



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU, & MURGOR, JJA.)

CIVIL APPLICATION NO. 50 OF 2015

BETWEEN

AFRICA OIL TURKANA LIMITED.....1ST APPLICANT

AFRICA OIL KENYA BV.....2ND APPLICANT

AFRICA OIL CORPORATION.....3RD APPLICANT

AND

EDWARD KINGS ONYANCHA MAINA..... 1ST RESPONDENT

MAOSA KENGARA MONENA.....2ND RESPONDENT

CENTRIC ENERGY CORPORATION.....3RD RESPONDENT

INTERSTATE PETROLEUM

COMPANY LIMITED.....4TH RESPONDENT

(An Application to strike out the Notice of Appeal lodged by the 1st respondent on 21st July 2015, in the intended appeal against the Judgment and order of Kimondo, J, dated 2nd July 2015 and delivered in the High Court of Kenya at Eldoret,

in

Winding Up Cause No. 1 of 2014

(formally Winding Up Cause No 1 of 2012 Kitale)

RULING OF THE COURT

The applicants' Notice of Motion dated 17th September 2015 seeks to strike out the 1st respondent's

Notice of Appeal dated 21st July 2015 and filed in court on the same day. The application is supported by an affidavit sworn by Faith Macharia- Okaalo, learned counsel for the applicants.

In the affidavit, **Ms. Okaalo** avers that the judgment of the High Court was delivered on 2nd July 2015 wherein the High Court ordered the Winding Up of Interstate Petroleum Company Limited, the 4th respondent. That on 21st July 2015 the 1st respondent filed a Notice of Appeal well after the 14 days period specified by the **rule 75** of this Court's rules. She further avers that a copy of the Notice of Appeal was served on the applicants on 31st August 2015 well after the mandatory 7 days period specified by the rules, and that no application had been filed by the 1st respondent to extend the period for filing and service of the Notice of Appeal on the applicants.

Furthermore it is averred that the 1st respondent had also neglected to serve the Notice of Appeal on other affected parties namely, **Eric Patrick Adero Obat, Moses Ombonyo Onyango** and **Lucy Muthoni Gatimu** (*the affected parties*), and that he had also failed to file an application to obtain an order dispensing with service on the named affected parties.

In a replying affidavit dated 7th December 2015, the 1st respondent described the delay in filing and serving the Notice of Appeal on the applicants as a regretful slip on his part which was in any event curable under **Article 159 (2) (d)** of the **Constitution**; that the delay would not occasion any prejudice to the applicants or the affected parties in any event did not appear in the High Court during the hearings.

The 1st respondent also filed grounds of opposition which state that the applicants Notice of Motion violated **section 3A and 3B** of the **Appellate Jurisdictions Act**, **section 5** of the **Oaths and Declarations Act**, **sections 9, 11, 12, 24, 34** and **55** of the **Advocates Act**, **sections 1A** and **1B** of the **Civil Procedure Act** and **sections 17 to 19, 43-47** and **107-109** of the **Evidence Act**. This was for reasons that Anjarwalla & Khanna Advocates allegedly lacked ostensible legal authority and the locus standi to draw and sign the Notice of Motion. As a result it was incurably and irredeemably defective and incompetent, bad in law, an abuse of the court process, frivolous, oppressive, and scandalous *ab initio*; further, that the Notice of Motion approbates and reprobates on the question of whether the service of the Notice of Appeal was upon all parties affected by the intended appeal, yet some parties were not served with a hearing notice in the High Court at Eldoret.

The 1st respondent also complains that no proof had been tendered on whether legal and ostensible authority had been donated to Faith Macharia- Okaalo to swear the affidavit of 17th September 2015 on behalf of the firm of advocates, or whether Alice Jonathan Gulenywa complied with the requirements of **sections 9, 11, 12, 24, 34** and **55** of the **Advocates Act** to make and commission the affidavit.

It was further contended that the Constitution of Kenya excludes Saturdays and Sundays as working days, and that **Article 159 (2)(d)** of the Constitution enjoins courts to dispense substantive justice. The 1st respondent took the view that the 7 days period set out in the rules was short oppressive and untenable, but that in any event the delay in effecting service on the applicants was not inordinately long.

In her submissions, **Ms. Okaalo** reiterated the averments in her submissions and to support her position she relied on **Ransa Company Limited & 2 others vs Manca Francesco [2015] eKLR**; **Turkana Drilling Consortium (K) Limited vs Interstate Petroleum Company Limited Civil Application No. 21 of 2011** and **Afri Co-operative Society vs Uganda Railway Corporation [2002] EA**. Counsel concluded by urging the Court to find that the 1st respondent's Notice of Appeal was incompetent and to strike it out.

Edward Kings Onyancha Maina, the 1st respondent who was in person, opposed the application and submitted that this Court had no jurisdiction to entertain the application that did not disclose the name of the law firm, and that the person that filed it was unqualified. Mr. Maina further submitted that the affidavit sworn by the applicants' counsel offends **section 107 to 109** of the **Evidence Act** since nothing was filed to prove that Ms. Okaala was authorised to swear the affidavit on their behalf. Another complaint was that, the applicants had misinterpreted the provisions on computation of time to include

Saturdays and Sundays, which days ought to have been excluded, with the result that the filing and service of the Notice of Appeal would be deemed to have been within the timeframes stipulated. Finally, that nothing had been produced by any of the affected parties to show that they had not been served.

On his part **Mr. Z Moku** adopted the submission of the 1st respondent but further added that **sections 3A** and **3B** of the **Appellate Jurisdiction Act** donated wide discretion to the Court to grant a party an opportunity to be heard, and if granted, the party would be placed in a position to regularize a misstep or an omission. Counsel posited that appeals such as this should be decided on merit and not on technicalities, particularly as the matter is of national importance. The Court should recognize that striking out the Notice of Appeal would be counter productive as the 1st respondent will simply resort to filing an application to reinstate the appeal, which would be a waste of the Court's time.

We have considered the application and the parties' submissions and will begin by addressing Mr. Maina's contention that the application was incompetent on account of its having been filed by unqualified persons as required by **sections 9, 11, 12, 24, 34, and 55** of the **Advocates Act** and **sections 107 to 109** of the **Evidence Act**.

Sections 34 and **35** of the **Advocates Act** are the relevant provisions, and are concerned with the drawing up of proceedings by unqualified persons, and also provide that the documents relating to the proceedings should bear the names of the drawer, while **sections 107 to 109** of the **Evidence Act** places the burden of proof on the person alleging the existence of facts.

The Notice of Motion is clearly signed by Anjawalla & Khanna Advocates who state that they are the advocates for the applicants. Having alleged that the firm of Anjawalla & Khanna Advocates were unqualified, it was incumbent upon Mr. Maina to place before this Court evidence to prove that allegation but he did not. Mr. Maina has also not proved that Ms. Okaalo, an advocate of the High Court of Kenya practicing with Anjarwalla & Khanna Advocates, who swore the affidavit in support of the application was not qualified to do so. In the circumstances, that ground of opposition falls.

On the question that the applicants miscalculated the computation of the period for filing of the Notice of Appeal by including Saturdays and Sundays, **rule 3** of this Court's rules only excludes Sundays and public holidays, and only when they fall on the last day of the stipulated period. It reads;

“(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;

(b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c)...”.

In the circumstances, we find that the 1st respondent incorrectly construed **rule 3** of this Court's rules.

Finally, on the issue that no evidence was produced by any of the affected parties to show that they had not been served, since the onus was upon the 1st respondent to show that the affected parties had indeed been served, which he has not done, then, we must accede to the applicants' averments regarding the failure to serve the affected parties.

Returning to the merits of this application, it is the applicants' contention that the 1st respondent flouted **rules 42, 75, and 77** of the **Court of Appeal rules**. **Rule 75** of this Court's rules provides that the Notice of Appeal shall be filed within 14 days of the decision that is appealed against.

Rule 77 (1) “An intended appellant” ... to “serve copies”... of the notice of appeal ... “on all persons

directly affected by the appeal.”

Rule 84 further stipulates:

“A person affected by an appeal 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 or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”.

The Notice of Appeal in this case was lodged on 21st July 2015 which was 18 days after the judgment was delivered. That contravened **Rule 75**. A copy of the Notice of Appeal ought to have been served on the applicants within 7 days after it was lodged in court, but was not served on them until 31st August 2015, which was a delay of 34 days. That also contravened **Rule 77 (1) of the said Rules**.

The Notice of Appeal was also not served upon on all the affected parties and yet no leave was obtained to dispense with service upon any party. These are fatal omissions which both Mr. Maina and Mr. Mokua would like to wish away under **Article 159(2)(d)** of the **Constitution** and **sections 3A** and **3B** of the **Appellate Jurisdiction Act** as mere technicalities. **Article 159(2)(d)** cannot be invoked to oust mandatory rules of procedure. And as this Court stated in ***Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. Nai. 6 of 2010***, **“If improperly invoked, the “02 principle” [sections 3A and 3B of the Appellate Jurisdiction Act] could easily become an unruly horse.”**

For these reasons, we find that the 1st respondent omitted essential and mandatory steps in his attempt to appeal in this matter Accordingly we allow the Notice of Motion dated 17th September 2015 with the result that the Notice of Appeal lodged on 21st July 2015 is hereby struck out with costs to the applicants.

It is so ordered.

DATED and delivered at Kisumu this 21st day of April, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR