



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 130 OF 2008

BETWEEN

JOSEPH KIANGOI.....APPLICANT/1ST RESPONDENT

AND

WACHIRA WARURU.....1ST RESPONDENT/APPELLANT

STANDARD NEWSPAPERS LIMITED.....2ND RESPONDENT/APPELLANT

LILIAN MOGENDI.....3RD RESPONDENT/2ND RESPONDENT

(An application to strike out the Notice of Appeal and record of Appeal being an appeal from the judgment and decree of the high Court of Kenya at Nairobi (Osiero, J.) dated 21st September, 2007

in

H.C.C.C.NO.701 2001)

RULING OF THE COURT

This is an application brought under **Rules 80** and **42(1)** of this Court's Rules and seeks to strike out the 1st and 2nd respondents' notice and the record of appeal.

The main grounds relied on are, that the respondents/applicants are in breach of **rule 76(1)** of the Court of Appeal Rules in that they have failed to serve the notice of appeal on **Lilian Mogendi**, the 3rd defendant in the High Court **Civil Case No.71 of 2001**, being a person directly affected by the appeal and that the respondents are not entitled to rely on the proviso to **rule 76(1)** of the Court of Appeal Rules.

The factual background is that the superior court, **Osiero, J.** on 21st September, 2007 gave judgment in favour of the applicant in a defamation suit in which the respondents did not offer any

evidence in rebuttal. Aggrieved by the said judgment, the respondent filed a notice of appeal on 5th October, 2007 which it failed to serve on **Lilian Mogendi** the 3rd defendant in the suit in the superior court. In an attempt to remedy the non service, the respondents filed in this Court an application dated 14th October 2007 seeking dispensation of service on the said third defendant but the application was dismissed for failure by the respondents' counsel to appear in Court when the application came up for hearing and in addition, no application for restoration had been filed after the dismissal.

When the application before the Court came up for hearing, the applicant was represented by **Mr Mogikoyo**, advocate whereas the respondents were represented by **Mr Billings**, advocate.

Mr Mogikoyo submitted that, because the respondents had not served the hearing notice as required under **rule 76** and had also not brought themselves under the proviso to the rule by seeking dispensation as stipulated, this Court had no jurisdiction and that the omission was fatal to both the Notice and the Record of Appeal. He contended that the 3rd defendant was a party directly affected by the appeal, and that by virtue of having filed a memorandum of appearance and defence through her counsel, she was regarded as having participated in the proceedings in the superior court. The applicant counsel also relied on the nine cases on his list of authorities. For the above reasons, he urged this Court to strike out the Notice and the Record of Appeal.

Mr Billings, learned counsel for the respondents in his response, relied on the replying affidavit by Nelly Matheka, the legal counsel of the 2nd respondent. He submitted inter-alia that, the 3rd defendant's counsel Messrs Kiage & Company had in the superior court sought leave to withdraw from acting for the 3rd defendant for lack of instructions and that application was granted by the court on 2nd April 2007; that the 3rd defendant's whereabouts were unknown, but she was believed to have migrated and settled overseas hence the non service of the Notice of Appeal on her. The respondents had made extensive enquiries concerning the whereabouts of the 3rd defendant as per the affidavit of **Mr Anyegah A Ondieki**, an advocate of the firm of **Guram & Company Advocates**, representing the respondents exhibited in the affidavit in reply and marked NMI; that the 1st and 2nd respondents are the only ones affected by the appeal in that, on 23rd July 2008, they had entered into a consent order with the applicant pursuant to which the amount intended to cover the decretal amount was deposited by the respondents out of which Kshs.4 million was released to the advocates for the applicant including taxed costs in the sum of Kshs.515,690.00 and the balance in the sum of Kshs.4,187,239.00 was deposited in an interest earning account in the joint names of the advocates for applicants and the respondents in a bank acceptable to both firms of advocates; that the applicant advocates were at all material times while the suit was going on in the superior court aware of the non availability of the 3rd defendant because they had at some point applied for substituted service after failing to trace her; and finally, the word "shall" appearing in **rule 76(1)** must be regarded as directory and not mandatory. In addition, the applicant did rely on a list of authorities.

Rule 76(1) of this Court's Rules provide:-

"An intending appellant shall, before or within seven days after lodging notice of appeal serve copies thereof on all persons directly affected by appeal."

At the outset, it is clear to us that, the heart of this applicant is the meaning we attach to the phrase "directly affected by the appeal." In our construction, we do not have to re-invent the wheel in that in the case of **DANIEL ODINDO WAGA vs NABIL HASSAN [2009] e KLR Civil Appeal No. 159 of 2009** this Court defined the phrase as follows:-

"The phrase "directly affected by the appeal" does not have a technical meaning. It is a question of fact whether a party shall or shall not be affected by the outcome of an appeal. The test we think, must be whether if the appeal were to succeed, the result will adversely affect that party."

Applying the above test to the facts in the current application in view of the fact that the 3rd defendant

did not have any representation at the time the judgment was obtained and did not also give evidence in the matter coupled with the fact that the applicant has already entered into a consent order with the 1st and 2nd respondents as regards the entire decretal amount means that she would not be directly affected by the outcome of the appeal. In addition, the funds covered by the consent order as crafted would if the appeal fails be applied in full and final settlement of the matter and if the appeal succeeds costs are likely to be awarded in favour of the two participating respondents only. The other reason why this application cannot succeed is that, it is common ground as between the contesting parties herein that the 3rd defendant had migrated from Kenya and the respondents had, though unsuccessfully tried to bring themselves within the proviso to **rule 76** of this Court's rules. It is clear from the affidavits filed that the 3rd defendant had deliberately avoided to participate in the proceedings in the superior court in that she had neither appeared to defend nor gave instructions to her lawyer who as a result sought leave to cease to act for her and obtained it. We consider that it would not be fair for this Court to ask parties to undertake what has been tried before and has failed, namely tracing the 3rd defendant.

In the circumstances, we think the unsuccessful attempt by the respondents to bring themselves within the proviso to rule 76(1) can be cured by our taking a broad view of justice as mandated by the overriding objective principle. The cure would come about because in the circumstances, justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view there cannot be a better case for the invocation of the overriding objective principle than this case. Court's should in our view lean more towards sustaining appeals rather than striking them out as far as is practicable and fair. As a tool of justice, the overriding objective principle is both procedural and substantive.

In this case, the substantive aspect of sustaining the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record just because the respondents failed to seek restoration of the application for dispensation in circumstances which indicate that the 3rd defendant was outside this Court's jurisdiction. We have a feeling that if we were to allow the application and strike out the notice and the record, of appeal we would in the special circumstances of this case, act unjustly and we would fail to give effect to the overriding objective. We accordingly invoke the overriding objective and in the circumstances of this case, dispense with the need for the respondents to have applied as per the proviso to **Rule 76(1)** of this Court's Rules.

In the circumstances, the application is dismissed but we make no order as to costs.

It is so ordered.

DATED and delivered at Nairobi this 9th day of July, 2010.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR