



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL APPLI NO.296 OF 2001

MISTRY JADVA PARBAT & COMPANY LTD.....APPLICANT/1ST RESPONDENT

AND

AMEERI KASSIM LAKHA APPELLANT/RESPONDENT

HASMUKHA DEVANI 2ND RESPONDENT

NAGIB DAMJI 3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya

Nairobi (Hewett, J) dated 25th May, 2001

in

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

RULING OF THE COURT

When the notice of motion dated 8th December, 2006 and filed on 14th December, 2006 came for hearing, Mr. Gautama, learned Senior Counsel for the 1st respondent raised what is in effect a preliminary objection to the effect that the application was not brought within 30 days from the date the record of appeal was served in breach of the proviso to *Rule 80* Court of Appeal Rules.

The impugned application is brought under *Rule 80* of the Court of Appeal Rules and seeks an order that both the notice of appeal dated 29th May, 2001 and the record of appeal be struck out on the grounds stated on the body of the application.

Rule 80 under which the application is brought, provides:

“A person affected by an appeal may apply to the court to strike out the notice of appeal or the 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”.

The proviso to **Rule 80** limiting the time within which the application to strike out the notice of appeal or appeal was to be made was introduced by L.N. No. 152 of 2002 dated 4th July, 2002 and published in the Kenya Gazette on 30th August, 2002.

Mr. Mutua, learned counsel for the applicant disclosed that the notice of appeal and the record of appeal were served on him on 5th June, 2001 and 21st November, 2001 respectively.

Mr. Gautama submitted without citing any authority that rules of procedure when amended become operational with immediate effect. Mr. Mutua agreed with that contention but submitted that the amendment cannot take away existing rights.

By **section 27 (1)** of the Interpretation and General Clauses Act, all subsidiary legislation shall be published in the Gazette and, “*shall come into operation on the day of publication*”.

It is also a rule of construction of statutes that, prima facie, if a provision of legislation affects procedure only it operates retrospectively. In *Municipality of Mombasa vs. Nyali Ltd.* [1963] EA 371 Newbod, J.A. said at page 374, paragraph G:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and rule of construction is only one of the factors to which regard must be had in order to ascertain that intention”.

(See also *Patel vs. Republic* [1968] EA 97, *Patel vs. Benbros Motors Tanganyika Ltd* [1968] EA 460).

It is true that the record of appeal was filed and served about nine (9) months before the 30 days limitation period in the proviso to **Rule 80** was introduced. The present application was filed on 14th December, 2006 over 4 years after the time limitation was introduced.

The appeal had been fixed for hearing five (5) months before the application was filed but it was adjourned. In enacting the proviso, the Rules Committee must have intended, among other things, to curtail belated interlocutory applications which would interfere with the hearing of appeals like the present application. If the proviso is construed to apply only to appeals filed after the proviso was enacted, the intention of the Rules Committee would be defeated. The rule became operational on 30th August, 2002 when it was published in the Gazette and there is no good reason why it should not apply retrospectively to all appeals pending at the time it became operational.

The rule would of course not apply to applications to strike out appeals which were pending on the date it became operational, the present application not being one of them. We hold, therefore, that the proviso to **Rule 80** came into operation on 30th August, 2002 when it was published in the Gazette and being a procedural rule operates retrospectively to all appeals which had been filed before the rule became operational.

The present application is, thus, caught by the time bar in the proviso. We strike it with costs to the respondents as being time – barred.

Dated and delivered at Nairobi this 8th day of February, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR