure Rules** in support of their contention that the Company had no automatic right of appeal from the ruling of the High Court in the exercise of its Winding Up jurisdiction, there is no merit in that argument and the ground for striking out the appeal based on it must fail too. The Winding Up jurisdiction of the High Court is conferred by **section 218** of the **Companies Act** and under **section 270** of the same Act, subject to any conditions and limitations prescribed by the rules, an appeal lies as of right to this Court from any decision or order given by the High Court in the exercise of the jurisdiction conferred upon it by section 218.

The two applications have absolutely no merit and are hereby dismissed with costs to the Company. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR