



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A.)
CIVIL APPEAL (APPLICATION) NO. 312 OF 2009

BETWEEN

PREMIER DIARY LIMITEDAPPELLANT

AND

AMARJIT SINGH SAGOO.....1ST RESPONDENT

KURSHBIKAU HARJEET SINGH CHANDHA (Suing as the legal administrator of the
Estate of HARJEET CHARAN SINGH CHANDHA2ND RESPONDENT

*(Application to strike out the Record of Appeal from the judgment and decree of the High Court
of Kenya at Kisumu (Warsame, J.)*

dated 18th September, 2007

in

H.C.C.C. NO. 61 OF 2001)

RULING OF THE COURT

The application which came up for hearing before us on 17th March, 2011 was by way of Notice of Motion expressed as having been brought under

“**Rule 42(1) and (2) and 80** of the Court of Appeal Rules. There was only one prayer sought in that application and that was:-

“**THAT The Honourable (sic) be pleased to strike out Civil Appeal No. 312 of 2009 with costs.**”

The application was brought on the following grounds:-

“**1. That the appellant, namely PREMIER DIARY LIMITED, was not a party in the High Court proceedings in Kisumu High Court Civil Case No. 61 of 2001.**”

2. **THAT the appellant did not issue any Notice of Appeal upon which the present appeal can be premised as required under Rule 74 of this court's rule.**
3. **THAT by virtue of ground 2 above the court lacks jurisdiction to entertain this appeal.**
4. **THAT the applicant will rely on the record of appeal filed on 21st December, 2009 herein to argue the motion.**
5. **THAT the appellant did not seek leave of court to be joined as a party or interested party.**
6. **THAT the appellant has no right of appeal.**
7. **THAT the appeal is incurably and fatally defective.**
8. **THAT further grounds such as may arise shall be argued at the hearing hereof."**

In addition to the foregoing grounds there was a sworn affidavit by **Wesley Robinson Gichaba**. In that affidavit, Mr. Gichaba deponed:-

- “1. **THAT I am Advocate of High Court of Kenya practicing in the name of Gichaba & Company Advocates having the conduct of this matter for and on behalf of the 2nd Respondent/Applicant hence conversant with facts and duly authorized to swear this affidavit.**
2. **THAT my true place of abode is TOM MBOYA ESTATE, KISUMU.**
3. **THAT I know of my own knowledge the appellant served me with the complete record of appeal on 21st December, 2009, which was during the Christmas vacation.**
4. **THAT upon perusal of the record I realized that the appellant is PREMIER DIARY LIMITED.**
5. **THAT I know of my own knowledge that Premier Dairy Limited was not a party in the High Court proceedings which is the subject of the appeal herein.**
6. **THAT the Memorandum of Appeal found at page 1 of the record of appeal indicates the Premier Dairy Limited is aggrieved by the decision of Warsame, J. dated 18th September, 2007 and delivered by Mugo, J. on 25th September, 2007 when it was not a party.**
7. **THAT the plaint filed in the superior court and summons issued thereof were against two defendants namely:**
 - a) **Amarjit Singh Sagoo and**
 - b) **Premier Dairy Limited.**
8. **THAT Premier Dairy Limited did not issue any notice of appeal hence the court lacks jurisdiction to entertain an appeal by a busy body.**
9. **THAT I verily believe that in the premises the appeal filed is incurably defective and should be struck out.**
10. **THAT I swear this affidavit in support of the application to strike out the entire appeal with costs.**
11. **THAT in support of the application for the orders sought I will also rely on the record of appeal in the Court of Appeal at Kisumu Civil Appeal No. 312 of 2009."**

In his submissions, Mr. W.R. Gichaba, the learned Counsel for the applicant, simply rehashed what he

had sworn in his affidavit and emphasized that the respondent/appellant was not a party in the High Court proceedings.

In opposing the application Mr. W.A. Amoko, the learned Counsel for the appellant/respondent, submitted that the application related to the names “Diary” and “Dairy” which in his view amounted to triviality which caused no prejudice to the applicant.

In the **High Court Civil Suit No. 61 of 2001** which gave rise to the **Civil Appeal No. 312 of 2009**, the 2nd respondent (which is the appellant in this Court) is described as “**PREMIER DAIRY LTD.**”. However, the record of appeal shows the appellant’s name as “**PREMIER DIARY LTD.**” Mr. Amoko described this as an innocent slip. We would agree with Mr. Amoko that this “innocent slip” caused no prejudice to the applicant.

Article 159(1) (d) of the Constitution provides:-

“justice shall be administered without undue regard to procedural technicalities.”

And **Sections 3A** and **3B** of the Appellate Jurisdiction Act provide:-

“3A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

“3B (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.”

What has engaged the Court in this application is simply the fact that instead of describing the appellant as **PREMIER DAIRY LTD**, it was described as **PREMIER DIARY LTD**. And for that mere slip which was described by Mr. Amoko as “innocent slip”, we are being asked to strike out the entire record of appeal! We do not think this Court would be persuaded to take such a drastic step of striking out this appeal, especially in view of the provisions of the Constitution and the Appellate Jurisdiction Act as set out above.

In view of the foregoing, we find no merit in this application and we order that the Notice of Motion dated 30th January, 2010 be and is hereby dismissed with costs.

Dated and delivered at Kisumu this 13th day of April, 2011.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR