



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

Civil Appeal (Appli) 296 of 2001

AMEER KASSIM LAKHAAPPLICANT/APPELLANT

AND

- 1. MISTRY JADVA PARBAT & COMPANY LIMITED**
- 2. HASMUKH DEVANI**
- 3. NAGIB DAMJI.....RESPONDENTS**

(An application for orders that this Honourable Court be pleased to dispose with service of the notice of appeal dated 29th May, 2001 and the record of appeal dated 20th November, 2001 filed by the applicant/appellant, on Three A's Investments Ltd, the 4th defendant in the superior court, being High Court Civil Case Number 251 of 1997

in

H.C.C.C. NO. 2513 OF 1997)

R U L I N G

In a plaint dated 20th September, 1997 and filed in the superior court at Nairobi, Mistry Jadva Parbat & Company Ltd, sued Ameer Kassim Lakha, Hasmukh Devani, Nagib Damji and Three A's Investments Ltd, the 1st, 2nd, 3rd and 4th defendants respectively in that case praying for judgment against them jointly and severally for Ksh.54,480,229/63 with interest thereon at the rate of 36% per annum until payment in full, plus costs of the suit. That plaint was later amended twice and the second amended plaint was dated 22nd February, 2001. The defendants remained the same but an additional prayer was added in the last amended plaint and that prayer sought an order restraining any transfer, lease, assignment or change of user, title or ownership of property known as L.R. No. 209/354/11 until the sum of Ksh.54,480,229/65 together with interest thereon was paid in full. The record shows that all defendants filed statements of defence and in some cases such as that of the first, second and fourth defendants, amended defences were filed. On 16th February, 2001, the first and fourth defendants namely Ameer Kassim Lakha and Three A's Investments Ltd, through their common firm of advocates, filed chamber summons dated 15th

February 2001 in the superior court seeking an order that the amended plaint dated 11th November, 1997 and filed in court on 17th November 1997, be struck out as against the first defendant. The 2nd and 3rd defendants also filed an application jointly dated 17th February, 2001 seeking that the entire plaint be struck out as against them. I note that those two applications were filed before the further or last amended plaint dated 22nd February, 2001 was filed. Nevertheless both applications which were made under **order 6 rule 13 (1) (b) and (d)** were placed before Hewett, J. (as he then was) who after hearing the applications (which were apparently consolidated and heard together), in a lengthy ruling delivered on 25th May, 2001 dismissed them. The applicant in this application before me Ameer Kassim Lakha felt aggrieved by that ruling. He filed notice of appeal dated 29th May 2001 in the superior court on the same date. On the face of it, it was indicated in that notice of appeal that it was intended to be served upon Ramesh Manek, Pandya & Taleti and Mutua Mboya & Nzissi, advocates on record for the 2nd, 3rd and 1st respondents respectively. No indication was made in that notice of appeal that it was also intended to be served upon the 4th respondent, Three A's Investments Ltd. I understand from the submissions, I will later refer to that that omission was because the advocate for the applicant and 4th respondent are the same firm of advocates. That notice of appeal was served upon Mutua, Mboya & Nzissi, advocates on 5th June, 2001. Be that as it may, the record of appeal was subsequently prepared and Civil Appeal Number 296 of 2001 was filed in this Court on 20th November 2001. The record of appeal was served upon Mutua, Mboya & Nzissi, advocates on 21st November 2001 according to the record before me. The appeal first came up for hearing on 26th May 2004, but Mr. Mutua raised a preliminary issue contending that the record of appeal was filed late. That was dismissed in a ruling dated 28th May 2004. In a notice of motion dated 8th December 2006, the 1st respondent, through its advocates Mutua Mboya & Nzissi sought an order of this Court to strike out the notice of appeal and the entire appeal on grounds that copy of notice of appeal was not served upon the 4th respondent Three A's Investment Ltd, and that the appellant had left out the 4th respondent in the record of appeal and was not served with the record of appeal. That application came up for hearing before a full bench of this Court and was, in a ruling dated and delivered on 8th February 2008 dismissed on grounds that the applicant in that application who is the 1st respondent in this notice of appeal did not comply with the requirements of the proviso to **rule 80** of the Court of Appeal Rules as the application was filed outside 30 days from the date of the service of the record of appeal as is provided in the Rule.

That obstacle surmounted, the appeal was then set down for hearing on 13th October 2008. I note that the applicant failed to take advantage of that application to apply to serve Three A's Investments Limited out of time. However, on that date the hearing could not proceed as the 4th defendant in the superior court Three A's Investments Limited was neither made a party in the appeal nor was it served with a hearing notice. It was not before court and no order of the court directing that service upon it be dispensed with was availed to the court. The matter was adjourned to enable the applicant to comply with the rules.

That order is the genesis of this application before me dated and filed on 13th February 2009 in which the applicant Ameer Kassim Lakha is seeking an order.

“That pursuant to and in deference in the Ruling of this Honourable Court on 13th October, 2008, this Honourable Court be pleased to dispense with service of his Notice of Appeal dated 29th May, 2001 and the Record of Appeal dated 20th November, 2001 filed by him, on Three A's Investments Limited, the fourth defendant in the Superior Court, being High Court Civil Case number 2513 of 1997.”

Five grounds were cited in support of the application. These were in a brief summary that the 1st respondent's Managing Director, had, in an affidavit in support of an originating summons relevant to the proceedings in the superior court deposed that the 1st respondent entered into the suit contract with Bustani of Kenya Limited who were acting as agents for a disclosed principal namely the Three A's Investments Limited – the 4th defendant in the suit in the superior court, and that meant that the applicant was clearly not personally liable and that was the reason for his application for dismissal of the suit as

against him; that the case in the superior court is still pending and is awaiting to be heard; and that being the case the outcome of his appeal in this Court will have no bearing on the liability or otherwise of the 4th defendant in that case Three A's Investments Limited. Further as the firm of advocates acting for both the applicant and Three A's Investments Limited is one firm of advocates, namely Mandla & Sehmi Advocates, it would be otiose for the same firm of advocates to serve upon themselves both the Notice of Appeal and Record of Appeal since they filed notice of appeal and prepared record of appeal on the applicant's behalf. Lastly, the applicant says Three A's Investments Limited does not object to notice of appeal and record of appeal being served upon it out of time and acknowledges service out of time and says it can be deemed to have been served within the required time.

There is affidavit sworn by Ameer Kassim Lakha in support of the application which states mainly that the 4th defendant in the superior court Three A's Investments Limited is not interested in the outcome of the appeal before this Court at all since it is the entity that entered into the contract sued upon, and so there is no objection to the copies of notice of appeal and record of appeal being served upon it and that it has received the same and does not raise any objection in the same having been served upon it out of time. Ameer Kassim Lakha annexed a letter headed **THREE A's INVESTMENTS LIMITED** addressed to Mandla & Sehmi, advocates stating the above.

The application was opposed and in a replying affidavit sworn by Kunverji Kanji Patel dated and filed on 4th May 2009, the deponent states in brief that the 4th defendant in the superior court Three A's Investments Limited had not been made a party to the appeal; that the said 4th defendant duly filed a memorandum of appearance dated 22nd October 1997, a defence dated 30th October 1997 and the chamber summons application dated 15th February 2001 of which ruling is the subject of the appeal before this court and that in both notice of appeal filed 29th May 2001, and record of Appeal filed on 20th November, 2001 all parties upon whom it was intended to serve the two documents were listed.

In his submission before me, Mr. Gautama mainly emphasized the contents of the affidavit in support and the grounds upon which the application was based, particularly the last ground in the application which was to the effect that services upon Three A's Investments Limited be allowed out of time, or be dispensed with altogether. When reminded that there was no application before the court for service of the notice of appeal and record of appeal out of time and that as to dispensing with the service under the proviso to **rule 76 (1)** of this Court's Rules, the application should have been made within a certain time set out in that Rule, Mr. Gautama urged me to use the inherent powers of the Court to grant that order as to him, the circumstances, the facts, and the history of the matter warranted the use of those powers. His position was that the applicant was merely complying with order of the court dated 13th October 2008. Mr. Gautama's position was supported by Mrs. Solanki, the learned counsel holding brief for Mr. Manek the learned counsel for the 2nd respondent and Mr. Sharma, the learned counsel holding brief for Mr. Pandya for the third respondent.

Mr. Mutua, the learned counsel for the 1st respondent; in his submissions in opposing the appeal raised four points which were first that the application was not made in compliance with the proviso to **rule 76 (1)** as it was not made within seven days of the filing of the documents, the service of which the applicant now wants to dispense with. Secondly, that the Court has no powers to dispense with service upon a person who took part in the proceedings before the superior court such as Three A's Investments Limited which took part in the proceedings in the superior court in that the application in the superior court upon which decision is now the subject of appeal was filed by both the applicant and Three A's Investments Limited. Thirdly, that Three A's Investments Limited was not a party upon which the service was intended as it was not cited in the notice of appeal nor in the record of appeal and finally Mr. Mutua contended that the application could not have been brought to comply with the order of the Court made on 13th October 2008 as that order never directed that the application be made in the way it was made.

I have anxiously considered the application, the grounds for it, the affidavit in support, and the annexures thereto, the replying affidavit and the annexures thereto, the submissions by all the learned

counsel, the history of the case both in the superior court and before this Court together with the fact that Civil Appeal No. 296 of 2001 in respect of which this application has been made has been set down for hearing on more than one occasion and is still awaiting hearing. I have also considered the law.

The application is stated to be brought pursuant to **section 3 (2)** of the Appellate Jurisdiction Act, **Rules 1 (2), 4 and 76** of the Court of Appeal Rules (the Rules). Although **rule 4** is mentioned, the prayer sought in this application which I have reproduced above is one and is a prayer seeking to dispense with service of notice of appeal and record of appeal. There is no prayer for extension of time to serve the two documents out of time in the actual application. Further, although the fifth ground in support of the application and the affidavit of the applicant both state that Three A's Investments Limited does not object to service upon it being made out of time and that it has already been served and has accepted service out of time, no attempt was made to state as would be expected in a proper application under **rule 4** of the Rules the circumstances for the delay. All these lead me into the conclusion that although **rule 4** is cited in the application, the application is for all intents and purposes premised upon **rule 76** of the Rules of the Court. It cites that rule and prays for orders that could only be available pursuant to that Rule.

Rule 76 (1) states as follows:-

“An intended appellant shall, before or within seven 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 persons who took no part in the proceedings in the superior court.”

Mr. Mutua submits that Three A's Investments Limited is a person who took part in the proceedings in the superior court and is thus not covered by the proviso. In short he contends that it falls under the main rule and was bound to be served with the notice of appeal pursuant to **rule 76 (1)** of the Rules. He contends that dispensation of service cannot be sought in respect of service upon Three A's Investments Limited. Secondly, and in any event, he argues that even if the proviso was to apply to Three A's Investments Limited, still the dispensation with service spelt out in the proviso to **rule 76 (1)** should have been sought within seven days of the date notice of appeal was lodged. If I understand him, in either case, as there was a delay in serving Three A's Investments Limited with the notice of appeal, proper application for extension of time was required and this application to dispense with the service of notice of motion would have only been appropriate after the time for filing it was extended if the application for extension of time to file it succeeded. I have on my own considered that, anxiously as I have said. I find merit in that argument. The application by way of chamber summons dated 15th February 2001 which sought orders that the amended plaint dated 11th November 1997 be struck out as against the 1st defendant with costs to be provided for was filed by “*Mandla & Sehmi, Advocates for the 1st and 4th defendants.*” That is what appears in that application. A look at the affidavit in support of it shows that the fourth defendant Three A's Investments Limited was cited on several instances. In short, it was one of the applicants in that application. The rejection of that application by the superior court is what gave rise to the filing of the subject notice of appeal and subsequent record of appeal. In my mind, I would entertain no doubt that Three A's Investments Limited was a person directly affected by the appeal. That one firm of advocates represented both applicant and Three A's Investments Limited should not be allowed to confuse the issues. They are two separate parties in the suit. That being my view of the matter, it should have been served with the notice of appeal under the provisions of **rule 76 (1)**. It was not so served within seven days as required by that Rule. If the applicant still wanted it served then it should have fallen back to **rule 4** and sought extension of time to serve it with notice of appeal out of time. If however, I am wrong on that aspect and the applicant in his wisdom felt that Three A's Investments Limited in effect took no part in the proceedings leading to the appeal, then it had seven days to apply to dispense with service of notice of appeal upon it. It did not do so within that time. It has now come before me with the same application to dispense with service of notice of appeal upon Three A's Investments Limited over seven years since that notice of appeal was lodged and without the period of seven days specified in the Rule having been extended. I do not, with respect think this is proper. In my

considered view, the applicant needed to apply to have either period of service extended if he wants to serve the notice of appeal upon Three A's Investments Limited or have the period of application for dispensation with service extended if he still wants the Court to direct that the service upon Three A's Investments Limited be dispensed with under the proviso to **rule 76 (1)**. As matters stand now, without that extension of time, I would find it impossible to entertain the application for dispensation with service of notice of appeal upon Three A's Investments Limited. The applicant says Three A's Investments Limited does not object to service out of time and has indeed been served out of time. Those are factors that would come up for consideration if an application for extension of time is properly before the court. As I have stated above, in the application before me, though **rule 4** is cited, the substantive application is not brought under that Rule and no attempt had been made to meet the principles set out for consideration under that rule, and rightly so because the application is for dispensation and not for extension of time to file application for dispensation of service or for service of notice of appeal out of time. I note that under **rule 87 (2)** the Court can direct the appellant to serve the record of appeal on such other parties to the original proceedings on application by a party or on its own motion, but this application is not brought under that provision and is seeking to dispense with such service.

Mr Gautama asks me to exercise inherent powers and allow either dispensation with service upon Three A's Investments Limited or allow service out of time. With respect, he did not come out clearly as to which of those two he wanted, but be that as it may, I do not think I have inherent powers sitting as a Judge of the Court of Appeal. **Section 3 (2)** of the Appellate Jurisdiction Act deals with powers conferred to this Court when hearing an appeal. My jurisdiction is limited by written law and not inherent. I have considered **rule 1 (2)** of the Rules. It does not allow me to ignore the existing Rules. In any event, even if I had inherent powers, I would still be restricted to exercising such jurisdiction only in cases where there are no clear legal remedies provided. In the matter before me, it is clear that provisions of **rule 4** of the Rules of Court would have taken care of the situation and so the situation does not call for exercise of inherent jurisdiction to ensure justice is done.

Lastly, I have carefully perused the order made by a full bench of this Court and dated 13th October, 2009. All it states is that an application for an order that service of notice of appeal need not be effected on 4th defendant should have been made but none was made and so the Court was of the view that the appeal was not ready for hearing. It did not direct that such application be made without following the required provisions of the Rules of this Court which clearly specify that such application should have been made within seven days of the date of lodging the notice of appeal failing which an application for extension of time to do so became necessary. Whether or not the outcome of the appeal would have effect on Three A's Investments Limited are matters I would only consider if the application was properly before me.

The upshot of all the above is that this application is not properly before me. I strike it out with costs to the first respondent.

Dated and delivered at Nairobi this 15th day of May, 2009.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR