



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 99 of 2009 (UR 61/2009)

SAJ APPLICANT

AND

AOG

THE HONOURABLE ATTORNEY GENERAL RESPONDENTS

(Application to strike out the 1st Respondent’s notice of appeal filed on 18th March, 2009

in an intended appeal from the ruling of the High Court of Kenya

at Nairobi (Rawal, J.) dated 17th March, 2009

in

MISCELLANEOUS CASE NO. 15 OF 2009)

RULING OF THE COURT

This is an application by SAJ under **Rules 47 and 80** of the Court of Appeal Rules (Rules) for orders that; the notice of appeal filed on 18th March, 2009 by AOG the first respondent herein be struck out and that the interim orders issued in *Civil Application No. Nai. 75 of 2009* be vacated.

The applicant is a British citizen while his wife who is the first respondent, is a Kenyan citizen. Both are Muslims and were living in United Kingdom (UK) until 30th November, 2007 when the first respondent left UK with ZJ – their child of marriage who is a British citizen without the knowledge of the applicant. Thereafter, the applicant filed proceedings in the High Court of Justice, England and on 15th January, 2009, the English Court ordered, *inter alia*, that the child be a ward of the Court during his minority and that the mother – the first respondent should cause the return of the child forthwith to England. The 1st respondent did not comply with the order. The applicant thereafter came to Kenya and filed *Miscellaneous civil Application No. 15 of 2009* in the High Court of Kenya (Family Division) under the Children Act 2001 and Civil Procedure Act, for the return of the child to England in compliance with the orders of the High Court of Justice, England. The application was allowed by Rawal, J. on 18th March, 2009 who ordered, among other things, that the child be forthwith returned to High Court of Justice, England as a ward of that court and further that the child be accompanied by her mother, the first respondent.

On 18th March, 2009, the first respondent filed a notice of appeal signifying her intention to appeal against the decision of Rawal, J. On the basis of that notice of appeal, the first respondent filed *Civil Application No. Nai. 75 of 2009* in this Court under **Rule 5 (2) (b)** of the Rules seeking a stay of execution of the orders of Rawal, J. and all consequential orders pending the determination of the intended appeal. That application is still pending for hearing. However, on 31st March, 2009, this Court granted an interim stay of execution of the orders of Rawal, J. pending the hearing of the application.

That notice of appeal is the subject matter of this application. The application to strike out the notice of appeal is based on the grounds that; the notice of appeal is a nullity as no leave to appeal against the decision of Rawal, J. has been obtained; that the notice of appeal was not served within the seven days prescribed by the Rules; that the notice of appeal is fatally defective and incompetent as it does not indicate what part of the ruling of Rawal J. that the first respondent intends to appeal against; that that notice of appeal does not bear the name of all persons to be served; that the notice of appeal does not name the 2nd respondent and that the notice of appeal is drawn in breach of **Form D** prescribed by **Rule 74 (6)**.

The application is mainly brought under **Rule 80** of the Rules which provides:

“80. A person affected by an appeal may, apply to the court to strike out the notice of appeal or appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent”.

It is not necessary to decide whether or not the decision of Rawal J. that the first respondent intends to appeal against is appealable with or without leave for **Rule 74 (4)** of the Rules provides:

“When appeal lies only with leave or on a certificate that a point of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal”.

Thus, assuming but without deciding, that, leave to appeal was required, **Rule 74 (4)** authorises the filing of a notice of appeal before such leave is obtained.

On the question of service of the notice of appeal, **Rule 76 (1)** provides that the intended appellant:

“Shall, before or within 7 days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal”.

The notice of appeal lodged on 18th March, 2009 was served on the advocates for the applicant on 26th March, 2009 – that is one day after the prescribed 7 days which expired on 25th March, 2009.

Jan Mohamed, learned counsel for the 1st respondent conceded that the notice of appeal was served out of prescribed time but contended that, that was not fatal because the court has jurisdiction to extend time.

It is true that this court has unfettered discretion under **Rule 4** to extend time limited by the Rules or by a decision of the Court or of a superior court. However, the discretion of the court is exercised upon a formal application which is normally heard by a single Judge. By the time the present application was filed the first respondent had not even filed an application for extension of time to serve the notice of appeal. The result is that by the time the present application was made and heard, the first respondent had not taken the essential step of serving the notice of appeal within the prescribed time. In our view, the application is incontestable on this ground.

Rule 74 (6) provides that the notice of appeal:

“Shall be substantially in the form D in the First Schedule hereto and shall be signed by or on behalf of the appellant”.

Form D – indicates that the heading of the notice of appeal should be *“as in the proceeding appealed from”*. Further both **Rule 74 (3)** and Form D require the appellant to indicate whether the intended appeal is against the whole or part of the decision and if against a part only, the part should be specified.

Section 72 of the Interpretation and *General Provisions Act* Chapter 2 of the Laws of Kenya, which is the substantive law on defects in forms prescribed by statutes provides:

“Save as otherwise expressly provided, wherever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead”.

Rule 74 (6) requires that the notice of appeal should “*be substantially in Form D*” which phrase refers to the substance of the notice of appeal and not to its form.

In the light of the foregoing, we do not consider the incorrect heading of the notice of appeal and the omission to state whether the intended appeal is against the whole or part of the ruling to be matters of substance. They are mere defects in the form which would be cured by the memorandum of appeal. The memorandum of appeal, if filed, would bear the correct heading of the appeal as well as indicate what the appellant’s grievance actually is against the decision of the superior court.

However, we are of the view that the omission to name the Attorney General as a second respondent in the notice of appeal when the Attorney General was in fact a second respondent in the application in the superior court and the failure to indicate in the notice of appeal that the Attorney General was a party to be served with the notice of appeal affect the substance of the notice of appeal and renders it incompetent.

Thus, the applicant has shown that the notice of appeal was served outside the prescribed time without leave of the Court and that the notice of appeal is incompetent for omission to name the Attorney General as a respondent in the intended appeal and as a party to be served.

In view of the foregoing, we strike out the notice of appeal dated 17th March, 2009 and lodged on 18th March, 2009. As a consequence, we set aside the interim order of stay of execution given by this Court on 31st March, 2009 in *Civil Application No. Nai. 75 of 2009*. We make no orders regarding the costs of this application.

Dated and delivered at Nairobi this 12th day of June, 2009.

E. M. GITHINJI

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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