



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 191 of 2008**

**NATIONAL BANK OF KENYA LTD.....APPLICANT**

**AND**

**1. KATANGI DEVELOPERS LTD**

**2. ONYX INVESTMENTS LTD.....RESPONDENTS**

**(Application for extension of time to serve notice of appeal and record of appeal out of time from the ruling of the High Court of Kenya at Kisumu ( Birech Comm. of Assize) dated 17<sup>th</sup> September 2001**

**in**

**H.C.C.C. NO 146 of 1999**

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**RULING**

The applicant by its notice of motion dated 2<sup>nd</sup> July 2008 seeks an extension of time for service upon the respondents of a notice of appeal and a record of appeal in Civil Appeal 206 of 2003 National Bank of Kenya Ltd vs Jivraj Raishi & Brothers Limited.

The dispute which has given rise to this application is, indeed, protracted and has a somewhat chequered history. By a plaint dated 20<sup>th</sup> April 1999, Jivraj Raishi & Brothers Limited and Sanyu International Limited (“Raishi and Sanyu”) sued the applicant for breach of contract by allegedly unlawfully varying the rate of interest and debiting their account with penalties at varying interest rates which were allegedly outside the scope of the charge which was created in 1990 by Raishi and Sanyu over their parcel of land known as L.R. No. Kisumu Municipality /Block 10/107 in favour of the applicant as security of an overdraft. They therefore claimed various reliefs as set out in the plaint.

On 17<sup>th</sup> May, 1999 the applicant filed its defence to the suit and counterclaimed for Shs. 350,769,395 being in respect of the amount advanced to Sanyu. The amount claimed included interest. On 22<sup>nd</sup> June 2001 Raishi filed an application under **Order VI rule 13** of the Civil Procedure Rules to strike out the defence by the applicant as being merely a general denial of the pleadings.

The application sought an order for judgment to be entered in its favour in terms of the prayers sought

in the plaint. After hearing the parties the court, specifically, granted first, a declaration that the alleged acts of the applicant were illegal, null and void; second, a permanent injunction restraining the applicant from selling the charged property; and thirdly, costs. Strange as it may be, the learned Commissioner of Assize, also, ordered the applicant to execute a discharge of charge over the property within seven days of his ruling. It is clear from the plaint that this prayer was neither pleaded nor sought.

Not surprisingly, the applicant filed a notice of appeal but it appears not to have made any other significant move. However, sometime on or about 18<sup>th</sup> April 2002 or over six months after the ruling granting Raishi the reliefs sought, the applicant discovered that the charged property had been transferred on 5<sup>th</sup> October 2001 to Katangi Developers Ltd who in turn transferred it on 28<sup>th</sup> March, 2002 to Onyx Investments Ltd the two respondents herein. This Court on 11<sup>th</sup> July, 2002 after an application by the applicant granted a stay of execution of the orders of the superior court with a further order that the original title of the charge property be deposited with the superior court. It is worthy of note that the applicant cited the respondents as interested parties.

It is on record that the applicant subsequently filed Civil Appeal No. 207 of 2003 which appeal was withdrawn on the grounds that it had been overtaken by events and would serve no useful purpose. This was on 26<sup>th</sup> June, 2008.

Though the applicant had filed Civil Appeal No. 206 of 2003, it did not take steps whatsoever to bring the respondents on record though it was common knowledge and indeed a matter already in the open that the charged property had been transferred into their names. The omission to serve them with the notice of appeal in respect of the ruling of 3<sup>rd</sup> June 2002 is attributed by the applicant to its then counsel for the applicant, Mr. G.J. Mainye, who is said to have overlooked the fact that he would be required to serve the notice of appeal on the respondents by making the appropriate application for extension of time. I would comment here that though Mr. Mainye might have been genuinely mistaken or simply ignorant of the relevant rules, I would not have slammed the door of justice on them were it not for the fact that it took about five years for the said advocate and the current advocates to realize the omission. The delay was simply inordinate and without reasonable explanation.

My discretion under **rule 4** is unfettered but it must be exercised on sound basis or as is normally put judicially. The period of inactivity between 2002 and 2008 when the applicant lodged this motion on notice is inordinate and the reasons given for it are not satisfactory. In my view, the applicant is guilty of laches. It would be prejudicial to the respondents if I extend time as sought.

Mr Otieno for the applicant submits that the charged property is now in the hands of Onyx having obtained it from Katangi and that by virtue of this both of them have become persons or parties directly affected by the appeal. He further contends that since their right over the charged property would be directly affected by whatever orders this Court may make if the appeal were to succeed, it is in their interest that they come on record. Mr Otieno added that omission to comply with **rule 76(1)** of the Rules was simply an oversight and amounts to an innocent mistake of its counsel. He did not believe that the respondents would suffer any prejudice if served with notice of appeal.

Both Mr. Shah and Mr. Wasuna have vehemently opposed the application. They averred that the applicant had been aware of the existence of the respondents as early as April, 2002 and that the omission to comply with the Rules to enjoin the respondents in the appeal is simply ignorance of procedure. Moreover, they asserted out that the appellants were not aware of the omission until Civil Appeal No. 206 of 2003 came up for hearing before this Court when it was pointed out that the Rules of the Court do not provide for interested parties to be made parties to the appeal. It is counsel's strongest point that a party not before the superior court cannot be made a party to any appeal in this Court and no appeal can lie against a person or a party who was not properly before the superior court.

**Rule 76(1)** of the Court of Appeal Rules enacts that:

**“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 person who took no part in the proceedings in the superior court.”**

The object of the rule and of the proviso is that the rights of a party likely to be directly affected by the result of an appeal should not be affected without the party being provided with an opportunity of being heard. The requirements of **rule 76(1)** and its proviso are mandatory. See **SHEIKH v SHEIK & ANOTHER [1989] KLR 155.**

It was common ground that the respondents did not take part in the proceedings before the superior court. It was also common ground that their names feature nowhere in the pleadings nor on the heading and body of the decision appealed from. Further, the respondents did not participate in the proceedings giving rise to this appeal. The issue, then, is are they persons directly affected by the appeal?

The respondents may not be interested in the dispute between the applicant and Raishi and Sanyu. They could be innocent purchasers for valuable consideration without any knowledge of wrong doing by the latter. They are beneficiaries of a judgment of the superior court though not parties to the proceedings. As no application was made to implead or make them parties in the superior court they cannot be brought into the appeal under the provisions of **rule 76(1)** of the Rules as they lack *locus standi*. See **Gichuki v Nangurai [1983] KLR 1.**

See also the case **Sanitary Equipment & Builders Ltd v Nairobi City Commission [1991] KLR 243** wherein it was held that it was a fundamental error to attempt to implead a Bank in the appeal when it was not a party thereto.

Further, in **Ngare v Kihara Civil Application No. NAI 259 of 2000** (unreported) O’Kubasu JA held that a person who was not a party to the suit in the superior court cannot be brought in the appeal and he proceeded to strike out the name of Douglas Kihara who was not a party to the suit in the superior court.

Moreover, there is no order against the respondents which is capable of being appealed against.

If the applicant genuinely wanted to safeguard the charged property slipping out of Raishi’s hands, it should have amended the pleadings in the superior court to incorporate the respondents or it should commence proceedings separately or jointly against the respondents and Raishi and Sanyu. It is inconceivable that to date no action has been taken to encumber the title to the charged property.

Again, I believe that the respondents not having been parties to the suit it would be the height of injustice to drag them into the appellate court and yet they would not be able to answer any allegations in the pleadings between the applicant and the respondents, which allegation may be foreign to them. The respondents should not be dragged into this Court. If, for example, they are alleged to have acquired the charged property fraudulently, how will they be expected to answer the accusation on appeal? They would definitely be prejudiced.

In the result and for the foregoing reasons, I refuse to exercise my discretion in favour of the applicant. Consequently, I dismiss the application with costs.

**Dated and delivered at Nairobi this 17<sup>th</sup> day July 2009.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**