



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CIVIL APPEAL NO. 39 OF 2014**

**BETWEEN**

**MUKESH MANCHAND SHAH ..... 1<sup>ST</sup> APPELLANT**

**HARISH RAICHAND SHAH.....2<sup>ND</sup> APPELLANT**

**AND**

**PRIYAT SHAH.....1<sup>ST</sup> RESPONDENT**

**MONA SHAH.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the ruling and order of the High Court of Kenya at Mombasa*

*(Odero, J.) dated 23<sup>rd</sup> July, 2014*

*in*

***Mombasa HCCC No. 37 of 2013(OS)***

**\*\*\*\*\***

**RULING OF THE COURT**

When this appeal came up for hearing on 11<sup>th</sup> March, 2015, counsel agreed by mutual consent that it be determined by way of written submissions. The Court set 22<sup>nd</sup> April, 2015 to mention it for the purpose of either highlighting the submissions or taking a date for judgment. The appeal was, as a matter of fact and pursuant to that order, listed before us on 22<sup>nd</sup> April, 2015. On record was a notice of cross appeal which had been filed the previous day, on 21<sup>st</sup> April, 2015.

**Mr. Inamdar**, learned counsel for the appellant objecting to the notice of cross appeal, submitted that in terms of **Rule 93(2)** of the Court of Appeal Rules and the holding in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696**, the notice of cross appeal was irregularly on record and urged us to accordingly expunge it.

**Mr. Khagram**, learned counsel for the respondent for his part argued that the notice of cross appeal was first erroneously filed on 19<sup>th</sup> March, 2015 in the High Court by the clerk on a mistaken belief that, like a

notice of appeal under **Rule 75(1)** the notice of cross appeal is also lodged in the High Court. Immediately this mistake was realized, the notice was properly filed in this Court as explained; that the notice was filed within the time stipulated by **Rule 93(2)** aforesaid. He urged the Court to consider the notice as duly lodged on 19<sup>th</sup> March, 2015.

**Rule 93(2)** requires that:

**“A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal or not less than thirty days before the hearing of the appeal, whichever is the later.”** (Our emphasis)

We are only concerned with the highlighted last part of this rule. According to Mr. Inamdar the notice of cross appeal was filed outside the period stipulated, having been filed on 21<sup>st</sup> April, 2015 just a day before the hearing; that it ought to have been filed not less than thirty days before 11<sup>th</sup> March, 2015 which, in his view, was the hearing date; that a cross appeal being a separate and independent appeal, directions ought to have been given on that date as to its hearing just as was done with the main appeal.

Mr. Khagram, however, maintained that a cross-appeal is not an independent appeal but is brought in the context of the main appeal; that the hearing of the appeal did not commence on 11<sup>th</sup> March, 2015 but was due to commence on 22<sup>nd</sup> April, 2015 when counsel were expected to highlight their submissions.

While it is a common factor that under **Rule 93(2)** the notice of cross-appeal ought to have been lodged not less than thirty days before the hearing of the main appeal, there is no agreement on whether indeed the notice was so lodged.

For the respondent the notice was lodged on 19<sup>th</sup> March, 2015, albeit in the High Court, in which case, counsel submits, it was lodged more than thirty days before 22<sup>nd</sup> April, 2015, the hearing date.

The determination sought in this objection is whether the hearing of the appeal was on 11<sup>th</sup> March, 2015 in which case there was no notice to talk of as it was filed way after the hearing date or whether the hearing was on 22<sup>nd</sup> April, 2015 and assuming that the notice lodged in the High Court was excusable then it is argued that more than thirty days had elapsed since it was filed in satisfaction of **Rule 93(2)**.

We reiterate that the appeal was set to be heard on 11<sup>th</sup> March, 2015 but was adjourned to enable counsel for the appellants to study the list of authorities served upon him by counsel for the respondents. At this stage parties recorded a consent to file written submissions. They were given 22<sup>nd</sup> April, 2015 to highlight the submissions and /or be given a date for judgment.

It is clear to us from our reading of **Rules 101-104** of the Court of Appeal Rules that “a hearing” of appeals in this Court is conducted by parties or counsel presenting arguments either orally or in the form of written submissions. Where parties elect the latter, **Rule 104(d)** directs that:

**“(d) The arguments contained in any statement lodged under rule 100 shall receive the same consideration as if they had been advanced orally at the hearing.”**

What took place on 11<sup>th</sup> March, 2015 cannot, with respect to learned counsel for the appellant, amount to a hearing in the strict sense of the word because the arguments must first of all be presented and adopted by the Court. On 22<sup>nd</sup> April, 2015 whether counsel chose to highlight their submissions or simply asked for a date for judgment, that in our considered view, would have been the hearing date.

Having found that the hearing date for purposes of the appeal was on 22<sup>nd</sup> April 2015, the next question is whether the notice of cross appeal was lodged more than thirty days before that date.

It seems to us that the mischief in **Rule 93(2)** is to ensure that the notice given to an appellant is sufficient and not less than what a respondent gets in the main appeal. **Sub-rule (2) of Rule 93** highlighted in the part reproduced earlier in this ruling, requires, the notice to be lodged in the “*appropriate registry*” as defined in **Rule 6**, namely the registry of this Court. Form G in the First Schedule confirms this from its heading.

The lodgment of the notice in the High Court was therefore of no effect. The requirement of **Rule 93** was not met when ultimately on 21<sup>st</sup> April, 2015 it was lodged in this Court. It was far less than thirty days by twenty nine (29) days. At that stage direction on the determination of the main appeal had been given and indeed submission filed and exchanged. As the directions did not contemplate the cross appeal, parties could not have been expected to include it in their submissions.

In the result the notice of cross appeal dated 21<sup>st</sup> April, 2015 and lodged on the same day is expunged from the record. Costs will be in the appeal.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of May, 2015.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W.OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**