



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & NYAMU JJ.A)
CIVIL APPLICATION NO. NAI. 173 OF 2010
BETWEEN

ABDIRAHMAN ABDI also known as ABDIRAHMAN MUHUMED ABDI.....APPLICANT

AND

SAFI PETROLEUM PRODUCTS LTD.....1ST RESPONDENT
THE COMMISSIONER OF LANDS.....2ND RESPONDENT
NOAH KATAN NGALA.....3RD RESPONDENT
JULIUS SUNKULI.....4TH RESPONDENT
CHEMECH LABORATORIES (KENYA) LTD.....5TH RESPONDENT
KENYA AFRICAN NATIONAL UNION.....6TH RESPONDENT
HON. WILLIAM SAMOI RUTO.....7TH RESPONDENT

(application to strike out the Notice of Appeal from an intended Appeal from the Ruling and Order of the High Court (Rawal J.) delivered on 13th day of April 2010

in

H.C.C.C. NO. ELC.36 OF 2007)

RULING OF THE COURT

By his notice of motion expressed to be brought under rules 76, 82, 81 (1) and 43 of the Court of Appeal Rules, Abdirahman M. Abdi, also known as Abdirahman Mohamed Abdi, seeks orders:

(1) “That the Notice of Appeal lodged by the Plaintiff in Nairobi High Court Civil Case No. ELC 36 of 2007 be struck out and or be deemed to be withdrawn.

(2) That it be ruled that the lodgment of the intended appeal by the plaintiff be barred by time factor.”

The reasons given on the face of the application for seeking those orders are four pronged, namely, that the notice of appeal lodged on 20th April 2010, was not served on the applicant within the stipulated period, the notice if it was lodged on 6th May 2010, was filed out of time without leave, the letters dated 14th April 2010 and 18th April 2010 bespeaking copies of proceedings and ruling were not copied to his advocates on record, with the result that the time stipulated for lodging the intended appeal expired by

effluxion of time on 19th June 2010.

It is common ground that the notice of appeal dated 19th April 2010 was filed in Court on 20th April 2010. It is shown to have been lodged in Court on 6th May 2010. The applicant's counsel was served with a copy of the notice of appeal on 12th May 2010, which was outside the period stipulated for serving a notice of appeal. No leave was applied for or given for filing the said notice out of time. Nor did the first respondent copy a letter to the Deputy Registrar bespeaking copies of proceedings and certified copy of judgment to the parties in the intended appeal for purposes of the proviso to **rule 82** (formerly rule 81) of the Court of Appeal Rules.

It was conceded by the applicant's counsel and Mr. Mwenesi for the 5th Respondent that an unsealed copy of the notice of appeal was served upon them respectively on 28th April 2010, which according to counsel for 1st respondent was only a day outside the stipulated period. The copies served on them were court stamped as having been filed in court on 20th April 2010. The date of filing and the last day stipulated for either filing or serving any document is normally not taken into account in computing time. In view of that we agree with counsel for the 1st respondent that the unsealed copy of the notice of appeal was served only one day out of time.

The question which then presents itself is whether a notice of appeal has to be sealed before being served. Rule 75 (Formerly Rule 74) of the Court of Appeal Rules provides that a notice of appeal shall be filed within 14 days of the decision against which an appeal is intended. Rule 77(1) (Formerly Rule 76(1)) provides that a notice of appeal shall be served upon all persons likely to be affected by the decision in the intended appeal. Both provisions do not state that such a notice must first be sealed before service. What is, however, logical is that such a notice must be shown to have been filed in the High Court within the time stipulated in the rules of court. The process of sealing a notice of appeal, is not a mandatory step in the service of the process.

Mr. Hassan Lakicha for the 1st respondent having conceded that the notice of appeal dated 19th April 2010 was filed one day out of time it is incumbent upon us to consider whether notwithstanding that delay the said notice of appeal should be upheld. Mr. A.B. Shah for the applicant invited us to strike it out because in his view, notwithstanding the overriding objective in civil litigation the court does not have an application before it for extension of time on which the court would then exercise its discretion in that regard. It was his further view that if the court were to proceed to exercise its discretion on the basis of the overriding principle aforesaid, it will deny the applicant a right of hearing on the matter.

The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice. It is however, not a principle the court may invoke without giving the parties an opportunity of being heard on the matter. In the matter before us the parties were given an opportunity to express their views. Mr. A.B. Shah, was however, reluctant to express a view on the matter because he did not think he needed to do so in absence of an application for extension of time to serve a notice of appeal. That was despite the fact that the court urged him more than once to do so. In situations as the one before us what a court is obliged to do is to give a party an opportunity to be heard. If for whatever reason the party concerned does not avail himself of that opportunity he should not complain that he was denied a hearing.

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The

court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.

In the matter before us, we accept that the 1st respondent filed his notice of appeal one day out of time, and rule that evidence of filing is sufficient for purposes of **rule 77(1)** of the Court of Appeal Rules. We also rule that the notice of appeal was filed one day out of time and having considered the facts of this matter and taken into account the overriding objective of civil litigation we rule that one day's delay is excusable.

An issue was raised regarding the competence of the application before us, in view of the fact that it was brought outside the stipulated period without leave. The same principles as stated earlier apply. Ordinarily, the motion should have been struck out, but in view of the overriding objective in civil litigation we overlooked the delay and instead considered the application on its merits. In view of the conclusion we came to regarding the delay in serving the notice of appeal, it follows that the failure on the part of the 1st respondent to copy the letters bespeaking copies of proceedings and judgment to counsel for the other parties need not be considered as doing so will not serve any useful purpose.

In the result we dismiss the applicant's notice of motion dated 16th July 2010 but with no order as to costs.

Dated and delivered at Nairobi this 8th day of July 2011

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR