



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 87 OF 2007

BETWEEN

- 1. THE BOARD OF TRUSTEE, NATIONAL SOCIAL SECURITY FUND**
- 2. NAFTALI O. MOGERE**
- 3. TOM DIJU OWUOR**
- 4. FRANCIS ATWOLI**
- 5. ESTHER TUM**
- 6. PETER KIBATI**
- 7. AMBASSADOR JOSHUA K. TERER.....APPLICANTS/RESPONDENTS**

AND

**MESHACK OWINO ONYANGO (suing as Legal Representative of the Estate of
SILAS OCHIENG ONYANGO (DECEASED).....APPELLANT/RESPONDENT**

**(Application to strike out a notice of appeal and in an appeal from the judgment and decree of the
High Court of Kenya at Milimani Commercial Courts, Nairobi (Ransley, J.) dated 16th February,
2006**

in

H.C.C.C. NO. 627 OF 2003)

RULING OF THE COURT

This is an application under **Rules 1 (3) and 80** of the Court of Appeal Rules for an order that the notice

of appeal and the appeal be struck out on the grounds that:

- “1. The notice of appeal was filed outside the prescribed time.**
- 2. The decree included in the record of appeal is irregular and invalid in the sense that it was not extracted, obtained or issued pursuant to the procedure set out in the provision of Order XX Rule 7 sub-Rules 2, 3, 4 and 6 of the Civil Procedure Rules.**
- 3. The record of appeal contains an invalid Decree and the same does not therefore meet the mandatory requirements of Rule 85 (1) of the Court of Appeal Rules.**
- 4. The Record of Appeal does not contain a valid duly signed and certified judgment and it also contains proceedings which have not been certified as the correct proceedings of the case before the superior court.**
- 5. It is fair and just that orders sought be granted”.**

The application is opposed by the respondent.

In the superior court, the appellant claimed from the respondents on behalf of the estate of **Silas Ochieng Onyango** two sums of money, namely:

“(a) Pension Scheme	-	Shs.1,077,072.00
(b) Group Life Assurance Scheme	-	<u>Shs.1,137,072.00</u>
Total	-	Shs.2,214,144.00
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The respondents admitted in the Joint Statement of defence that the deceased’s estate was entitled to a pension lump sum of Shs.1,077,072/= less Shs.33,467/45 being the deceased’s liabilities – that is a net of Shs.1,043,604/55 which sum was paid on 8th March, 2004 during the pendency of the suit.

The superior court (Ransley, J.) in its judgment made a finding that the plaintiff was entitled to the pension lump sum and that the pension lump sum already paid was the correct amount. The court however, disallowed the insurance claim holding that the insurance was for the purpose of providing for the lump sum only.

The court concluded:

“The plaintiff was therefore at liberty to sue for this last sum as it had not been paid prior to the institution of the suit and I therefore find that the plaintiff is entitled to costs from the date of filing the suit until payment was made.

I therefore award half the costs of this suit to the plaintiff together with interest at court rates from the date of filing the suit until payment on the 8.3.2004”.

The decree which was extracted and signed by the Deputy Registrar of the High Court states in part:

“IT IS ORDERED:

- 1. THAT the Plaintiff was at liberty to sue for the sum of Kshs.1,077,072/= as it had not been paid prior to the institution of the suit.**
- 2. THAT the plaintiff is entitled to full costs from the date of filing of the suit until payment was**

made.

3. THAT the plaintiff is entitled to half the costs of this suit together with interest at court rates from the date of filing the suit until payment on the 8th March, 2004”.

At the hearing of the application, Mr. Mutubwa learned counsel for the applicant abandoned grounds 1 and 2 of the application. He contended in support of ground 3 that the decree does not conform with the judgment in that it contains some awards which were not given by the court. He submitted in particular, that the learned judge did not award Shs.1,077,072; that the judge instead awarded Shs.1,043,604/45; that the judge did not award full costs and instead awarded half costs until the date the amount admitted was paid.

On the other hand, Mr. Amuga, learned counsel for the respondent contended that the decree conforms with the judgment. He submitted that the court awarded full costs for the sum already paid up to 8th March, 2004 and half the costs after the payment; that the bill of costs was taxed and that the judgment has already been satisfied.

Rule 85 (1) of the Rules which specifies the documents which should be included in the record of appeal, such as the one the subject of this application, requires that the record of appeal should contain, inter alia, a certified copy of the decree or order.

If such document is omitted from the record of the appeal, the Rules do not provide for the filing of a supplementary record to include such a document unlike the case of documents referred to in **Rule 85 (2A)**.

In the present case, the record of appeal contains a certified copy of the decree as required by the Rules. The judgment is ambiguous regarding the costs whether both full and half costs were given. The decree is similarly ambiguous. The fact that both the judgment and the decree are ambiguous and that the respective counsel have different construction of the judgment and decree does not render the decree invalid. If any question arises between the parties to the suit relating to the execution, discharge or satisfaction of the decree, the High Court has jurisdiction under **Section 34** of the Civil Procedure Act to resolve the dispute. And if the issue of the correctness of a decree under appeal arises in the course of appeal the appellate court has inherent jurisdiction to determine the issue or remit the issue to the High Court for determination.

Furthermore, the issue of non conformity of the decree with the judgment is a mere technicality because the costs have been taxed and the decree has been satisfied by the applicant.

By article 159 (2) (d) of the new Constitution of Kenya, the courts are now required to administer justice without undue regard to procedural technicalities. In addition, this Court is required to give effect to the overriding objective of civil litigation enshrined in the *Appellate Jurisdiction Act (Cap 9 of Laws of Kenya)* which is, among other things, to facilitate the just and expeditious resolution of appeals (see **Section 3A (1) and (2)** of the Act).

Thus, it would be against the policy of the law to strike out the appeal on a mere technicality raised in support of the application.

As regards the 4th ground of the application, the Rules do not require that a certified copy of the judgment and a certified copy of the proceedings should be included in the record of appeal.

For those reasons, the application is dismissed. The costs of the application shall be costs in the appeal.

Dated and delivered at Nairobi this 15th day of October, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR