



IN THE COURT OF APPEAL

AT NAIROBI

(BOSIRE, GITHINJI & ONYANGO OTIENO JJ.A)

CIVIL APPLICATION NO. NAI.133 OF 2010

BETWEEN

SHEIKH OSMAN MOHAMED.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(An application to strike out the notice of appeal dated 12th May 2009 from the High Court in Milimani Commercial Courts (Khaminwa J.) dated 4th May 2009

in

H.C.C.S. NO. 191 OF 2004)

RULING OF THE COURT

Sheikh Osman Mohamed, the applicant was the successful party in **Nairobi High Court Civil Case No. 191 of 2004**. Kenya Commercial Bank Limited, the unsuccessful party was dissatisfied with the decision against it and lodged a notice of appeal in the superior court, duly signed by its advocates on record, on 12th May 2009, but the said notice, dated 12th May 2009 was not endorsed by the Deputy Registrar before a copy thereof was served upon the applicant. Besides, the respondent bank did not file a record of appeal within the stipulated 60 days.

In the application before us, dated 4th June 2010, expressed to be brought under rule 80 of the Court of Appeal Rules, the applicant has invited us to strike out the aforesaid notice of appeal for two reasons. Firstly, that the said notice of appeal is defective for the reason that it was not endorsed by the Deputy Registrar of the superior court before it was serviced upon the applicant, and in the alternative that the endorsed copy was not served upon the applicant within the stipulated period. The second reason which to our mind does not lie, is that the respondent filed a record of appeal out of time.

The respondent in this motion filed a record of appeal on 21st July 2010, slightly over a month after this motion was filed. In a replying affidavit sworn on 31st May 2011, the respondent's counsel, Mr. Chacha Odera, has deponed that his firm, by their letter dated 12th May 2009, and shown to have been copied to the applicants advocates on record, bespoke copies of proceedings and judgment from the superior court. The letter was duly acknowledged by the Deputy Registrar, by his letter in reply dated 15th May 2009, which was copied to the applicant's advocates. Copies of proceedings and judgment were prepared, and by his letter dated 18th June 2010, the Deputy Registrar notified the respondents' advocates that the

copies were ready, and that letter was copied to the applicant's advocates. It is, however, clear from the record of this application that the applicant's advocates also independently applied for copies of proceedings and judgment but did not copy their letter to the respondent's advocates. On this, Mr. Musyoki for the applicant stated that they were not obliged to do so as they did not intend to appeal against the superior court's decision. The applicant was furnished with the copies of proceedings about six months before the respondents were notified that typed copies of proceedings and judgment were ready for collection.

From the foregoing there is essentially only one issue for consideration, namely, whether the respondent has been shown to have failed to take an essential step timeously after filing the notice of appeal. We note that there is no prayer for an order striking out the record of appeal in **Civil Appeal No. 179 of 2010**. However, in the affidavit in support of the motion the applicant depones, in paragraph 6 thereof, that his advocates had not been served with a copy of a letter bespeaking copies of proceedings and judgment. The respondent, as stated earlier, has exhibited their letter bespeaking the same, and the letter is shown to have been copied to B.M. Musyoki & Co. Advocates, Development House, 2nd Floor, Nairobi. The applicant did not file a further affidavit to deny this. In view of that and considering that an appeal has already been filed we will give the benefit of the doubt to the respondent, as **prima facie**, they have shown that indeed they took essential steps to mount an appeal after filing their notice of appeal. Because of the peculiar facts of this case, the case of **Benedict Mwazighe Harry Njai v. Gasper Walele & Others** Civil Application No. NAI.255 of 2010 cited to us has no application.

Besides what the applicant has raised is a technical issue. Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya make provision for the need of the court to bear in mind the overriding objective in civil litigation. Courts must strive to give effect to it without undue regard to technicalities of procedure. Article 159(2)(d) of the 2010 Constitution entrenches the requirement that justice be administered without undue regard to procedural technicalities. It is the court's duty to have loyalty to the spirit of the Constitution and the policy of the law.

We are unpersuaded that this is a fit case for the exercise of our judicial discretion in favour of striking out the notice of appeal. The notice of appeal, contrary to submissions by Mr. Musyoki for the applicant that it is defective, is valid and there is no requirement of law that such notice should first be endorsed by the Deputy Registrar before being served upon the persons to be directly affected by the intended appeal. What is important is to show that the said notice has been lodged in court. The copy on record clearly shows it was received by the court on 12th May 2009.

In the result, we agree with Mr. Chacha Odera for the respondent that this motion lacks merit. Accordingly it is dismissed with costs.

Dated and delivered at Nairobi this 1st day of July 2011

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR