



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 42 of 2006 (UR 23/2006)

PATRICK MUKIRI KABUNDU.....APPLICANT

AND

RUTH WAKONYO KABUNDU.....1ST RESPONDENT

JACOB MWONGO.....2ND RESPONDENT

JASON KIMBUI.....3RD RESPONDENT

BISHOP LAWI IMATHIU.....4TH RESPONDENT

KABUNDU HOLDINGS LIMITED.....5TH RESPONDENT

(Application to strike out the Notice of Appeal from the Ruling of the High Court of Kenya

at Nairobi (Ojwang, J.) dated 14th October, 2006

in

H.C.C.C. NO. 649 OF 1996)

RULING OF THE COURT

This is an application by way of Notice of Motion expressed as having been brought “***under Rules 42, 43, 74, 80, 81 & 85 of the Court of Appeal Rules and all other enabling provisions of the law.***” In this application, the applicant, ***Patrick Mukiri Kabundu***, acting in person, sought the following orders:-

“1. THAT the Notice of Appeal filed herein on 25th October, 2005 by the 1st Respondent be struck out.

2. THAT the cost of the applicant be borne by the respondent in any event.”

This application is brought on the following grounds:-

“(a) THAT the Notice of Appeal dated 25th October, 2005 is incurably defective in substance and form.

(b) THAT the 1st Respondent herein has failed to take some essential requirements after filing the Notice of Appeal thus rendering the intended appeal incompetent .

In addition to the foregoing grounds, there is a supporting affidavit sworn by the applicant setting out in some detail the background to this matter.

When the application came up for hearing before us on 3rd February, 2009, the applicant, as we have already stated, appeared in person while Mr. J. Makori appeared for the 5th respondent and also held brief for Mr. Bryant for the 2nd, 3rd and 4th respondents. There was no appearance for the 1st respondent but her lawyers, Akoto & Company Advocates were served.

The applicant addressed us briefly in a bid to show that the notice of appeal filed by the 1st respondent was defective.

On his part, Mr. Makori supported the application to strike out the notice of appeal on the ground that ***Kabundu Holdings Ltd.*** which was the 1st plaintiff in the suit in the superior court had not been served with the notice of appeal.

As already stated, this application is brought on the ground that the notice of appeal filed herein was defective in both substance and form.

We have considered what was placed before us and we would point out that the 1st respondent whose notice of appeal was being challenged did not appear whether in person or by counsel. In our view the starting point is ***rule 76(1)*** of this Court’s Rules which provides:-

“76 (1) An intended appellant shall, before or within 7 days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal;

Provided that the Court may on application, which may be made ex parte within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

In this application, it is the applicant’s contention that ***Kabundu Holdings Ltd.*** which was the 1st plaintiff in the superior court was not served with notice of appeal. There is, however, an affidavit of service by one, ***Peter Khainga*** to the effect that he proceeded to *M/s Kabundu Holdings Ltd.* offices situated at Kabundu House along Moi Avenue Mombasa where he found one, ***Patrick Mukiri Kabundu*** who is the Managing Director of the said company and served him with the documents; that he accepted service but declined to acknowledge receipt of the said documents. It is to be observed that the said ***Patrick Mukiri Kabundu*** is the applicant herein. He is the one who has filed this application on the ground that ***Kabundu Holdings Ltd.*** was not served. It is rather unfortunate that 1st respondent whose notice of appeal is being challenged was not represented during the hearing of this application.

We have looked at the copy of the notice of appeal in issue and it shows that the copies of the Notice of Appeal were to be served upon the following:-

“1. *Patrick Mukiri Kabundu*

Kabundu House

Moi Avenue

P.O. Box 98767

MOMBASA

2. *Lubullelah & Associates Advocates*

Commonwealth House

Moi Avenue

NAIROBI

and

3. *Deche Nandwa & Bryant Advocates*

Imperial Bank Building

Nkrumah Road

MOMBASA.”

It is significant to note that there was no mention of *Kabundu Holdings Ltd.* as a party to be served with a copy of the notice of appeal. This was contrary to the provisions of **Rule 74(3)** which provides that all parties to be served be cited in the Notice of Appeal.

From the foregoing, it is clear that there was no intention to serve *Kabundu Holdings Ltd.* with a copy of the notice of appeal. It is therefore rather interesting to see an affidavit of service by the process server (*Peter Khainga*) that he served *Kabundu Holdings Ltd.* through its Managing Director, when there was no intention on the part of the 1st respondent to effect service on *Kabundu Holdings Ltd.*

We think we have said enough to show that this application to strike out the notice of appeal is not without merit. We do not think it is necessary to consider other issues raised as the application can easily be disposed of by what we have already considered. Accordingly, the application is allowed and we order that the notice of appeal filed herein on 25th October, 2005 by the **1st respondent** be and is hereby struck out but with no orders as to the costs of the application.

Dated and delivered at NAIROBI this 13th day of February, 2009.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR