



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 4 OF 2011**

**BETWEEN**

**NATHAN MUHATIA PALA t/a**

**MUHATIA PALA AUCTIONEERS.....1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> APPELLANT**

**JOHNSON MUGWE NG'ANG'A..... 2<sup>ND</sup> RESPONDENT/2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH NYAGA KARINGI.....APPLICANT/RESPONDENT**

*(An application for dismissal of the appeal dated 4<sup>th</sup> January, 2011 from the judgment of the High Court of Kenya at Embu (Khaminwa, J. dated 9<sup>th</sup> February, 2009*

**in**

**H.C.C.C NO. 33 OF 2004)**

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

**RULING OF THE COURT**

1. Before us is an application dated 18<sup>th</sup> July, 2013 brought pursuant to **Rules 83 & 87 (1) (j)** of the **Court of Appeal Rules** (the Rules), wherein the respondent seeks the following orders:-
  - ***The appeal dated 4<sup>th</sup> January, 2011 be dismissed with costs to the respondent.***
  - ***The costs of the application be provided for.***

The grounds upon which the respondent relies on in support of the application are firstly that the 1<sup>st</sup> appellant has not filed or served the requisite Notice of Appeal; secondly, that the appeal filed by the 2<sup>nd</sup> appellant is incurably defective because it does not conform with the Notice of Appeal lodged before this Court.

2. The genesis of the application before us is that the respondent was tenant in a business premises situated on Plot No. 112/78 in Embu town. When the business premises was purchased by the 2<sup>nd</sup>

- appellant in the year 2003 the respondent continued being a tenant. The respondent was a protected tenant under the **Landlord and Tenant (Shops and Hotels and Catering Establishments) Act**, Chapter 301, Laws of Kenya. Disputes arose between the respondent and the 2<sup>nd</sup> appellant culminating in several suits in the Business Premises Tribunal. While the suits were still pending before the Tribunal, the 1<sup>st</sup> appellant acting as the 2<sup>nd</sup> appellant's agent levied distress on the respondent's property on account of rent arrears. The respondent claimed that the 2<sup>nd</sup> appellant also evicted him from the suit premises. The respondent sought damages for the alleged unlawful distress and eviction. On the other hand, the appellants denied that the distress was unlawful and maintained that the respondent was in rent arrears of Kshs. 198,000/=. The 2<sup>nd</sup> appellant averred that the respondent was not evicted as alleged and that he left the suit premises on his own. The value of the goods that were attached by the 1<sup>st</sup> appellant was also in dispute.
3. The High Court (Khaminwa, J.) in a judgment delivered on 9<sup>th</sup> February, 2009 held that the distress and eviction of the respondent was unlawful and granted the respondent Kshs. 1,847,906/= as damages. It is that decision which is the subject of this appeal. Aggrieved with trial court's decision the 2<sup>nd</sup> appellant lodged a Notice of Appeal on 10<sup>th</sup> February, 2009 and served the same upon the respondent's advocates on 20<sup>th</sup> February, 2009. The Record of Appeal was filed on 5<sup>th</sup> January, 2011 and served upon the respondent on 7<sup>th</sup> January, 2011.
  4. Mr. M. N. Nyaga, learned counsel for the respondent, submitted that the 1<sup>st</sup> appellant did not file a Notice of Appeal contrary to the provisions of **Rule 87 (1) (j)** of the Rules; the failure by the 1<sup>st</sup> appellant to file a Notice of Appeal rendered the appeal a nullity; the appeal filed did not conform with the Notice of Appeal lodged by the 2<sup>nd</sup> appellant. Relying on the Supreme Court's decision in **Raila Odinga -vs- IEBC & 3 OTHERS- Petition No. 5 of 2013** and this Court's decision in **Shabani -vs- NBC Holding Corporation (2004) 2 EA 262** Mr. Nyaga argued that the failure by the appellants to comply with the mandatory requirements of procedure rendered the appeal incompetent. He urged us to allow the application.
  5. Mr. P. G. Ng'ang'a, learned counsel for the appellants, in opposing the application, submitted that **Rules 83 & 87 (1) (j)** of the Rules were not applicable and that the application made by the respondent was under **Rule 84** of the Rules. He argued that the respondent had not filed the application within 30 days from the date of service of the Record of Appeal and therefore the application should be struck out. Mr. Ng'ang'a conceded that the 1<sup>st</sup> appellant had not filed a Notice of Appeal. He maintained that the 1<sup>st</sup> appellant was not a stranger but was a defendant in the High Court and his inclusion in the 2<sup>nd</sup> appellant's appeal was a mistake which could be rectified by virtue of **Article 159** of the **Constitution**. He maintained that the appeal by the 2<sup>nd</sup> appellant was competent because he had filed a Notice of Appeal and deposited the security ordered by the High Court. He urged us to dismiss the application.
  6. Mr. Nyaga, in responding to the submissions made by Mr. Ng'ang'a, submitted that if the 1<sup>st</sup> appellant's appeal was struck out it would render the entire appeal incompetent.
  7. We have considered the application, the affidavits sworn by parties, submissions by counsel and the law. This application has been brought pursuant to **Rules 83 & 87 (1) (j)** of the Rules. **Rule 83** provides:-

***“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”***

We are of the view that **Rule 83** is not applicable in this case. This is because the provision relates to a situation where a party has filed a Notice of Appeal but has failed to file the Record of Appeal within the requisite time. On one hand the 1<sup>st</sup> appellant did not file a Notice of Appeal; on the other hand, the 2<sup>nd</sup> appellant lodged a Notice of Appeal on 18<sup>th</sup> February, 2009 and served the same upon the respondent within the requisite time frame. Thereafter, the 2<sup>nd</sup> appellant filed a Record of Appeal on 5<sup>th</sup> January, 2011 within the requisite time frame, taking into account the

period taken in preparation of the proceedings as indicated on the certificate of delay dated 23<sup>rd</sup> December, 2010.

8. **Rule 87(1) (j)** of the Rules provides:-

**“ (1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—**

.....

**(j) the notice of appeal;....”**

It was the respondent's case that the failure by the 1<sup>st</sup> appellant to file a Notice of Appeal rendered the appeal as filed incompetent. It is not in dispute that it is only the 2<sup>nd</sup> appellant who filed a Notice of Appeal and included the 1<sup>st</sup> appellant as a party in the Record of Appeal. Therefore, the issue that falls for our determination is whether the inclusion of the 1<sup>st</sup> appellant in the appeal by the 2<sup>nd</sup> appellant renders the appeal herein incompetent.

9. After the enactment of **Sections 3A & 3B** of the **Appellate Jurisdiction Act**, Chapter 9, Laws of Kenya which also find support in **Article 159 (2) (d)** of the **Constitution**, this Court has on numerous occasions held that the approach of the courts must necessarily be different from that which was adopted prior to the enactments. In **Deepak Chamanlal Kamani & Another -vs- Kenya Anti-Corruption Commission & 3 Others-Civil Appeal (Application ) No. 152 of 2009** this Court in considering the Overriding objective of the Court expressed itself as follows:-

**“So that as Lord Woolf says in the BIGGUZZI Case the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.”**

Further that,

**“In dealing with decisions of the court made before the amendments, litigants and the practising bar must now bear in mind the existence of the amendments and that the court will consider previous decisions bearing in mind the existence of the amendments.”**

We are of the considered view that in the circumstances of this appeal, dismissing/ striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal as filed by the 2<sup>nd</sup> appellant. This is because the 2<sup>nd</sup> appellant has complied with all the requirements of lodging the appeal and justice requires the appeal to be heard on its merits. We therefore find that it would be in the interest of justice to strike out the 1<sup>st</sup> appellant's appeal and sustain the 2<sup>nd</sup> appellant's appeal.

10. The upshot of the foregoing is that we allow the application dated 18<sup>th</sup> July, 2013 in part and strike out the 1<sup>st</sup> appellant's appeal and direct that the 2<sup>nd</sup> appellant's appeal do proceed for hearing. Costs of this application shall abide by the outcome of the appeal.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of January, 2014.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**