



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appli 29 of 2007

ALI K. AHMED T/A SKY CLUB RESTAURANT.....APPLICANT

AND

KABUNDU HOLDINGS LIMITEDRESPONDENT

(An application for striking out notice of appeal in an intended appeal from the ruling of

the High Court of Kenya at Mombasa (Maraga J) dated 6th September, 2005

in

H.C.C.APPEAL NO. 82 OF 2004)

RULING OF THE COURT

The applicant in this Notice of Motion before us filed on 8th February, 2007, *Ali K. Ahmed t/a Sky Club Restaurant*, was the appellant in the High Court Civil Appeal No. 82 of 2004 at Mombasa between him and the respondent *Kabundu Holdings Limited*. On 12th April 2005 the applicant, filed in that appeal “*a Notice of Preliminary Objection*” in which he stated that Patrick Mukiri Kabundu had no capacity in law to act for the respondent *Kabundu Holdings Limited*; that the respondent had no *locus standi* to defend the proceedings in that case and that the subject matter of the proceedings therein did not belong to the respondent. Maraga J. heard that Notice of Preliminary Objection and in a ruling dated and delivered on 6th September, 2005, the learned Judge of the superior court held that the respondent Mr. Kabundu had no *locus standi* in that matter and was therefore debarred from appearing for the respondent in that appeal. The learned Judge also struck out the applications dated the 26th April, 2005 and 22nd June 2005 filed by Mr. Patrick Mukiri Kabundu on behalf of *Kabundu Holdings Limited*. The respondent, *Kabundu Holdings Limited* felt aggrieved by that ruling and sought to appeal. It lodged notice of appeal dated 7th November, 2005 on 8th November, 2005. On being served with that notice of appeal, the applicant filed notice of motion before us dated 5th February, 2007 and lodged in the Court of Appeal Registry on 8th February, 2007. The notice of motion seeks:-

“1. That this Honourable Court be pleased to strike out the respondent’s Notice of Appeal dated 7th November, 2005 arising from the ruling of Honourable Justice D. K. Maraga dated 6th September, 2005 in Mombasa High Court Civil Appeal No. 82 of 2004.

2. That costs of and incidental to this application be borne by the respondent.”

The application is based on three grounds, namely that the notice of appeal has not complied with the rules; that the notice of appeal was lodged after the time allowed by the rules and that the same is a gross abuse of the process of this Honourable Court. The affidavit in support merely states that the notice of appeal is not valid as it was filed exactly sixty three days after the order intended to be appealed from was delivered and was lodged without leave of the Court to lodge it and serve it out of time. It is important to state here that the notice of motion was filed on behalf of the applicant by the firm of advocates, Oyoo and Company, Advocates. That firm has ceased to act for the applicant and in its place Isaac Onyango and Company, Advocates are now acting for the applicant.

In response to the application, the respondent filed a replying affidavit sworn by Patrick Mukiri Kabundu in which whereas the respondent did not dispute the allegation by the applicant that the subject notice of appeal was filed way out of time without leave of the Court, it however, raised two points. First is that the notice of motion is incompetent as it was filed by an advocate, who at the relevant time, had no practising certificate, and secondly, that on 4th January, 2006, the respondent filed an application for extension of time to stay the order dated 6th September, in the superior court. He annexed a decision of Njagi J delivered on 18th October 2007 which in his view demonstrated that as of the date this notice of motion was filed, Mr. Oyoo had no licence to practise as an advocate of the High Court of Kenya and that being the case any pleadings he filed during that relevant period remained incompetent, this Notice of Motion included.

Before us Mr. Onyango, the learned counsel for the applicant argued that Mr. Oyoo had practising licence covering the year 2007 although the licence was given in September of that year. He was however, unable to show us a copy of that licence and neither did he cause any affidavit to be sworn to that effect. All the allegations he made were from the bar and could not persuade us to ignore a decision of Njagi J. which was in Civil Suit No. 259 of 2006 delivered on a matter between the same parties on issues covering the relevant period. In our view, the notice of motion was filed by a person who was not at the relevant time holding a practising certificate; and we cannot act on it as it is incompetent. It is struck out.

However, that is not the end of the matter. It has been brought to the Court's notice, that Maraga J delivered the ruling against which the appellant filed notice of appeal, on 6th September, 2005. **Rule 74 (2)** provides as follows:-

“(2) Every such notice shall, subject to the provisions of rules 82 and 94 be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

Pursuant to that rule, the notice of appeal against the ruling of Maraga J should have been lodged by 20th September, 2005. It was not lodged within that time. It was lodged on 8th November, 2005, which was about 49 days later. The respondent says that it filed application for extension of time or to validate the late notice of appeal in the superior court but that was dismissed and he had filed notice of appeal against that dismissal and an application seeking stay of that order. That in effect confirms that no leave of the Court was obtained or has been obtained to file the subject notice of appeal out of time and none exists as at the date this application was heard. Thus it has come to our notice that a document had been filed out of conformity with the Rules of this Court. We have a duty to act **suo moto** and we hereby do act. The notice of appeal dated 7th November, 2005 and lodged in the Court on 8th November, 2005 arising from the decision of Maraga J. dated 6th September, 2005 in Mombasa High Court Civil Appeal No. 82 of 2004 is struck out. We make no order as to costs of the application which we have struck out and no order as to costs of striking out the notice of appeal on our own motion. The striking out of the notice of appeal does not, however, prevent the respondent from pursuing any pending application or appeal for extension of time. Orders accordingly.

Dated and delivered at Mombasa this 23rd day of January, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR