IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 277 OF 2005

M S K ……. APPLICANT/RESPONDENT

AND

S N K……...…… RESPONDENT/APPELLANT

(Application to strike out the notice of appeal and the record of appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 10th May, 2005

in

DIVORCE CAUSE NO. 6 OF 1997)

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RULING OF THE COURT

The application dated 1st December, 2005 seeks to strike out the notice of appeal dated 11th May, 2005 and the record of appeal dated 27th October, 2005. The subject matter of the application arises from the judgment and decree of the superior court in Nairobi in *Divorce Cause No. 6 of 1997*. The parties in the divorce cause were the applicant as the Petitioner and Respondent and one **S.M.I** as the co-respondent.

The application is based on the following grounds:

(a) The Appellant has failed to take an essential step in this proceedings in that the Appellant has not served the Notice of Appeal on all parties directly affected by the appeal as required under the mandatory provisions of Rule 76 (1) of the (sic) Civil Procedure Rules.

(b) The Appellant has not obtained leave of this Honourable Court to dispense with the required service.

(c) The Notice of Appeal dated 11th May, 2005 and the Record of Appeal dated 27th October, 2005 are fatally defective as the appellant has failed to comply with the mandatory provisions of Rule 76 (1) of the Court of Appeal Rules in instituting its appeal".

The application is supported by the applicant's affidavit sworn on 1st December, 2005.

During the hearing of the application the learned counsel ***Mr. Harit Sheth*** represented the applicant, while the learned counsel, ***Mr. S. M. Mwenesi*** represented the respondent.

Mr. Sheth in his submissions relied on the contents of the affidavit in support of the application and the grounds set out in the body of the application as outlined above. However, in his submissions, he emphasized on the respondent's failure to serve the notice of appeal on S.M.I, the co-respondent in the divorce cause in which the apportionment of various properties was made in the judgment, the subject matter of the appeal; failure to serve T[PARTICULARS WITHHELD]Limited, the registered owner of L.R.NO [PARTICULARS WITHHELD] which property was awarded to the respondent; failure to serve J[PARTICULARS WITHHELD]Ltd. a company whose assets were distributed in the judgment and were the subject matter of the Originating Summons; failure to serve K[PARTICULARS WITHHELD] Trading Company; and finally failure to serve M, a daughter of the two parties, who was awarded Kshs.10 million subject to the amount being invested on her behalf by the respondent. Mr. Sheth submitted that three of the five unserved parties were directly affected by the appeal and therefore ought to have been served with a notice of appeal pursuant to **Rule 76 (1)** of this Court's Rules.

As regards the co-respondent, Mr. Sheth submitted that since she had entered appearance but had never taken part in the proceedings in the superior court, an application to this court to dispense with service ought to have been filed pursuant to the proviso to **Rule 76(1)** of this Court's rules, but no such application was made by the respondent. Such an application ought to have been filed within seven days after the lodging of the notice of appeal and therefore the respondent was hopelessly out of time. In addition, Mr Sheth contended that the co-respondent had specifically applied to be joined in the proceedings and the application was dismissed. Mr Sheth concluded his submissions by stating that the respondent had also erred in not describing the three parties in the notice of appeal as required under the rules. In particular, Mr Sheth stressed that failure to serve the parties described above violates **Rules 76** and **80** of this Court's rules and renders both the notice of appeal and the record of appeal incompetent. In this regard he cited three authorities in support of his submissions.

Mr. Mwenesi, the learned counsel for the respondent relied on the contents of three affidavits sworn in reply on 1st December 2005, 24th January 2006 and 23rd February 2009 respectively. The learned counsel drew the Court's attention to the decree the subject matter of the appeal which he said made the award of the property [PARTICULARS WITHHELD]to the respondent and not a third party and that according to the decree, the parties directly affected by the appeal were the applicant and the respondent. As regards the award of Kshs 10 million to M was to be invested on her behalf by the respondent and therefore it is only the respondent who is at the moment affected since it has not been confirmed if the investment had already been made on her behalf. Moreover the Gigiri property was held in trust. As regards the other properties the partners held 50% of the shares as per the judgment. The sum of Kshs.80 million was awarded to the applicant in order to forego her interest in the companies mentioned. Mr. Mwenesi emphasized that all the Court ought to look at, is the wording of the decree including brackets and punctuations and if the court did that, it would reach the conclusion that there were no other parties directly affected by the appeal. Concerning S.M.I, the co-respondent, he submitted that she never took part in the proceedings in the superior court and there is no order against her in the decree and that the intended appeal was not targeted at the decree absolute.

Mr Mwenesi urged the Court to invoke its inherent powers under **Rule 1 (3)** of this Court's Rules in order prevent the abuse of its process. The learned counsel distinguished the facts in the current application from the facts in the case of **Ruthibo vs. Nyingi [1984] KLR 505,** which was relied on by the applicant, in that, in the Nyingi case the omitted party was directly affected which was not the case in the matter currently before the Court. He submitted that the non-service of the co-respondent who did not participate in the proceedings and was not party to the decree at all should never be used to lock out a party from the corridors of justice. He concluded his submissions by contending that it would be in the interest of justice that the respondent be allowed to pursue the outcome of the intended appeal. In support of this submission, Mr Mwenesi made reference to the recently enacted sections 3A and 3B of the Appellate Jurisdiction Act and urged the Court to give effect to the overriding objective as defined in the sections and overlook the technicalities of procedure so as to serve the wider interests of justice.

What has emerged from the decree upon which the intended appeal is grounded is that Kshs.10 million was awarded to M for her schooling and care and the awarded amount was to be invested on her behalf; that the Gigiri property, namely, LR.[PARTICULARS WITHHELD] was ordered to be transferred outright to the respondent but held in trust for the applicant and the children. The court also awarded a further sum of Kshs. 80 million to the applicant in consideration of her foregoing her claim in J[PARTICULARS WITHHELD] Credit Trading Company and other companies except T[PARTICULARS WITHHELD] Limited.

It is common ground that property LR. [PARTICULARS WITHHELD] is registered in the name of T[PARTICULARS WITHHELD]Company Limited and for this reason T[PARTICULARS WITHHELD]Company Limited, will be directly affected by the outcome of the appeal. It is also not in dispute that the award by the superior court of the shares to the respondent in all the other companies, namely K[PARTICULARS WITHHELD] Trading Company and J[PARTICULARS WITHHELD]Credit Limited, could affect the shareholding, ownership, and control of the companies. It is also clear to us that M, has a direct interest in the decree obtained by virtue of the award to her of Kshs.10 million for her schooling and care. In our view, all these parties are directly affected by the appeal in terms of **Rule 76 (1)** of this Court's Rules and for that reason ought to have been served with the Notice of appeal but were not served by the respondent. In addition a perusal of the memorandum of appeal clearly shows that the respondent has challenged the awards made against J[PARTICULARS WITHHELD]Credit Trading Company Limited, K[PARTICULARS WITHHELD] Trading Company Limited and T[PARTICULARS WITHHELD] Limited which is further proof of the companies being directly affected by the appeal. For these reasons all four out of the five mentioned parties are directly affected by the appeal since the orders made by the Judge affect their respective property's rights and other interests as per the decree.

In this regard, the case of **Ahny Openda** [1982] KLR 87 cited by the applicant is on all fours with the current matter because in the **Openda** case property rights and actions were affected by the decree.

It is also clear to us that as regards S.M.I, the correspondent in the divorce cause did enter appearance and also did apply to be enjoined in the divorce cause in the superior court, but the application for joinder was dismissed by the superior court. As the respondent now contends that S.M.I did not take part in the proceedings and therefore not likely to be directly affected by the appeal, we think, that her position could have been taken care of by the proviso to **Rule 76 (1)** of this Court's rules which states:

"Provided that the Court may on application which may be made ex parte within seven days direct that service need not be effected on any person who took no part in the proceedings in the superior court".

However, it is not in dispute that no such application for dispensation was made as required under the proviso.

At the outset, we consider it important to restate the object of **Rule 76 (1)** of the Court's Rules. Concerning the point, one of the cases cited to us, is the case of **Sheikh vs. Sheikh [1985] KLR 649** where this Court held:

"The object of rule 76 (1) of the Court of Appeal Rules in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being provided an opportunity of being heard".

The right of hearing is a constitutional right under **Section 77** of the Constitution and in addition it is the cornerstone of the rules of natural justice.

It follows that although **Rule 76** is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierachy of fundamental rights, the right of hearing ranks very high. For this reason we think that failure to serve the notice of appeal renders a notice of appeal incompetent including the record of appeal itself. This is because **Rule**

76 (1) is a mandatory requirement and provides that all persons directly affected by the appeal, must be served with a notice of appeal or the Court is requested upon an application by the appellant which may be ex parte, to direct that service need not be effected on any person who took no part in the proceedings in the superior court.

Granted that both the applicant and the respondent had some shares in them or were managed by one or both parties, in law, properties or interests are vested in them as limited companies, the vesting was in them as juristic persons, as limited liability companies and as such the companies are distinct from the individual members or shareholders. This is trite company law since the Victorian days of **Salmon vs. Salmon [1895-9] ALL ER Rep pg 33.**

In this matter the Court has agonized on the options open to it and in particular whether to sustain or save such a bulky record of appeal which came in five large volumes the size of a mini fridge! Thus, under Section 6 of the Judicature Act, this Court is under a duty to do substantial justice without undue regard to technicalities. In the recent past both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate an overriding objective to regulate civil litigation in these terms:-

"Section 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.

Section 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 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".

With respect, Mr Mwenesi's invitation for us to save the notice and the bulky record of appeal by applying the overriding objective "***(the double O principle)***" would on the contrary violate the principle itself because the cardinal aim of the principle is to enable the Court to act justly and this Court cannot act justly unless it treats all affected parties with equality right from the beginning of the appeal process up to the end so that they can in turn marshall their arms so as to effectively articulate their rights. Thus, we have also given thought to the possibility of giving an appropriate compliance order such as ordering that all the directly affected parties be served afresh with both the notice and the record of appeal, but we are equally aware that we would be giving such an order over five years after the event which gave rise to the subject matter of the appeal and this in turn means that such parties could have changed their positions or their rights and interests affected due to the passage of time. Furthermore, such a course would in essence result in the extension of time stipulated for service of a notice of appeal without a formal application and without giving the respondent a chance to be heard on such extension of time. That would be unjust. It is for this reason that contrary to what the learned counsel Mr Mwenesi has urged concerning the application of the overriding objective to save the record, failure to comply with rule 76 would be in our view, a violation of the overriding objective since the Court would be acting unjustly against the affected

parties. In this regard we believe that one of the principal purposes of the "***double 'O' principle***" is to enable the Court to take case management principles to the centre of the Court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap. On our part, we have no doubt that a process which would result in the exclusion of the directly affected parties, would fly against this timely intervention in the management of the civil justice system in our country. Expressed differently the purpose of the ***"double O principle"*** in its application to the civil proceedings is to facilitate the just quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded.

While the enactment of the "***double O principle***" is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case of ***Puruse Pty Limited –vs- Council of the City of Sydney [2007] NSWLEC 163*** where the court underscored that the court in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.

With the above objective in view, this Court would obviously be the last one to worship at the altar of technicalities. All the same, having put all the above provisions into account, we find ourselves unable save both the notice of appeal and the record of appeal because the effect of saving them would firstly be at the expense of excluding the affected parties from effectively articulating their respective positions in the appeal due to failure by the respondent to have served them, and, secondly, this Court's rules provide for dispensation in any deserving cases and there is no proof whatsoever that the respondent did give any thought to apply for dispensation.

It is absolutely essential to have all the affected parties before the Court. The corridors of justice should not lock out affected parties. As stated above the right to due process is grounded in the Constitution which in turn recognizes the attainment of justice as a fundamental principle**.** In our view the overriding objective cannot override fundamental principles of law.

For the above reasons our view is that Rule 76 is not in conflict in way with the overriding objective. Instead it furthers some of its principal aims such as acting justly as demonstrated above.

In the result, we strike out the notice of appeal dated 11th May, 2005 and filed on 12th May, 2005 and the record of appeal dated 27th October and filed on 18th October, 2005 with costs to the applicant.

It is so ordered.

Dated and delivered at Nairobi this 12th day of February, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR