REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL (APPLI) 139 OF 2008 (KSM 18/08)

1. DAVID OJWANG OKEBE.....APPLICANT

2. PETER OKELLO ONGONGO.....APPLICANT

3. PATRICK ACHOLA NYAWARA.....APPLICANT

4. LUCAS OTIENO OUMA.....APPLICANT

5. NORMAN OMULLO ODHIAMBO.....APPLICANT

6. TOM OGWENO ONYANGO.....APPLICANT

7. THADAYO OTIENO OREMBO.....APPLICANT

9 DENNIS AKUMU OUMA.....APPLICANT

10. JANE A. ODERA.....APPLICANT

11. ROBERT ODOYO OCHOMO.....APPLICANT

AND

1. SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT/RESPONDENT

2. COMMISSIONER OF POLICE ..... 12TH RESPONDENT

3. ATTORNEY GENERAL ..... 13TH RESPONDENT

(An application to strike out record of appeal from the judgment of the High Court of Kenya at Kisii (Musinga, J.) dated 30th April, 2008

in

H.C.C.A. NO. 247 OF 2003)

****

CONSOLIDATED WITH

CIVIL APPEALS NOs. 248, 249, 250, 251, 252,

253, 254, 254, 255, 256 & 257 OF 2003)

****

RULING OF THE COURT

The motion before us was brought by 11 applicants seeking an order that the record of appeal filed herein on 27th June, 2008 be struck out. They also seek an order that the decretal sum, half of which is deposited in a joint interest-earning account and one other half unpaid, be released to the applicants' advocates. Several provisions of the rules of this Court are invoked, to wit: ***Rules 1 (2), 41, 42, 74, 80*** and ***85 (2)***.

The six grounds upon which the application is based are stated as follows: -

> "*a) That the decree of the subordinate court contravenes the provisions of Order XX Rule 6 of the civil Procedure Rules and therefore renders the record incurably defective.*
>
> *b) The Memorandum of Appeal filed herein is not of the decision and decree appealed against as it introduces new parties who were not in the title of the decree of the superior court namely Commissioner of Police and Attorney General as 12th and 13th respondents thereby rendering the record incurably defective.*
>
> *c) No respective notices of appeals were filed and served in respect of decrees of the High Court Civil Appeal Numbers 248, 249, 250, 251, 252, 254, 255, 256, 257 all of 2003 which have been made subject of the record of appeal herein contrary to the provisions of the law.*
>
> *d) The Memorandum of Appeal filed in the High court was not of the suit filed and determined in the subordinate court as it has a different heading thereby rendering the record incurably defective.*
>
> *e) There is only a single record of appeal filed and served in respect of or against 11 decrees of the High Court appealed against thereby rendering the record incurably defective as consolidation for purposes of hearing and judgment in the superior court did not necessary (sic) extinguish the singular and independent identity of the said appeals and decrees of the High Court hence the need for respective notices of appeals and records of appeal.*
>
> *f) The decrees of the superior court filed herein are not certified as required by law thereby rendering the record incurably defective."*

The grounds were also amplified by learned counsel for the applicants, Mr. Kisera, in the affidavit in support where he deponed thus:

> "*a) <u>THAT</u>, whereas the headings of the judgment of the subordinate court varies (sic) with the headings of the decrees thereof as Commissioner of Police and Attorney General are omitted in the decree thereby rendering the record of appeal incurably defective .....*
>
> *b) <u>THAT</u>, whereas the decree of the subordinate court is self contradicting and confusing as it refers to a hearing conducted on 20th August, 2003 and judgment of 24th September, 2003 while it is dated 28th November, 2003 contrary to the date of judgment it is referring .....*
>
> *c) <u>THAT</u>, whereas the appeal herein is intended to be in respect of 11 decrees of the High Court, only 1 notice of appeal was filed in High Court Civil Appeal No. 247 of 2003 of the 1st respondent/applicant herein and non (sic) in High Court Civil Appeals Nos. 248, 249, 250, 251, 252, 253, 254, 255, 256 and 257. .....*

d) THAT, whereas the judgment of the subordinate court had 4 parties named in the title, the memorandum of appeal to the High Court had only 2 parties .....

e) THAT, whereas headings of the decrees of the superior court are different from the headings of the notice of appeal and the memorandum of appeal as more parties namely the Attorney General and the Commissioner of Police are introduced by the memorandum of appeal as parties while they were not parties in the superior court. .....

f) THAT, whereas the decrees of the superior court filed herein are not certified thereby rendering the record of appeal incurably defective.

g) THAT, ½ of the decretal sum was deposited in a joint interest earning account in the names of the advocates for parties in Kenya Commercial Bank Migori and ½ is with the appellant."

It is pertinent to review, briefly, the background to the application before considering the submissions of counsel.

In October, 1999, 11 employees of South Nyanza Sugar company Ltd (*Sony Sugar*) (now the applicants) were arrested by the police on complaints laid by Sony Sugar that they were defrauding the company by colluding with farmers and transporters in sugarcane weighing and transportation. They were arraigned before Rongo Magistrate's Court where the case was withdrawn after sometime, only for them to be re-arrested and charged on the same offences before Migori Court where they were all subsequently acquitted under ***section 210*** of the ***Criminal Procedure Code***.

Each of the 11 employees then filed civil suits against Sony Sugar and enjoined the Commissioner of Police and the Attorney General seeking special, general and aggravated damages for false imprisonment and malicious prosecution. All eleven cases were consolidated and all parties agreed that one of the suits will be treated as a test suit on liability and the finding thereon would apply to all other suits. Evidence on the issue of liability was called and considered and in the end, the learned trial magistrate found in favour of the employees. His judgment on the issue was delivered on 24th September, 2003 and he set down the suit for hearing on 3rd October, 2003 on the issue of quantum of damages payable in each case. It would appear that the parties in each case agreed to file written submissions upon which the quantum would be considered and upon consideration of those submissions, the learned magistrate issued separate judgments for each of the employees. Shs.100,000/- was awarded in general damages for false imprisonment and malicious prosecution, and Shs.50,000/= was awarded in special damages, while the claim for aggravated damages was rejected in each of the cases. The judgments were delivered on 25th November, 2003.

There is on record copies of decrees drawn up and issued by the Resident Magistrates Court, Migori on 22nd July, 2004. As these are contentious we reproduce one of them which is identical to the others: -

"***REPUBLIC OF KENYA***

IN THE SENIOR RESIDENT MAGISTRATES COURT AT MIGORI

CIVIL SUIT NO. 136 OF 2002

DAVID OJWANG OKEBE .....PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR CO. LTD. .....DEFENDANT

DECREE

In Court before ***Mr. KARIUKI MWANIKI ESQ****. Resident*

*Magistrate Migori on the **28th November, 2003**).*

***CLAIM FOR**:*

a) General damages for false imprisonment and malicious prosecution and aggravated damages.

b) Special damages in paragraph 9 of the plaint.

c) Costs of this suit.

d) Interest on a) and b) above at court rates.

This suit coming up for hearing on the 20th August, 2003 and for judgment on 24th September, 2003.

***IT IS HEREBY ORDERED** that:*

a) The defendant do pay Kshs. 50,000/= as special damages to the plaintiff.

b) The defendant do pay Kshs.100,000/= as general damages to the plaintiff.

c) The defendant do pay costs of the suit and interest to the plaintiff.

***GIVEN UNDER** my Hand and Seal of the Court this 28th day of November, 2003.*

***ISSUED** at **MIGORI** this ..... day of .....2004.*

RESIDENT MAGISTRATE

MIGORI"

It is apparent, amongst other things, that the decree refers only to one defendant, Sony Sugar, although the judgment was against the three defendants, jointly and severally. It is also Sony Sugar only who appealed to the superior court where 11 separate appeals were filed in respect of the awards to each employee. Each appeal was against the decision of the trial court made on 28th November, 2003, but it challenged, not only the finding on liability but also the quantum of damages assessed. At the hearing of the appeals, the parties agreed that they would be consolidated and they were so heard.

Learned counsel for Sony Sugar, Mr. Okongo, abandoned the appeal against quantum of damages and informed the court that he would be urging the issue of liability only. That proposition was however opposed strenuously by Mr. Kisera, who submitted that the issue of liability could not arise at the appellate stage. That is because the decision of the trial court on that issue was made on 24th September, 2003 and it was an appealable one. Thirty days, however, expired before any appeal was filed and there was no leave to pursue it out of time. The superior court (Musinga, J.) agreed with Mr. Kisera and held that the purported appeal on liability was an abuse of court process since it was out of time and no leave was sought to file it out of time. The appeal was struck out as were all appeals consolidated with it, thus provoking a second and final appeal to this Court.

The notice of appeal was lodged on 8th May, 20089 and was intended for service on all 11 employees and the Attorney General on behalf of himself and the Commissioner of Police both of whom took no part before the superior court. The record of appeal was subsequently lodged on 27th June, 2008 and was awaiting a hearing date when the motion before us was taken out on 24th July, 2008.

Returning now to the motion, learned counsel for the parties raised and argued four issues which we shall now deal with *seriatim:* -

> *1) What is the true construction of rule 85(2) of the Court of Appeal rules ("the Rules") in relation to certification of a decree of the superior court in its appellate jurisdiction?*
>
> 2) *How many notices of appeal ought to be lodged where several cases are consolidated?*
>
> 3) *Was the Attorney General and the Commissioner of Police properly joined as respondents in the appeal when they took no part in the superior court?*
>
> 4) *Does the proviso to rule 80 of the rules apply in this case to invalidate the application for striking out?*

On the first issue, the submission by Mr. Kisera for the applicants was that the decrees extracted from the decision of the subordinate court were not compliant with ***Order XX rule 6*** of the Civil Procedure Rules in that the names and descriptions of two of the parties before that court, namely the Commissioner of Police and the Attorney General, were omitted. The rule provides: -

> "**6. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."**

The decrees of the subordinate court which are exhibited in the record of appeal, though certified by the court to be correct, are therefore invalid. Secondly, Mr. Kisera submitted, the decree of the superior court is not certified as a true copy of the original as required under ***Rule 85 (2)*** of the rules and is also invalid for purposes of the appeal. In making that submission, Mr. Kisera referred to the wording in ***Rule 85(1) (h)*** of the rules which requires a "*certified decree or order"* and he related that provision to ***Rule 85 (2)*** which provides that the record of appeal "*shall contain the documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) .....*"(emphasis added). Reading the two provisions together, Mr. Kisera submitted, it is necessary that the decree of the superior court should be certified.

In response to the first issue, Mr. Odunga who held brief for Mr. Okongo for Sony Sugar, submitted that the decrees emanating from the subordinate court could not invalidate an appeal since there can be an appeal to the superior court without a decree. He referred to the definition of "*decree"* in ***section 2*** of the Civil Procedure Act and the proviso thereto which states: -

> "**Provided that, for the purposes of appeal,"decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;"**

The decrees, whatever their imperfection, were on record and so was the judgment of the subordinate court and therefore, in Mr. Odunga's submission, the appeal cannot be struck out on that account. As for certification of the decree ensuing from the superior court in its appellate jurisdiction, he submitted that ***Rule 85(2)*** did not require certification and therefore the decree on record cannot be challenged either. In making that submission Mr. Odunga referred to ***Rule 85 (2) (v)*** which makes no reference to certification unlike ***Rule 85 (1) (h)*** which expressly states that requirement.

We have considered the rival submissions of both counsel and we think there is substance in Mr. Odunga's submissions. Decrees emanating from subordinate courts do not require the involvement of any of the parties, the requirement under ***Order XX*** rule ***7 (5)*** of the Civil Procedure rules being:

> "**In a subordinate court the decree shall be drawn up and signed by the magistrate who pronounced it or by his successor."**

This is in contrast to decrees emanating from the High Court in its original jurisdiction which, under ***Rule 7 (2)*** should be drawn up by either party and approved before signature by the registrar. In accordance with ***Rule 7 (5)***, the impugned decrees in this record were authored by the court. At all events, as correctly pointed out by Mr. Odunga, a first appeal from the subordinate court to the superior court is sustainable without a formal decree.

As for the decree emanating from the superior court in its appellate jurisdiction, we agree with Mr. Odunga that it requires no certification. It is common ground that the decree or order of the superior court in its original jurisdiction must be certified. The rationale for that requirement is clear enough and was restated by this Court in **Chemigas Ltd v BOC (k) Ltd [2001] 1 EA 21**, thus:

> "**a decree or order envisaged by the provisions of rule 85 (1) of the Rules, is the foundation of every appeal, and unless it accords in every respect with the judgment or ruling appealed against, a decision of this Court in such an appeal may proceed upon a wrong premise. Its correctness in substance and form is really a matter for the court which gave or issued it. Moreover, it is not uncommon for parties in a particular case being involved in more than one case. So whether or not the number of the case is the correct one or not is a matter for the court from which a decree or order emanated. That perhaps explains why rule 85 (1) (h) requires a certified copy of the decree or order appealed from to be included in the record of appeal. As we stated earlier, certification of such a document is not merely a ministerial act, but a judicial act as it entails one satisfying himself that the formal order accords with the judgment or ruling giving rise to it."**

The requirement for certification was inserted by amendment to ***Rule 85 (1) (h)*** by **L/N No. 101/85.** ***Rule 85 (2)*** however covers documents necessary for an appeal from the superior court in its appellate jurisdiction, which is the situation in the matter before us. As far as is relevant it states:

> "**85 (2) For the purpose of an appeal from a superior court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court:**
>
> **(i) .....**
>
> **(ii) .....**
>
> **(iii) .....**
>
> **(iv) .....**
>
> **(v) the decree or order;**
>
> **(vi) ....."**

(emphasis added).

The amendment to ***Rule 85 (1) (h)*** by **L/N. 101/85** did not affect that provision. So that, for purposes of a second appeal, any decree from the subordinate court, which corresponds to the decree of the superior court in its original jurisdiction, must be certified. It is common ground that the decrees of the subordinate court which are in the record of appeal before us are, indeed, certified. That is in accordance with the first part of ***Rule 85(2)*** as read with ***Rule 85 (1) (h)***. What is not certified is the decree of the superior court in its appellate jurisdiction which, under the second part of the rule (emphasized above), needs no certification. Perhaps the explanation is that an appellate court would, more often than not, simply order the dismissal of an appeal or allow it. The decree or order in this case was that the "*Appeal is struck out*".

For those reasons, we agree with Mr. Odunga on the construction of ***Rule 85 (2)*** and reject the first

ground for striking out the appeal.

On the second issue, it was the contention of Mr. Kisera that there ought to have been 11 notices of appeal and also 11 records of appeal filed even when it was intended to consolidate them before this Court. The reason is that there were 11 decrees each of which attracted an appeal. In his view, therefore, the notice of appeal filed under one appeal which consolidated the others was defective and should therefore be struck out. In response, Mr. Odunga submitted that the notice of appeal adopted the format in which the superior court heard and determined the matter before it. It had heard all appeals as one consolidated matter and made one decision. If all appeals before that court had been separated and heard separately, there would have been different decisions and the appellant would have reacted accordingly. In support of his submission, Mr. Odunga cited similar provisions in English Civil Procedure explaining the effect of consolidation of suits. In the commentary to ***Rule 3. 1(2) (g)*** relating to consolidation of proceedings it is stated:

"**The effect of consolidation of proceedings is to combine two or more claims so that they will proceed thereafter as one claim."**

In his submission, the superior court had made an order consolidating all 11 appeals and there was only one judgment issued by the court. That is the judgment being challenged on appeal to this Court and it was unnecessary to separate the records.

We have anxiously considered the issue and we think, in the circumstances of this case, that the notice of appeal and record of appeal were properly filed. The main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so. Such was the case in the matter before us. It is evident that the court of first instance acceded to the parties' request that one of the 11 cases be tried as a test case on liability and that the result would apply to all the other cases. Eleven decisions then ensued from that court on the issue of quantum of damages and consequently 11 appeals were filed before the superior court. For similar reasons, the superior court made an order for consolidation of the appeals and only issued one judgment thereon which was stated to apply to all consolidated appeals. In our view, the objective of the consolidation order would be defeated if separate appeals were filed. It is instructive that all the parties have been represented by the same counsel, respectively, since the dispute arose. We reject that ground also.

The third issue calls into question the introduction of the Commissioner of Police and the Attorney General into the proceedings before this Court when they played no part before the superior court. Mr. Kisera submitted that the introduction of those persons contravenes ***Rule 87*** of the rules and such procedure was deprecated by this Court in **Trimborn Agricultural Engineering Ltd v David Njoroge Kabaiko & Another Civil App (Appl.) No. 274/98 (UR)**.

On the other hand, Mr. Odunga submitted that the Commissioner of Police and the Attorney General were parties before the trial court but did not challenge the decision of the trial magistrate. Only Sony Sugar appealed. There was no requirement that the two be joined as parties before the superior court and they took no part. In this appeal however, the two will be directly affected by the appeal and they are thus properly joined as respondents.

We think the starting point on this issue is ***rule 76*** of the rules which requires that a notice of appeal be served on all persons directly affected by the appeal. The rule refers to "*persons*" not "*parties*" and logically it will include persons who may not have been parties to the dispute. It is only the court which may decide whether any person may be excluded under the proviso thereto. The Commissioner of Police and the Attorney General were parties in the trial but did not challenge the decision on appeal before the superior court. They could not be compelled to appeal before that court if they did not wish to. In this Court however, they may well be affected by any decision made in the appeal and ***Rule 76*** therefore comes into play and requires compliance. The ***Trimborn case*** cited in aid by the applicants does not help

them. There, the appeal was struck out because of the existence of two notices of appeal one of which was challenged for failing to include in its heading the names of two of the parties to the suit in the superior court. This was omission to include, not inclusion of persons directly affected, though not parties to the first appeal. The latter position is covered under the rules and, as Shah, J.A stated in his ruling in that case:

> "**The courts below should see to it that all the names of the parties to the suit are properly included in the titles of the suit in the judgments, or rulings so that there can be no room for doubt. However, it is the duty of the intended appellant to see to it that all parties directly affected by the judgment are served with a properly headed notice of appeal."**

In our view, whenever a party is faced with a decision on whether to exclude or include a person in the notice of appeal, it is with abundant caution that he should choose inclusion, since there is provision for exclusion under the rules without suffering the drastic fate of striking out if exclusion was the choice *ab initio*.

The notice of appeal on record, as stated earlier, was intended for service on the Commissioner of Police and the Attorney General, and we think the appellant was well advised to include them, *ex abundanti cautella*. ***Rule 87*** , which the applicants refer to, relates to service of the record of appeal on persons who under ***Rule 78*** have lodged with the registry their address for service. The Commissioner of Police and the Attorney General in this matter were represented by learned counsel Ms. Grace Kamau who merely submitted that they should not be made parties since they were not involved in the superior court. She said nothing about complying with ***Rule 78*** and the submissions made in respect of ***Rule 87*** are therefore misguided.

The third ground therefore fails.

Finally, Mr. Odunga submitted on the fourth issue that the application itself was incompetent as it was filed in contravention of the proviso to ***Rule 80*** of the rules. Simply put, it ought to have been filed within 30 days of **service of the notice of appeal** but instead it was filed within 30 days of filing and service of the record of appeal. It was therefore out of time.

Conceding that the application was filed long after the notice of appeal was served on the applicants, Mr. Kisera submitted that the proviso to ***Rule 80*** did not apply to "*notice of appeal*" but "*record of appeal*". Fortunately for us this issue has arisen before and the Court expressed itself on it. It was in **Salasia v Muchira & others [2005] 2 EA 270** which we may quote *in extenso*, thus: -

> "**The only valid point raised by Mr. Kiogora was that the proviso to rule 80 was applicable to both the notice of appeal and the appeal. It plainly must be so from the logic of it, although the wording could have been, expressly, better put (sic). The starting point is the mischief that the amendment of the rule was intended to address. And that was the practice by parties, either by design, negligence or pure inaction, waiting for days, months or even years until the very minute when the appeal is called out for hearing, only to seek the striking out of either the notice of appeal or the appeal or both. Apart from the element of surprise to the appellant, it was disruptive of the court's time and the calendar for conduct of its core business. The former rule 80 gave express sanction for applications of such nature to be made "at any time" by any person on whom a notice of appeal had been served. Rule 101 (b) which applies at the hearing of the appeal and which is intended to deter a respondent from objecting to the competence of an appeal on grounds that could have been raised under rule 80, did not seem to address the mischief fully as it leaves the court with a discretion. And so it was, that if a person affected by an appeal chose to seek to strike out the notice of appeal or the appeal or either of them, they were free to do so under the amended rule, but only within 30 days of service thereof. If it was the appeal itself, the same limitation applies. We cannot readily cite specific cases, but we are aware that this Court has rejected many applications, similar to the current one, on that basis. At all events, the proviso to the rule refers to service of the record of appeal which by definition is a reference to both the notice of appeal and the**

main appeal as provided for under rule 85 of the rules. We are in no doubt that the intendment of the amended rule was to limit the period within which challenges to a record of appeal, including a notice of appeal, may be made and it is clear to us that the application before us is not in compliance with the rules of this Court."

Admittedly as stated in that case, the proviso to the rule is not clearly expressed, and hopefully, the proposals put forward by the Rules Committee in terms of the above construction will put the matter beyond argument. In the meantime, we remain faithful to the construction of the rule.

It follows that the application before us is incompetent as it was filed contrary to the provisions of ***Rule 80*** of the rules. It is also lacking in merits and we order that it be and is hereby dismissed with costs to be paid by the applicants and the Attorney General.

Dated and delivered at Kisumu this 17th day of July, 2009.

E.O. O'KUBASU

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR