



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT ELDORET
(CORAM: GITHINJI, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 119 OF 2011

BETWEEN

SUKARI SACCO LTD

PATRICK WAFULA JUMA

JESSE FWAMBA..... APPLICANTS

AND

MUMIAS OUTGROWERS (MOCO) 1998 LTD.....RESPONDENTS

(Being an application for (1) extension of time within which to serve notice of appeal from the ruling of the High Court of the High Court of Kenya at Bungoma, (Muchemi, J.) dated 2nd December, 2010 in Bungoma High Court Winding Up Cause No.1 of 2009 and (ii) extension of time within which and for whose order to be made that other than the petitioners and respondent – Mumias Outgrowers (1998) Ltd, Equity Bank and Kenya Sugar Board Service of Notice to be dispensed with for other interested parties
in

BUNGOMA H.C.W.U.C.NO.1 OF 2009)

RULING

This is an application under **Rules 4, 76** and **77** of the Court of Appeal Rules in essence for extension of time within which to serve a notice of appeal and for dispensation of service of the notice of appeal on some affected parties.

The applicants who are wrongly named as petitioners in the application filed a winding-up petition in the High Court at Bungoma being **Winding Up Petition No. 1 of 2009** seeking an order to wind up ***Mumias Outgrowers Company [1998] Ltd (company)*** on the ground that the company was insolvent. Upon the advertisement of the petition, various parties including ***Equity Bank Ltd*** gave a notice of intention to appear on the hearing of the petition. Equity Bank Ltd indicated in its notice that it was a creditor of the company owed Kshs.28,716,930/- while ***Mumias Sugar Company Ltd*** which also gave a notice of intention to appear claimed to be a creditor for Kshs.818,869,440/- On its part, ***Eri Supplies Ltd*** gave a notice of intention to appear claiming that it was a creditor for the sum of Kshs.2,257,833.25/-. There was also a notice to appear by ***Kenya Sugar Board*** claiming that it was a creditor for Kshs.150,000,000/-.

Again, several parties filed a notice of preliminary objection to the petition. In particular the applicant company, Equity Bank Ltd and Kenya Sugar Board each filed a notice of preliminary objection

to the petition and sought an order that the petition be struck out. The preliminary objection filed by the company (MOCO) through M/s Lutta & Co. Advocates was heard first. It was allowed by the superior court (F.N. Muchemi, J.) on 2nd December, 2010 with the result that the winding-up petition was struck out.

The petitioners being aggrieved by the order lodged a notice of appeal on 6th December 2010. The notice of appeal is the subject matter of the present application.

On 15th February 2011, two of the three petitioners, namely, **Patrick Wafula Juma** and **Jesse Fwamba** filed **Civil Appeal No.36 of 2011** in this Court against the Ruling/Order of the superior court striking out the winding-up petition.

On 16th March 2011, Equity Bank Ltd filed an application in the appeal for striking out the appeal on the grounds, inter-alia, that the record of appeal is defective as the notice of appeal was not served.

Similarly on the same day, the company, (MOCO), the respondent in this applicant, filed an application in the appeal seeking similar orders. The application by the company is slated for hearing next Thursday 22nd September, 2011.

I have considered the application and the submissions of Mr Ombito, learned counsel for the applicant. I have also considered the respective submissions of Mr Lutta for the company; Mr Kamau for Equity Bank Ltd and Mr Marube for Kenya Sugar Board all who oppose the application.

I agree as submitted by Mr Lutta that the application is not properly drawn and that the prayers sought are vague. It is clear however that the application for extension of time was prompted by the two pending application in Civil Appeal No.36 of 2011 for striking out the appeal on the ground of non-service of the notice of appeal. There is no doubt that the applicant, by the application, seeks to pre-empt the two pending applications by seeking leave to serve the notice of appeal out of time on some parties and dispensation of service of the notice of appeal on some other parties. In my view the defects pointed out by Mr Lutta do not render the application incompetent.

I appreciate that the Court exercises its discretion to extend time on well settled principles. However this is a peculiar application in that the notice of appeal was lodged in time and the appeal has already been filed and the record of appeal served. It is submitted by Mr Ombito that the company was indeed served with the notice of appeal on 6th December, 2010 although this is disputed; that all the parties have been properly and timely served with the record of appeal, that the company was served on 21st February 2011; that advocates for Equity Bank Ltd were served on 24th February 2011 and that advocates for Kenya Sugar Board were served on 18th February 2011 and that the delay was less than 30 days.

Although Mr Ombito explains that failure to serve the notice of appeal was due to the fact that he travelled abroad to see his sick brother, it is apparent that the real reason is that he failed to appreciate that the notice of appeal is required to be served on all persons directly affected by the appeal otherwise he could not have filed the appeal on 15th February 2011 only to file the present application later on 12th May 2011.

Since the applicant filed the appeal promptly and apparently served the record of appeal within the time prescribed by the Rules, the parties to the appeal were ineffect notified of the existence of the appeal. Thus failure to service a notice of appeal which service is merely intended to inform the affected parties of the imminent appeal, is in the circumstances of this case, a mere procedural technicality which has not caused any prejudice to the affected parties. By **Article 159(2)(d)** of the Constitution, justice should be done without undue regard to procedural technicalities.

The applicant's winding-up petition was struck out on technicalities. It would be just if the Court were to facilitate the hearing of the appeal which is already filed by extending time for service of the

notice of appeal which service should have preceded the filing of the appeal.

However they are no grounds for dispensation of service of the notice of appeal on some parties. Indeed it has not been shown that the affected parties did not take part in the proceedings in the superior court.

For those reasons, I allow the application to the extent that I extent time for service of the notice of appeal. Time for service is extended by fourteen days from the date hereof. Thus, the applicant to serve the notice of appeal on all persons affected by the appeal within 14 days.

Costs of this application to the respondent, Equity Bank Ltd and Kenya Sugar Board respectively.

Dated at Eldoret this 21st day of September, 2011.

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR