IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL (APPLICATION) NO. 134 OF 2009

BETWEEN

KENYA COMMERCIAL BANK LIMITED....APPLICANT/1ST RESPONDENT

AND

BENJOH AMALGAMATED LIMITED............RESPONDENT/APPELLANT

BIDII KENYA LIMITED..2ND RESPONDENT

(An application to strike out the record of appeal from a

ruling & order of the High Court of Kenya at Nairobi

(Khaminwa, J) delivered on 14th May, 2009

in

HCCC NO. 494 OF 2008)

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RULING OF THE COURT

Background

1. The applications before the Court are two [2] notices of motion, one dated 24th July, 2009, by the applicant/1st respondent, ***KENYA COMMERCIAL BANK LIMITED***, seeking to strike out the record of appeal in respect of **CA No. 134 of 2009** [the appeal] arising from the ruling of the High Court, (Khaminwa, J), delivered on 14th May, 2009, and the other dated 27th July, 2009, by the 2nd respondent, ***BIDII KENYA LIMITED***, also seeking to strike out Civil Appeal No. 134 of 2009.

2. The applicant's notice of motion was brought pursuant to ***Rules 42, 80 and 85 of the Court of Appeal Rules*** and was supported by the affidavit of Chris Theuri, an employee of the applicant/1st respondent, sworn on the same day. In it he deposed that the record of appeal did not contain primary documents, some affidavits and exhibits as envisaged by ***Rule 85(1)(f) of the Court of Appeal Rules***. Further, he deposed that the appellant did not seek leave of the Court to exclude documents from the record contrary

to ***Rule 85(3) of the Court of Appeal Rules***. The primary documents purported to be missing from the record were listed by the deponent to include: the application seeking injunction, several affidavits in reply to the application, grounds of opposition, plaint and defence and the trial court?s typed proceedings.

3. The 2nd respondent, ***BIDII KENYA LIMITED***, also filed a notice of motion, dated 27th July 2009, brought pursuant to ***Rules 42 and 80 of the Court of Appeal Rules***. It is supported by the affidavit of Rahul Diesh Bid, a director of the 2nd respondent sworn on 27th July 2009. The motion similarly seeks the striking out of the appeal with costs. This motion is supported by several grounds. It is deposed that the appellant, ***BENJOH AMALGAMATED LIMITED*** has no ***locus*** to prefer the appeal since the application and subsequent ruling by the learned judge delivered on 14th May, 2009 was only in respect of ***MUIRI COFFEE ESTATE LIMITED***. Further, it is deposed that the appeal was filed without leave and that the record of appeal is defective as it lacks essential documents in clear contravention of ***Rule 85(1)(d) of the Court of Appeal Rules***.

4. In opposition to the application to strike out their appeal, the respondent/appellant's director, Samuel Kungu Muigai swore and filed two affidavits in reply to the application dated 24th July, 2009, one sworn on 18th February, 2010 and the other sworn and filed on 9th March, 2015. He deposed that the respondent/appellant has duly complied with the requirements of ***Rule 85(3) of the Court of Appeal Rules*** as the record of appeal was complete. Further he deposed that under ***Rule 85(2)(a) of the Court of Appeal Rules***, the respondent/appellant has an option of filing a supplementary record of appeal, which was unnecessary since all relevant documents are now on record.

5. In the second more detailed replying affidavit, the respondent/appellant has invoked the new constitutional principles that require courts not to pay undue regard to technicalities. Further, this Court is urged to take note of the pleadings and primary documents which are attached to the affidavit of Chris

Theuri in his supporting affidavit dated 24th July, 2009, and see the pleadings as being, for all intents and purposes, before the Court. It is further deposed that failure to include primary documents in the record of appeal does not render the appeal incompetent in view of the overriding objective under the Appellate Jurisdiction Act and therefore the Court should not take the draconian step of striking out the appeal. It is deposed that any defect to be found in the record is curable and therefore the appeal should be heard on its merits.

Submissions by counsel

6. When the application came before the Court for hearing, all the parties were represented by learned counsel: Mr Issa represented the applicant/1st respondent and the 2nd respondent while Mr Wachakana represented the respondent/appellant.

7. Mr Issa submitted that since the application before the High Court was dismissed, the respondent/appellant cannot subsequently file an appeal against a decision where no orders were made, especially since no leave was sought or granted by the High Court; that the appeal is incompetent and should be struck out since the appellant has omitted various primary documents in compiling the record of appeal and that the appellant was not a party to the proceedings that resulted in the impugned ruling. Counsel urged us to strike out the appeal with costs to the applicant/1st respondent and the 2nd respondent.

8. In opposing the application, Mr Wachakana submitted that there was a replying affidavit on record and a list of authorities on which he relies on in support of his case. Counsel urged the Court to invoke the constitutional principle that courts should not pay undue regard to technicalities. Counsel further urged the Court to take judicial notice of the pleadings and documents annexed to the applicant's application and deem them as duly and properly filed as part of the record of appeal. In response to the application that no typed proceedings from the High Court have been made part of the record, counsel urged the Court to note that counsel had applied for the same to be made available to them via their letter dated 18th May, 2009, to the High Court but there has since been no reply. Counsel relied on his list of authorities to

support his contention that the appeal should not be struck out.

9. In reply, Mr Issa reiterated that the authorities cited by counsel for the respondent/appellant are not applicable in the present circumstances where the respondent/appellant is not a party to the impugned ruling.

Determination

10. We have considered the applications, supporting affidavits, replying affidavits and submissions made by counsel.

11. There are two key issues for the court to consider and these are:

> *i. whether the respondent/appellant had the requisite* ***locus standi*** *to file the appeal, and*
>
> *ii. whether the Record of Appeal is incompetent by reason of omission of primary documents.*

In the event that we find that the respondent/appellant has no ***locus standi*** to file the appeal, we shall not proceed to delve into the second issue.

1. Does the respondent have the requisite *locus standi* **to file the appeal?**

Locus standi is defined in the Oxford Dictionary of Law, 5th Edition as *'the right to bring an action or challenge some decision'*. It is defined in Black's Law Dictionary, 9th edition as *'the right to bring an action or to be heard in a given forum'*. This Court has previously considered the issue of *locus standi* or lack thereof and its effects in ***KAKUTA MAIMAI HAMISI V PERIS PESI TOBIKO & 2 OTHERS*, *[2013] eKLR*** where the court stated as follows:

> ***"The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at*** *Article 159 (2) (d) of the Constitution****.***
>
> ***We do not consider*** *Article 159 (2) (d)* ***to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation. … It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law. That much is clear from a plain reading of the constitutive statute of this Court, the*** *Appellate Jurisdiction Act, Cap 9****, which provides as follows:***
>
> ***"S3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High court in cases in which an appeal lies to the Court of Appeal under any law."*** *(Our Emphasis).*
>
> ***The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie."***

12. The application in the High Court dated 10th February, 2009, was filed by the respondent/appellant herein and **Muiri Coffee Estate Limited** against the applicant/1st respondent and the 2nd respondent. The application sought stay of taxation proceedings before the Taxing Master including execution of taxed costs. The application also sought the setting aside, review of orders of 29th September, 2008 made by the learned Judge (Khaminwa, J). The application was based on the grounds that the Board of Directors of **Muiri Coffee Estate Limited** had appointed the firm of Gichuki Kingara & Company Advocates to act for them in place of firm of Wachakana & Company Advocates.

13. In the impugned ruling of 14th May, 2009, the learned judge stated:

> ***"According to the record of 29th September, 2008, there was chamber summons filed by Wachakana & Company Advocates on behalf of both the plaintiffs. ... The plaint together with verifying affidavit was filed by Wachakana Advocates."***

14. The learned judge also stated that on 29th September, 2008, Mr Wachakana addressed the court and stated:

> ***"I wish to notify the court that the second plaintiff, Muiri Coffee Estate Ltd wishes to discontinue the suit against both defendants. ... "***
>
> [Emphasis supplied]

15. The learned judge ruled that Wachakana or his firm were duly authorised to represent the 2nd plaintiff on 29th September, 2008. Accordingly, the application was dismissed with costs to both defendants.

16. Aggrieved by that decision, the respondent/appellant filed Civil Appeal No. 134 of 2009, against the ruling. **Muiri Coffee Estate Limited** is not a party to that appeal.

17. The question is whether the respondent/appellant is a party affected by the impugned ruling in view of the fact that the same related solely to **Muiri Coffee Estate Ltd**.

18. The Supreme Court in the case of ***SAMUEL KAMAU MACHARIA & ANOR V KENYA COMMERCIAL BANK LTD & 2 ORS, [2012] eKLR*** stated:

> ***"an appeal against a decision of a lower court is always commenced by a party who is aggrieved by that decision."***

19. We are guided by the case of ***AHN V OPENDA, (1982) KLR 87*** which held that a party who has taken no part in the proceedings may be a person directly affected by the appeal. Further in the case of ***ONJULA ENTERPRISES LTD V SUMARIA, (1986) KLR,*** 651 at 655, this Court held that a person directly affected by an appeal need not be only those who were parties to the proceedings.

20. A party who is aggrieved by a judgment or ruling of a trial court has a right of appeal. Who then is an aggrieved party? Black's Law Dictionary 8th Ed. 2004, at page 205 defines „aggrieved? as:

> "***Of a person or entity having legal rights that are adversely affected having been harmed by an infringement of legal rights***."

„Aggrieved party? is defined at page 3548 as:

> "***A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment***."

21. In the American decision of ***CULTON V CULTON, 398 S.E 2d 323,*** *Supreme Court of North Carolina, filed December 5 1990*, it was stated with approval that:

> "***Only a*** *'party aggrieved'* ***may appeal from an order or judgment of the trial division. An aggrieved party is one whose rights have been directly and injuriously affected by the action of the Court."***

22. The respondent/appellant was not an aggrieved party to the ruling against which it has filed an appeal. If the respondent/appellant was not a party directly affected by the impugned ruling in respect of HCCS NO. 494 of 2008, does it have ***locus standi*** to challenge on appeal the decision and order entered by the

court?

23. In the circumstances, the respondent/appellant does not have ***locus standi*** to challenge on appeal the ruling of the learned judge delivered on 14th May, 2009. This particular case concerns private rights between private citizens and is not one that concerns public interest, where the courts often have held that ***locus standi*** is to be applied widely to at times include general members of the public (see for instance the decision of the Supreme Court in ***MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS, [2014] eKLR.***

24. As has been shown above in the case of ***Kakuta Maimai Hamisi, (supra)*** the question of the right to appeal goes to jurisdiction, therefore if the appellant before the court does not have the requisite right to appeal then the court ought to immediately down its tools and abandon the matter altogether in line with the oft-cited decision of the Court of Appeal in the case of ***THE OWNERS OF MOTOR VESSEL „LILLIAN S? V CALTEX OIL KENYA LIMITED, (1989) KLR 1,*** where Nyarangi JA stated as follows:

> ***"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

25. This is further emphasised by the Supreme Court in the aforesaid case of ***Mumo Matemu, supra*** where the court stated:

> ***"The issue of*** *locus standi* ***raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In*** *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR,* ***this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis."***

26. Having taken the view that the respondent/appellant lacks the ***locus standi*** to file the appeal, this Court lacks the jurisdiction to hear it.

Accordingly, the two notices of motion dated 24th July, 2009, and 27th July, 2009, are hereby allowed. The effect is that the record of appeal in respect of **CA NO. 134 OF 2009**, filed on 29th June, 2009, is struck out with costs to the applicant/1st respondent and the 2nd respondent.

Dated and delivered at Nairobi this 31st day of July, 2015.

P. O. KIAGE

JUDGE OF APPEAL

K. M?INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR