IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI NO. 223 OF 2005 (132/2005 UR)

VANTAGE ROAD TRANSPORTERS LIMITED ....….. 1ST APPLICANT

SHAHID PERVEZ BUTT ……………..…..…..….…… 2ND APPLICANT

AND

MISTRY VALJI NARAN MULJI ……………….....…. 1ST RESPONDENT

JANENDRA RAICHAND SHAH …….........………… 2ND RESPONDENT

VIRCHAND MULJI MALDE ………………...........…… 3RD RESPONDENT

RATILAL GHELA SAMAT ………..……….........…… 4TH RESPONDENT

PREMAC PROPERTIES LTD...….………….....…..…. 5TH RESPONDENT

EQUATORIAL COMMERCIAL BANK LTD.…............. 6TH RESPONDENT

(Application for stay and/or suspend the execution of the orders of the High Court of Kenya

Mombasa (Mwera, J) dated 29th July, 2005

In

H.C. C. Suit No. 55 of 2005)

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RULING OF THE COURT

The principal application before the Court appears to be the notice of motion dated 30th July, 2005 and lodged in this Court on 1st August, 2005. The motion was said to have been brought under *Rules 5 (2) (b), 42 (1)* and *(2)* and *20 (2)* of the Court's Rules. *Rule 20 (2)* merely deals with conduct of business by the Court during vacations. *Rule 42 (1)* and *(2)* deals with the manner in which applications are to be made to the Court and the contents of such applications. So the substantive Rule under which the motion was brought is *Rule 5 (2) (b)* and as every one knows that Rule entitles the Court, where a notice of appeal has been filed in accordance with *Rule 74*, to issue, in any civil proceedings, an order of stay of execution, an injunction or a stay of any further proceedings. The filing of a notice of appeal under *rule 74* manifests an intention to appeal by the party so lodging the notice of appeal. It is a matter of common

sense that where no appeal is intended to be filed, there cannot be an order of stay of execution, injunction or an order staying further proceedings. Even Mr. Kaluma, learned counsel for the applicant, did admit that the orders available under rule *5(2) (b)* cannot be obtained in a vacuum, i.e. where no one intends to appeal. Among the orders sought in the applicant's notice of motion and which are still current were that:-

"(a) ---------------------------

(b) The Honourable court be pleased to stay and/or suspend the execution of the Orders of the High Court of Kenya at Mombasa (Hon. Mr. Justice John Mwera) issued on 29th July, 2005.

(c) The Hon. Court be pleased to grant bail to the 2nd Applicant pending the hearing and determination of the Appeal to be lodged by the Applicant herein.

(d) ------------------------------"

Before the jurisdiction of the Court under rule ***5 (2) (b)*** can be invoked, the party proposing to invoke the jurisdiction must show that he has filed a notice of appeal. The orders, sought to be stayed were made by Mwera, J. on 29th July, 2005; the applicants Vantage Road Transporters (1st applicant) and Shahid Pervez Butt (2nd applicant) filed their notice of appeal on 29th July, 2005, the same day the orders were made. Thereafter, and before the motion herein had been heard, the applicants filed Civil Appeal No. 274 of 2005. On 27th July, 2007, Civil Appeal No. 274 of 2005 came before the Court and the Court made the following order with regard to the appeal:-

"There are two motions before us. The first one is by the appellants, Vantage Road Transports Ltd. and Shahid Pervez Butt, dated 10th March, 2007, seeking, on the main, an order granting leave to withdraw this appeal on account of its being incompetent, the appellants having not first obtained leave to bring the appeal, and also that the copy of the decree on record not being certified as required by the Rules of this Court.

The second prayer in the motion is for leave to institute a fresh appeal against the decision which this appeal was filed. (sic)

The second motion is dated 24th January 2006, and was brought by the first respondent, Mistry Valji Naran Mulji, and is expressed to be brought under rules 42, 80, 81 (1) & (2) and 85 (1) (h) of the Court of Appeal Rules. In a nutshell, the 1st respondent prays for an order striking out the appeal as incompetent on two grounds. Firstly, that it was brought without leave of the Court, as the appellants did not have an automatic right of appeal against the aforesaid decision, which has been made pursuant to an application under order 39 rule 24 of the Civil Procedure Rules and secondly, that the record of appeal does not comply with the Court's Rules.

It is quite clear from the prayers in both the applications that the issue in both is the competency of the appeal. The effect of the appellants' motion is that they concede their appeal is incompetent for want of leave of the court to appeal. The issue which was argued at length before us, is whether in that event the appeal should be withdrawn, struck out or dismissed. In our view, after full consideration of the submissions of counsel, and it having been conceded that the appeal is incompetent, it follows that the right order to make in the circumstances is that Civil Appeal No. 274 of 2005 be and is hereby struck out.

Regarding the prayer for leave to institute an appeal we note that rule 39 of this Court's Rules fixes, a time limit within which to seek such leave. We have no evidence that the appellants in the struck out appeal have either applied for or obtained an extension of time within which to seek leave. In the circumstances, we decline to grant the leave sought and dismiss the prayer.

On the issue of costs, it is our view that the 1st and 6th respondents are entitled to the same, and

accordingly we order that the costs of both motions and the struck out appeal be and are hereby awarded to the two respondents against both the appellants."

The important point to note from this extract is that Civil Appeal No. 274 of 2005 which the Court struck out was filed pursuant to the notice of appeal which had been lodged on 29th July, 2005. That appeal having been struck out, there could not be, in our view an order staying anything because as we have pointed out, there cannot be an order of stay where there is no intention to appeal. But it appears that Dr. P.L.O. Lumumba who appeared for the applicants when the record of appeal was struck out contended before the Court that the fact that the appeal had been struck out did not have any effect on the current motion for orders of stay. That motion came before the same bench immediately after the appeal had been struck out and the Court made the following order:-

"Learned counsel for the applicants, Dr. Lumumba opened his submissions on the notice of motion dated 30th July, 2005 but was suddenly faced with the legal argument that this Court has no jurisdiction to entertain the application in view of an order made only minutes ago striking out the main appeal. He now seeks an adjournment to research on the point and reconsider the matter. The application for adjournment is opposed by Senior Counsel Mr. Gautama for the 1st respondent but is not opposed by Ms Odhiambo for the 6th respondent. Although the issue may be clear to us in view of the previous decisions made by this Court, we agree with Dr. Lumumba that the avenues of new ideas are not closed and we are in all the circumstances minded to give the applicants an opportunity to exhaust themselves on the law. In the event we order that the application be taken out of to-day's cause list and be relisted in the registry on an early date. Costs of the adjournment to the 1st and the 6th respondents."

If we understand the matter correctly, the Court, having struck out the appeal which was the basis of the application for stay, was clearly of the view that the Court had no further jurisdiction to issue the orders for stay sought by the applicants in their motion for stay. But Dr. Lumumba wanted to be given, and was in fact given time, to go and research on the issue of the Court's jurisdiction in the circumstances stated.

The hearing resumed before us on 16th January, 2008; Dr. Lumumba was not present but Mr. Kaluma who is an advocate in Dr. Lumumba's firm held his brief. Mr. Kaluma asked for a further adjournment which the Court refused to grant. Mr. Kaluma then proceeded to argue before us that the striking out of the record of appeal does not mean that the notice of appeal itself, which is a separate document filed in the superior court, is also struck out with the record of appeal. Mr. Kaluma submitted that there are only three specific circumstances in which a notice of appeal is "killed" and according to Mr. Kaluma those circumstances are:-

(a) where the notice of appeal is specifically struck out pursuant to the provisions of ***Rule 80*** of the Court's Rules;

(b) where the notice of appeal is deemed to have been withdrawn pursuant to ***Rule 82*** of the Court's Rules;

and

(e) where the appeal itself is dismissed after a hearing on its merit.

According to Mr. Kaluma, striking out the record of appeal for technical reasons does not affect the validity of the notice of appeal filed in the superior court and the notice survives such striking out of the record of appeal.

It is agreed that it is the existence of a notice of appeal which gives the Court jurisdiction to grant an order of stay under ***Rule 5 (2) (b)*** of the Rules. Mr. Kaluma relied on this Court's decision in **THE KENYA ANTI-CORRUPTION COMMISSION VS FIRST MERCANTILE SECURITIES CORPORATION**, NAI Civil Application No. 163 of 2007 (unreported). There, two notices of appeal

had been filed from one and the same decision and when that mistake was realized, one of the advocates wrote a letter purporting to withdraw one of the two notices. The issue appears to have been whether a notice of appeal could be withdrawn by merely writing a letter intimating that the notice is withdrawn. Dealing with that issue, the Court stated:-

"------. It is trite law that there is no provision in the rules for withdrawal of a notice of appeal by a party filing it. A notice of appeal on record remains so until struck out or dealt with under the provisions of rule 82 of the Rules of this Court where the appellant has failed to institute an appeal within the prescribed time. Also, a letter addressed to the Court cannot withdraw such a notice. It must, therefore, follow that the applicant could not and did not in law withdraw its notice of appeal dated 11th July, 2007 and lodged by Mr. Kimani Advocate. The same still subsists on record despite the letter intimating withdrawal which letter was in fact, ineffective. --------"

We do not know how Mr. Kaluma understood this authority, but our understanding of its relevant portions is that the Court can strike out a notice of appeal and the circumstances under which an appeal is to be treated as having been struck out are not stated in the decision. The decision did not, for example, state that even the striking out of a record of appeal cannot affect the validity of the notice. But the decision states that so long as a notice of appeal is not struck out by the Court and so long as it is not deemed to have been withdrawn under Rule 82, the notice will continue to be in the record. With respect, to Mr. Kaluma, this decision does not support his contention that a notice of appeal remains valid even if the record of appeal is struck out.

Perhaps Mr. Kaluma was unaware of the decision of Shah, J.A in **GABRIEL KIGI & 6 OTHERS VS. KIMOTHO MWAURA & ANOTHER**, NAI Civil Application No. 197 of 1997 (unreported). Disagreeing with COCKAR, C.J's decision in **AFRO MEAT COMPANY LTD VS. SYPROSE AGEKE OWUOR**, NAI Civil Application No. 95 of 1997 (unreported), Shah, J.A delivered himself in this way:-

"With great respect, I do not quite agree with the learned Chief Justice. Whilst I hold everything said by the learned Chief Justice in great regard, my humble view is that upon the striking out of a record of appeal for technical reasons the appellant is different (sic) footing from filing out of time for the first time, a notice of appeal. Once an appeal stands struck out, in my humble view, the same can be refilled either per its original record supplemented by inclusion of a copy of the formal order and of new or further grounds of appeal. To enable the filing of a redone record of appeal and a fresh one would need, **ex abundanti cautela** ***the filing of a notice of appeal, although in my view, filing a fresh notice of appeal is superfluous as the original notice of appeal filed in the superior court is still in the record. What has gone out with a struck out record of appeal is the duplicate notice of appeal which forms part of the record."***

The views of Chief Justice, Cockar expressed in the **AFRO-MEAT COMPANY** Case and from which Shah, J.A was dissenting were expressed as follows:-

"The purpose of a notice of appeal , therefore, is to manifest an intention to appeal and, where necessary, to specify the part of the decision intended to be appealed against. When an appeal has been filed then the purpose of filing has been fulfilled. A duplicate copy of the notice of appeal has become part of the record of appeal. On fulfillment of the purpose, of the notice of appeal, the document filed in the High Court in my view, now becomes a document which has lost its value. Clearly because if there is an intention to file an appeal again that intention has to be manifested afresh. The notice that had been filed earlier in the High Court cannot be used to express a fresh desire to appeal. It cannot form the basis for another appeal. Similarly , if an intention to appeal is not fulfilled within the appointed time – then the notice of appeal that has been filed is deemed to have been withdrawn (rule 82 (a1). This is also a mandatory rule."

So Mr. Kaluma's contention is directly supported by the views of Shah, JA in **KIGI's** case while Cockar, C.J's views were directly against the proposition. Cockar, C.J. had no doubt whatsoever that a party whose appeal has been struck out and who still wishes to appeal must start afresh by asking for

extension of time to file a fresh notice of appeal and thereafter a record of appeal. So that, according to Cockar, C.J. upon the appeal being struck out the notice of appeal, a copy of which must mandatorily be incorporated in the record of appeal (see ***Rule 85 (1) (j)***), becomes spent and is no longer a document of any value in the superior court's record in which it was filed. Shah, JA thought otherwise though he did concede that out of abundant caution, afresh notice is filed. We do not see the need for such abundant caution if the law does not require the filing of a fresh notice.

Bosire, Ag. J.A., as he then was, dealt with a different aspect of the matter in the case of **EDWARD ALLAN ROBINSON & TWO OTHERS VS. PHILIP GIKARIA MUTHAMI**, Civil Application No. NAI 187 of 1997 (unreported) . There Civil Appeal No. 18 of 1997 which had been filed by the applicants had been struck out on 9th July, 1997. An application for extension of time to file a fresh notice of appeal and then a record of appeal was made. A preliminary objection was taken to the application for extension of time and the objection was that in view of ***Rule 41*** of the Court's Rules, the application for extension of time ought to have been first filed in the superior court before coming to the Court of Appeal under ***Rule 4***. Bosire, J.A over-ruled the preliminary objection but on the question of whether a fresh start is to be made, the learned Judge's view was clear. He stated as follows.

"I have no doubt in my mind that an appellant whose appeal has been struck out for being incompetent has the right to move a court for extension of time to lodge a competent appeal. (See Ngoni Matengo Co-operative Marketing Union Ltd vs. Osman [1959] EA 557; Elizabeth Kamene Ndolo vs. George Matata Ndolo (Civil Application No. NAI 104 of 1995 – unreported). --------"

The learned Judge then continued and concluded as follows:-

"Regarding the merits of the application, the applicants brought the application promptly and, to my mind, this is a fit case for the exercise of my judicial discretion under rule 4 of the rules of this Court to extend time. I accordingly extend the time for filing a fresh notice of appeal by seven (7) days from the date of this ruling and for lodging a record of appeal for 30 days, thereafter. -----."

So that Bosire Ag. J.A had no doubt that time had to be extended for a fresh notice of appeal and nobody ever suggested that the old notice of appeal was still valid and, therefore, there was no need for filing a fresh notice of appeal.

The case of **CATHERINE KARUNGARU KARL VS. GUENTER OTTO KARL**, Civil Appeal (Application) No. 10 of 1998 (unreported) was a reference to the full Court under ***Rule 54*** of the Court's Rules. A previous appeal had been struck out and there was an application for extension of time to file a fresh notice of appeal so as to validate another appeal which had been filed after the striking out of the earlier appeal. The application for extension of time to file a new notice of appeal was refused, not because there was no need for filing a fresh notice of appeal, but because the appeal which was sought to be validated had itself been lodged out of time and there was no application for extending the time to lodge the record of appeal out of time.

All these decisions are in conformity with the practice of the Court where applications for extension of time to file a fresh notice of appeal are invariably made after a record of appeal has been struck out. That practice is clearly supported by the majority decisions we have cited herein, excepting of course the decision by Shah, J.A. We see no compelling reason to depart from that practice and we reject Mr. Kaluma's attempts to persuade us to hold otherwise. Shah J.A's view that a notice of appeal survives the striking out of a record of appeal was not supported by authority and was contrary to the well known practice of the Court. It was erroneous.

The consequence of that holding must be that the applicants' record of appeal having been struck out on 27th July, 2007, there is no valid notice of appeal remaining in existence and upon which the current motion for stay of execution can be based. We accordingly have no jurisdiction to hear and determine the notice of motion dated 30th July, 2007 and lodged in Court on the same day. We order that the said notice of motion be and is hereby struck out with the costs thereof to the 1st respondent. Those shall be our orders in the motion.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……………………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.