



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPLICATION NO. 2 OF 2015 (UR 1/2015)

BETWEEN

FEISAL MOHAMED ALI alias FEISAL SHAHBAL.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Application for bail pending hearing and determination of Mombasa Chief Magistrate's Court Case No. 1098 of 2014 following rejection of such an order by Hon. Justice Muya

in

Mombasa H.C. MISC APP. NO. 39 of 2015)

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RULING OF THE COURT

At the hearing of the applicant's application for an order that he be released on bail pending trial by the Chief Magistrate's Court, Mombasa, the respondent raised a preliminary objection on jurisdiction of this Court to entertain the application, which the parties agreed, quite rightly, should be heard and determined *in limine*. This ruling relates to that preliminary objection.

By way of background and context, the applicant, *Feisal Mohamed Ali* alias *Feisal Shahbal* and five others are charged before the Chief Magistrate's Court with two offences under the *Wildlife Conservation and Management Act, No. 47 of 2013*. In the first count they were charged, jointly with others not before the court, with possession of wildlife trophies without a permit contrary to **section 95** as read with **section 92** of the said Act, while in the second they were charged with dealing in wildlife trophies without a license contrary to **section 84(1)** as read with section 92 of the same Act. The offences were alleged to have been committed on 5<sup>th</sup> June 2014 at Tudor Estate Mombasa and the wildlife trophies involved are 314 elephant tusks weighing 2,152.45 kg.

The applicant's co-accused took their pleas on 11<sup>th</sup> June 2014 and 23<sup>rd</sup> June 2014 and each was released on bond of Kshs 10 million and one surety of similar amount. The record shows that the applicant was not in court on either date, prompting the prosecution to apply for a warrant of his arrest on the grounds that he was on the run from justice. It is not in dispute that the applicant was ultimately arrested, with the assistance of *INTERPOL*, six months later in the United Republic of Tanzania. Whether he was there

innocently or in a bid to avoid arrest and trial for the offences aforesaid is a hotly contested issue.

Be that as it may, the applicant was arraigned in court on 24<sup>th</sup> December 2014 when he pleaded not guilty to the charges. The prosecution opposed his application for bail or bond citing what they considered to be his flight to Tanzania and contended that from his antecedents, he was a real flight risk. By a ruling dated 9<sup>th</sup> January 2015, the trial magistrate concurred with the prosecution and declined to order release of the applicant on bail or bond pending trial. That ruling was subject of appeal in ***High Court Miscellaneous Application No. 39 of 2015***, which was dismissed on 9<sup>th</sup> July 2015 because, among other things, the issues it raised had already been determined by the High Court earlier on 30<sup>th</sup> March 2015.

Three months after denial of bail by the trial court, the applicant renewed his application for bail before the same court, citing on the main changed circumstances, to wit, his health condition. The application was strenuously opposed by the prosecution, which insisted that there were no changed circumstances and that the applicant was still a flight risk. By a ruling dated 18<sup>th</sup> March 2015, the trial magistrate granted the applicant bond of Kshs 10 million with one surety, presumably for the same amount and imposed some other conditions regarding his passport and travel out of the court's jurisdiction.

This new order aggrieved the respondent who immediately applied to the High Court for an order of revision, relying on some 6 grounds to impeach the ruling of the trial court. By a ruling dated 30<sup>th</sup> March 2015, ***Muya, J.*** held that there were no changed circumstances between the dates of the two rulings of the trial court and that the risk of the applicant's flight was real and constituted sufficient cause under the Constitution for denial of bail. Accordingly the learned judge revised the order for release of the appellant on bond.

Subsequently, the applicant applied to the High Court for review of its order on revision dated 30<sup>th</sup> March 2015, claiming that the High Court had not properly appreciated the changed circumstances. Muya, J. again did not see any merit in the application and dismissed the same on 18<sup>th</sup> May 2015.

Matters became a bit murky when the applicant next went back before the trial court and applied for bail, which was granted on 21<sup>st</sup> August 2015. Undeterred, the respondent immediately filed yet another revision application in the High Court raising a host of issues, among them whether the subordinate court could validly reverse the findings of the High Court that the applicant was a flight risk, and grant him bail. By a ruling dated 26<sup>th</sup> August 2015, the High Court once again revised the order of the trial court and cancelled the order for the release of the applicant on bail.

The next stage in this saga was the applicant's omnibus application dated 28<sup>th</sup> August 2015, in which he asked the High Court, on the basis of various constitutional arguments, to review all its previous rulings and orders regarding his release on bail. ***Chepkwony, J.*** heard that application and dismissed the same on 29<sup>th</sup> September 2015 after finding that all the issues raised by the applicant had been considered and addressed by Muya, J. It was after that ruling that the theater of battle moved to this Court.

On 3<sup>rd</sup> November 2015, the applicant filed an omnibus Motion on Notice in this Court seeking two main prayers, firstly extension of time under ***rule 4*** of the ***Court of Appeal Rules***, to file and serve a notice of appeal "***against the ruling delivered on 29<sup>th</sup> October 2015 by the High Court at Mombasa in Misc. Criminal Application No. 75 of 2015***" and secondly, presumably under ***rule 5(2)(a)***, an order that the applicant be released on bail or bond pending the hearing and determination of the application for extension of time. It is apt to point out at this stage that there was really no such ruling delivered on 29<sup>th</sup> October 2015, and that is but one of the many missteps in this application. Indeed as intitled, the application purports to be an application for bail pending hearing and determination of Mombasa Chief Magistrate's Court Case No. 1098 of 2014 "***following a rejection of such an order by Hon. Justice Muya in Mombasa High Court Misc. Application No 39 of 2015***". Of course the only ruling by Muya, J. in ***Misc App. No 39 of 2015*** is that dated 9<sup>th</sup> July 2015 dismissing the applicant's appeal against the ruling of the trial court dated 9<sup>th</sup> January 2015.

It is obvious that the applicant is invoking two fundamentally different jurisdictions of this Court under rules 4 and 5(2)(b) of the Court of Appeal Rules in one application, thus precipitating unnecessary cockups, going to jurisdiction of the Court and thwarting the sooner determination of the application on merit. The application for extension of time is, under **rule 53(1)** of the Rules of this Court heard in the first instance before a single judge. Such an application comes before the full court only by way of reference (See **rule 55**). On the other hand, it is only the full court that can hear and determine an application under rule 5(2) (b). (See **rule 53(2) (b)**).

The omnibus nature of the application also poses other obvious legal challenges that the applicant must surmount. To invoke jurisdiction of the Court under rule 5(2)(b), the applicant must have lodged an appeal or at the very least a notice of appeal, evincing an intention to file an appeal. In this case, the pendency of the application for extension of time to file a notice of appeal is an unequivocal admission by the applicant that he does not have a notice of appeal. Yet, when granted an opportunity to prosecute the application for extension of time, which may ultimately result in leave to file a notice of appeal out of time and thereby attain the necessary basis for invoking rule 5(2) (b), the applicant's counsel would hear none of it.

Upon the applicant's insistence that his application be heard in the form it was, the respondent took up the preliminary objection on jurisdiction contending that there was no jurisdiction to entertain the applicant's application in the form it was presented. Although **Mr. Muteti**, and **Mr. Wamotsa**, learned counsel for the respondent, as well as **Mr. Gikandi**, and **Mr. Nabwana**, learned counsel, for the applicant, veered off the issue and bombarded us with submissions on the jurisdiction of the Court under **Article 164(3) of the Constitution**; whether that jurisdiction is limited or unlimited and whether decisions of this Court on the nature of that jurisdiction are right or wrong, the cut and dry issue in the preliminary objection is whether we have before us a competent application capable of being determined on merit.

On that issue, it was Mr. Muteti's submission that there was no notice of appeal, which is the basis for an application under rule 5(2) (b). Learned counsel submitted that the application for extension of time to file a notice of appeal was pending and that the notice of appeal annexed to the application had not even been lodged as required by the rules. Counsel further contended that while the un-lodged notice of appeal purported to challenge the decision of Chepkwony, J. dated 29<sup>th</sup> September 2015 in Misc. App No. 75 of 2015, the application as intitled related to the decision of Muya, J. in Mombasa High Court Misc. App. No. 39 of 2015, which were two totally different proceedings.

Opposing the preliminary objection, Mr. Gikandi submitted that the court has jurisdiction under Article 164(3) of the Constitution to entertain appeals from all decisions of the High Court. That jurisdiction was broad and unlimited, indeed to use counsel's own figurative language, the jurisdiction of this Court is as broad as the Thika Superhighway. To the extent that Chepkwony, J. is a judge of the High Court, her decision is appealable to this Court as of right.

Mr. Gikandi further submitted that the right to bail is a constitutional right guaranteed by **Article 49(1)(h)** which should not be constricted in any way. He accordingly urged to find that the issue at stake in this application is the liberty of a citizen and to interpret the rules of the Court so as to ensure enjoyment of liberty. In short, at the heart of Mr. Gikandi's submissions is the proposition that Article 164(3) of the Constitution confers a right of appeal from all and sundry decisions of the High Court; that the right of appeal cannot be limited; and that in effect, to require the applicant to file a notice of appeal as a condition precedent to seeking relief from the Court is an unconstitutional limitation of the right of appeal.

We have duly considered the preliminary objection, the authorities cited, the submissions of learned counsel and the law. This is our view of the matter.

**Rule 59** of the Court of Appeal Rules makes provision for the filing of a notice of appeal in criminal matters and states as follows:

**“59. (1) Any person who desires to appeal to the Court shall**

***give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal.***

***(2) Every notice of appeal shall—***

***(a) state shortly the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal; and***

***(b) contain the address at which any documents connected with the appeal may be served on the appellant.”***

It is by lodging a notice of appeal that a party evinces intention to invoke the appellate jurisdiction of the Court under Article 164(3) of the Constitution. A person who has duly lodged a notice of appeal is an intended appellant and a duly lodged notice of appeal constitutes an intended appeal. By dint of **rule 2** of the Court of Appeal Rules, “appeal” in relation to appeals to the Court, includes an intended appeal. It is for the above reason that rule 5(1) provides that a sentence of death cannot be carried out before expiry of the time for lodging the notice of appeal, or where the notice of appeal has been lodged, before the appeal is heard and determined. On similar terms, under **rule 5(2) (a)**, before a party can apply to this Court to be released on bail pending appeal or for suspension of execution of any warrant of distress pending appeal, such party must have filed a notice of appeal. As regards civil matters, **rule 5(2) (b)** similarly requires a party who moves this Court for stay of execution of an order of the High Court, for an injunction or for an order staying further proceedings in the High Court, to have first lodged a notice of appeal.

It is trite therefore that the device of the notice of appeal invokes the appellate jurisdiction of this Court. That is the case whether the appeal or intended appeal is civil or criminal. In **JOSEPH LIMO & 86 OTHERS V. ANN MERZ, C. A. NO. 295 OF 1998** this Court emphasized that it is the notice of appeal, which initiates an appeal. Indeed, in terms of Rule 59(1) of the Court of Appeal Rules, “***...the notice of appeal shall institute the appeal.***” Further, in **SAFARICOM LTD. V. OCEAN VIEW BEACH HOTEL LTD. & 3 OTHERS, CA NO 325 of 2009, Omollo, JA** observed that where there is no appeal or intention to appeal as manifested by a lodged notice of appeal, the Court has no basis for meddling in the decision of the High Court.

The lodging of a notice of appeal is not an irrelevant or ritualistic formality. Beyond initiating the appeal, it also serves to notify the prospective respondent that the intended appellant has opted to escalate the legal battle to the appellate court, and to afford that party a fair opportunity to start preparing for the appeal, including mobilizing resources that may be required to defend or articulate its position.

In the matter before us, there is absolutely no dispute that the applicant has not filed a notice of appeal as required by rule 59. That the applicant appreciates the fundamental importance of a notice of appeal before the jurisdiction of this Court can be invoked is betrayed by his application for extension of time to file the notice of appeal out of time. Yet despite being offered an opportunity to regularize the situation and prosecute first the application for leave to file the notice of appeal, the applicant’s counsel insisted on prosecuting the application for the substantive relief sought by the applicant without a lodged notice of appeal.

In our view there is no basis for the submission that to require a party who intends to appeal to this Court to first file a notice of appeal is an unconstitutional limitation of the jurisdiction of the Court under Article 164(3). There is nothing unconstitutional about rules of procedure that regulate exercise of jurisdiction conferred by the Constitution or by any other law. This is particularly the case in situations like the present, where it has not been demonstrated that the procedural requirement or rule is arbitrary and devoid of any rational or legitimate basis in light of the values or principles espoused by the Constitution.

Taken to its logical conclusion, the applicant’s submission would mean that rules that regulate exercise of jurisdiction such as those that require certain actions to be commenced by plaint, originating summons,

petition, etc. or even those that set the time within which action should be taken, are *per se* constrictive of jurisdiction are therefore unconstitutional. This, in our view, is a casual and simplistic way of looking at the issue. A holistic interpretation of the Constitution and consideration of other constitutional principles and values pertinent to jurisdiction such as the right of the opposite party to know the case it has to meet, a reasonable opportunity for such party to prepare its response, and the constitutional imperative on timely resolution of disputes, among others, declaim such interpretation. (See **ANAMI SILVERSE LISAMULA V. IEBC & 2 OTHERS, SC PETITION NO. 9 OF 2014**).

That this Court has jurisdiction to hear an appeal or an application does not mean that no appeal or application before the Court can be incompetent. The Supreme Court made that point succinctly in **BWANA MOHAMED BWANA V. SILVANO BORU BONAYA & 2 OTHERS, SC PETITION NO. 15 OF 2015**. In that petition, this Court struck out a record of appeal that did not, among others, contain a certified copy of the decree appealed from. On appeal to the Supreme Court, the Court held, among other things, that if the bundle of documents required to be contained in a record of appeal are missing, the appeal is incompetent and defective. Accordingly, the Court cannot exercise its adjudicatory powers conferred by law or the Constitution where the appeal is incompetent and that an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues.

The Supreme Court cited with approval the judgment of the Supreme Court of Nigeria in **OCHEJA EMMANUEL DANGANA V HON. ATTAI AIDOKO ALO USMAN & OTHERS, SC 480/2011 and SC 11/2012 (CONSOLIDATED)** where *Bode Rhodes-Vivour, JSC* stated:

*“A court is competent, that is to say, it has jurisdiction when—*

- 1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and*
- 2. the subject matter of the case is within its jurisdiction, and no feature in the case... prevents the court from exercising its jurisdiction; and*
- 3. the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction” (emphasis added).*

Having carefully considered the respondent’s preliminary objection, we are satisfied that in the absence of a notice of appeal lodged in terms of Rule 59, the applicant’s motion on notice filed on 3<sup>rd</sup> November 2015 is fatally incompetent and this Court cannot entertain the same. Accordingly, the motion is struck out with no orders on costs.

**Dated and delivered at Mombasa this 4<sup>th</sup> day of December, 2015**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**