



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, ONYANGO OTIENO & VISRAM, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 249 OF 2010

BETWEEN

KENYUA NGUNJIRI.....APPELLANT

AND

JOHN B. MUYA.....RESPONDENT

***(Appeal from the judgment and decree of the High Court of Kenya
at Nairobi (Okwengu, J.) dated 21st October 2009***

in

H.C.C.C. NO. 88 “B” OF 2007)

RULING OF THE COURT

On 21st October 2009, Okwengu J. delivered judgment in High Court Civil Appeal No. 88 “B” of 2007 in which she set aside the judgment of the subordinate court and substituted it with an order dismissing the suit that was originally filed in the subordinate court and declined to award any costs to any party. The appellant in this appeal who was the respondent in the superior court, Kenyua Ngunjiri, felt aggrieved. He lodged notice of appeal and thereafter filed the appeal – Civil Appeal No. 249 of 2010 on 17th September 2010. On 19th October 2010, the respondent in the appeal John B. M. Muya filed this notice of motion before us dated 14th October 2010 seeking three orders namely:-

- “1. That the notice of appeal dated 28th October 2009, lodged in the High Court on 20th November 2009 and served upon the respondents counsel on 15th November 2009 be and is struck out with costs.***
- 2. That the memorandum and record of appeal, both dated 15th September 2010 be and are struck out.***
- 3. That costs of the application be provided for.”***

The grounds in support of the application are:-

- “1. That the appeal was against the judgment of the superior court dated 21st October 2009 yet the notice of appeal was lodged more than 14 days thereafter on 20th November 2009, as is evident from***

page 112 of the record of appeal; the notice was thus lodged late.

- 2. That to the best of the respondent's knowledge, or his counsel's, no leave to extend the time to lodge the appeal was either sought or granted.*
- 3. That from the back of the notice of appeal above mentioned, it was served but received under protest on 25th November, 2009.*
- 4. That the record of appeal was served upon respondents' counsel on or about the 21st September, 2010; this application has thus been brought within 30 days of such service.*
- 5. That the appeal would be a theoretical exercise as the appellant has, in line with the superior court's ruling, sought to recover the monies the subject matter from the company, Safina Limited, rather than from the respondent.*
- 6. That indeed the appellant had laid a claim from the company vides (sic) a letter dated 15th October 2003, after he had filed his plaint dated 25th September 2003, accompanied by a summons to enter appearance dated 26th September 2003.*
- 7. That the appellant has no interest in the appeal."*

There is an affidavit in support of the application sworn by the applicant/respondent John Muya. The application was opposed and in a replying affidavit sworn by the appellant Kenyua Ngunjiri on 30th November 2010 the deponent states at paragraph 3 and 4 as follows:-

- "3. That the judgment giving rise to this appeal was delivered by the Honourable Justice Okwengu on 21st October 2009.*
- 4. That being aggrieved with the decision I then instructed my advocates to appeal against the whole of the said decision and a notice of appeal was filed in the superior court on 29th October 2009, annexed hereto and marked as "KN1" are copies of the notice of appeal and the receipt no. 3038715 issued upon filing."*

At paragraphs 7 and 8, of that replying affidavit, the deponent states that the notice of appeal was filed and lodged at the superior court within the time specified in the **rule 74** of the Court of Appeal Rules and further that the date 20th November the respondent states in his application is not correct. As to alleged late service, the appellant/respondent states at paragraph 9 that the applicant/respondent's former advocate refused to accept the copy of the notice of appeal on 29th October 2009 insisting that he could only accept it after it was endorsed by the Registrar of the High Court.

Mr. Ombwayo the learned counsel for the applicant/respondent and Mr. Mungai, the learned counsel for the respondent/appellant both addressed us on their respective positions on the matter and we have considered their submissions carefully. We have also perused and considered the record before us.

In our view, it is clear to us that the notice of appeal was not filed out of time. The judgment the subject of the appeal was delivered on 21st October 2009. The notice of appeal as can be deciphered from both the record and the replying affidavit, was filed on 29th October 2009, i.e. eight days after the judgment. The repealed **rule 74** which is now **rule 75** states that notice of appeal is to be lodged at the superior court's registry within fourteen (14) days of the date of the judgment. As we have stated, the subject notice of appeal was filed within eight days of the judgment and there is a receipt exhibited duly issued by the superior court to confirm that. The rubber stamp of the superior court is appended on the same notice of appeal and is a further assurance to us that indeed the appellant/respondent lodged it within fourteen days of the date of judgment. Mr. Ombwayo's view is that as the notice of appeal shows that the Registrar signed it on 20th November 2009, that was the effective date of its lodgment pursuant to

rule 74 now **75** of the Court's Rules. With respect, we cannot accept that approach as it would not be just to the parties who would file their documents into the court but under that argument, would have to wait for the Registrar to sign those documents (if there is need for that as is the case of notice of appeal) in their presence to ensure they are lodged in time. In our considered view, once a party has filed notice of appeal, and it is rubber-stamped and receipt for its filing is issued, he of necessity has to leave the rest of any actions on that notice of appeal such as signing it by the Registrar, to abide the convenience of the registry and of the Registrar, as once he has filed it, he no longer exercises control over its movements within the registry. We hold that the notice of appeal in this case was lodged within the time required by the rules of this Court and nothing turns on that ground.

Mr. Ombwayo also submitted that the notice of appeal and record of appeal should both be struck out as their being filed was an abuse of the court process as the money was recoverable from a third party and not from the respondent, and to that effect, the appellant had commenced relevant proceedings against a third party Safina Limited. Our response to that is that it is not a matter for us to discuss and even to decide upon in the application such as is before us which is seeking striking out the notice of appeal and consequently the record of appeal. That is a matter to be argued at the hearing of full appeal.

Lastly, on the delay to serve the applicant/respondent with notice of appeal, the respondent/appellant has stated in the replying affidavit that the applicant's, advocates on record had declined to accept service of the notice of appeal when it was presented to them in time on grounds that it had to be first endorsed by the Registrar. This assertion was not challenged. It stands. It was the duty of the applicant/respondent to reveal it in its application if it hoped to be candid with the court. As he did not, he did not come to court with clean hands.

In our conclusion, this application lacks merit and there is no basis for exercising our discretion to allow it. It is dismissed with costs to the respondent/appellant.

Dated and delivered at Nairobi this 29th day July of 2011.

E. O. O'KUBASU

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR