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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 87 & 88 of 2005

DANIEL ODINDO WAGA APPLICANT/RESPONDENT

AND

NABIL HASSAN RESPONDENT/APPELLANT

(Application to strike out the Notice of Appeal dated 18th December, 2007 and the Record of Appeal filed in Court on 21st July, 2008 from a ruling of the High Court of Kenya at Kisumu (Mugo, J.) dated 13th December, 2007

in

H.C.MISC. CIVIL APPLICATION NO. 120 OF 2007)

RULING OF THE COURT

Nabil Hassan, the appellant in *Civil Appeal No 159 of 2008*, unsuccessfully moved the superior court for an order extending the time within which to enter an appeal against the decision of the Chief Magistrate's Court in which that court dismissed objection proceedings he had filed. The superior court at the same time declined to grant an order of stay of execution of the order given by the subordinate court in *Kisumu CMCC No. 738 of 1998*. In the aforesaid appeal, Nabil Hassan challenges, principally, the aforesaid two decisions of the superior court.

The background facts are short and straightforward. Property known as *Kisumu Municipality/Block 6/103*, was attached in execution of decree in *Kisumu CMCC No.738 OF 1998*. By a notice dated 1st September, 2003, Nabil Hassan raised objection to that attachment pursuant to the provisions of **Order XXI rule 53** of the Civil Procedure Rules. When the decree holder in that case intimated he intended to proceed with the attachment, Nabil Hassan filed objection proceedings through Messrs Onsongo & Company Advocates. That application was heard but was dismissed. No appeal against that dismissal was filed within the time stipulated, although Mr. Onsongo did successfully apply for leave to appeal against the dismissal of that application. Subsequently, the objector moved the superior court under *Miscellaneous Civil Application No. 120 of 2007*, for three basic orders. Firstly, for an order granting leave to the objector to appeal against the ruling dismissing his objection proceedings. Secondly, he prayed for an order extending the time within which to lodge an appeal against that ruling. Thirdly, he sought an order of stay of the sale of the aforesaid property pending the filing, hearing and determination

of his intended appeal. It is this application which the superior court dismissed and provoked **Civil Appeal No. 159 of 2008**.

Daniel Odindo Waga, the applicant herein, is the decree holder in the suit before the Chief Magistrate's Court. Nabil Hassan, the appellant was not initially a party in the suit and only came into the suit as an objector to execution of decree. When his objection to attachment failed, the aforesaid property was sold to a company known as **Brenos Limited**. The appellant did not, however, serve that company with both the notice of appeal and record of appeal.

In the application before us, David Odindo Waga, seeks an order striking out this appeal on basically the ground that Ms. Brenos Limited, allegedly, a party directly affected by the appeal, was neither served with a notice of appeal nor record of appeal and that renders the appeal incompetent and liable to be struck out.

Mr. Ocharo, for the appellant/respondent does not think Ms. Brenos Ltd is a party directly affected by the appeal. In a replying affidavit he swore on behalf of the appellant/respondent, he has deposed, inter alia, that the respondent's appeal does not concern land No. **Kisumu Municipality/Block 6/103**, but a refusal to extend time within which to file an appeal. He re-echoed that argument in his submissions before us and urged the view that service upon that company was not necessary. In his view, the company is not a party likely to be directly affected by the outcome of the appeal.

Mr. P.J.O. Otieno, for the applicant, thinks otherwise. In his submissions before us he made reference to the prayers the appellant included in his application which gave rise to the decision appealed from. In one of these prayers, the appellant sought an order stopping further dealings in the aforesaid property. For that reason he said, Ms. Brenos Ltd., the current registered proprietor becomes a party likely to be directly affected by the outcome of this appeal.

Rule 76(1) of this Court's Rules, provides that:-

“An intending appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”

The phrase ***“directly affected by the appeal”*** does not have a technical meaning. It is a question of fact whether a party shall or shall not be affected by the outcome of an appeal. The test, we think, must be whether if the appeal were to succeed, the result will adversely affect that party.

The appellant by lodging this appeal will want this court, to reverse the decision of the superior court which in effect barred him from appealing against the decision of the Chief Magistrate's Court ordering the sale of the aforesaid property which the appellant claims belongs to him. The property is now registered in the name of Ms. Brenos Ltd. The appellant is not pursuing this appeal merely to get an opportunity to appeal against the Chief Magistrate's Court's decision. He eventually would want to have the aforesaid property and that is why in his application before the superior court, apart from a prayer for extension of time, he included a prayer for a preservation order. The appellant's paramount purpose in bringing this appeal is to pave the way for seeking to recover what he considers to be his property illegally sold in execution of decree in a suit in which he was not a party. Ms. Brenos Ltd's interest in the appeal is not far fetched.

Mr. Ocharo, submitted before us, that the company never took part in proceedings in the superior court. That may well be so. That notwithstanding, it was nonetheless entitled to be served. Otherwise, the appellant was obliged under the proviso to **rule 76** of this Court's Rules to move the Court for a direction that service need not be effected on it for the simple reason that it did not take part in the proceedings giving rise to the order appealed against.

There is a second ground given for seeking to strike out this appeal, namely, that the record of appeal omits certain primary documents. Having come to the foregoing conclusion, we find no necessity for considering that ground. One ground, if it is established, suffices to entitle the Court to strike out an

appeal. That being our view of the matter, we allow the application dated **14th** but filed in Court on **19th August, 2008**, respectively, strike out **Civil Appeal No. 159 of 2008** as incompetent, and award the costs of both the application and the appeal to the *applicant/the respondent* in the appeal. We so order.

DATED at DELIVERED at KISUMU this 17th day of July, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR