



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL (APPLI) NO. 27 OF 2006**

**PROTEIN & FRUITS PROCESSORS LIMITED .....APPELLANT**

**AND**

**ENKASITI FLOWER GROWERS .....RESPONDENT**

***(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi***

***(Kubo, J.) dated 7th February, 2006***

**in**

**H.C. Misc. Civil Case No. 487 of 2005)**

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**RULING OF THE COURT**

This application is brought under **rule 80** of the Court of Appeal Rules for the striking out of the Notice of Appeal dated 13<sup>th</sup> February 2006 as well as the Record of Appeal filed herein on 8<sup>th</sup> March 2006 and for the costs of the same.

The grounds upon which the application is based are that:

- (a) The appellant had (and has) no right of appeal against the ruling and orders of the superior court against which the Notice of Appeal was lodged and this appeal preferred.***
- (b) The appellant company cannot lawfully transact any business as it does not have a lawfully constituted board of directors.***
- (c) The Notice of Appeal was lodged and Record of Appeal filed without or without proper authority from the appellant.***
- (d) It is just and equitable to grant this relief.***

The application was also supported by the affidavit deposed to by one Mansukhlal Shantilal Patel, the managing director of the applicant/ respondent herein.

This affidavit deposed that there is no right of appeal to the appellant where the superior court exercises its inherent jurisdiction to extend time under the proviso to **section 8(1)** of the Land Control Act, Chapter

302 of Laws of Kenya; and that since one of the two directors, the minimum number given in the Articles of Association of the appellant company, died before the institution of the proceedings in the superior court giving rise to the present appeal and since there has been no replacement, it had no lawfully constituted board of directors to transact any business, hence the appeal before this Court was incompetent.

A replying affidavit deponed to by one Patrick Kirono Mwaura as the director of the appellant (respondent) herein and filed in court on 12<sup>th</sup> May 2006 opposed this application on the grounds that the appellant has a properly constituted board of directors and was granted leave to appeal by the superior court.

Parties appeared before this Court on 6<sup>th</sup> May 2008. Mr. W.A. Amoko represented the applicant while Mr. Patrick K. Mwaura (the sole director) represented the appellant/respondent. They both addressed us as to whether or not the appellant has the right of appeal to this Court in this matter.

Mr. Amoko for the applicant stressed that **section 8(1)** of the Land Control Act did not have any provision for an appeal to this Court nor was the Act quoted anywhere in the Civil Procedure Code and/or Rules.

But Mr. Mwaura countered that the appellant had a right of appeal because he applied for leave to appeal from the superior court's ruling and was granted the leave by that court.

**Rule 80** of the Court of Appeal Rules on which this application was based provides that:-

***“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.”***

Although **rule 42** of this Court's Rules was also quoted in this application, the rule only gives the format for making such an application except for those made informally as provided under **sub-rule 2** of the Rule.

The facts of the case subject to the application are that on 11<sup>th</sup> June 1996 the applicant/respondent entered into an agreement to purchase a piece of land known as *L.R. No.10871/1 Title No. L.R. No. 58576* situate on Gatanga Road within Thika County Council from the appellant at a price of Kshs.31,000,000/= (Thirty one million). The land measured 32.74 hectares. Out of the purchase price, the applicant paid a sum of Kshs.23,750,000/=.

The parties duly executed all the necessary transfer documents including land control board forms, but these were not submitted to Kakuzi/Thika Land Control Board because, as the applicant puts it, the appellant expected to obtain exemption from his Excellency the President. Although this exemption was obtained from the President on 3<sup>rd</sup> February 1997, nothing was done about it and the parties do not seem to have moved any further.

The applicant realized that without the grant of the board's consent, it stood to lose the land as the agreement entered into with the appellant was null and void. As a result it moved the High Court on 11<sup>th</sup> April, 2005 for an order to extend time for it to apply for consent of the land control board.

Honourable Justice Kubo granted the order on 7<sup>th</sup> February 2006 but the appellant was not satisfied with it and applied to the same Judge for a review of the order but the Judge dismissed the application for review on 13<sup>th</sup> October 2006. It is this order that prompted the appellant to file the Notice of Appeal dated 13<sup>th</sup> September 2006 to this Court on 15<sup>th</sup> February 2006. It is this notice which is the subject of the present application.

**Section 75** of the Civil Procedure Act and **Order XLII** of the Civil Procedure Rules list the orders out of which appeals lie to this Court as of right. In any other case under Chapter 21 Laws of Kenya not provided for, an appeal only lies with leave of the court. Such leave must be sought and obtained in the Court of the first instance. If the leave is refused then this becomes a ground of appeal. Otherwise all other statutes, independent of the Civil Procedure Act and Rules have provisions for appeals. The Land Control Act is one of such statutes.

**Section 8(1)** of the Land Control Act provides that:-

***“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:***

***Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason for so to do, upon such conditions, if any, as it may think fit.”***

**Sub-section 2** of that section provides that:-

***“The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.”*** Underlining supplied.

The applicant applied the proviso to **section 8(1)** of the Act to make an application for extension of time which order the superior court granted but refused to review when the appellant sought such review order.

There is no automatic right of appeal against such refusal and it was incumbent upon the appellant to seek leave of the superior court to lodge such appeal, the present one, before us.

Mr. Mwaura who represents the appellant has told us he sought such leave but has not produced any evidence to confirm that he either did so or that if he made such an application, such leave to appeal was granted by the superior court.

Under the Land Control Act, the right of appeal has been stipulated under **sections 11** and **12** of the Act, but this right only operates from the decision of the Divisional Land Board to the Provincial and Central Land Control Appeals Boards. In fact the decision of the Central Land Control Appeals Board is final and cannot be questioned by any court – see **section 13(2)** of the Land Control Act.

It would appear then that, apart from the appellant having no right of appeal as of right or that he did not seek and obtain leave of the superior court to lodge this appeal before this Court, the Land Control Act did not envisage or intend that applications relating to consent of land boards in respect to controlled transactions be the subject of court litigation.

We have been referred to the case of **HARYAN SINGH BHOGAL (t/a HARYAN SINGH & CO. V. JADVA KARSAN (1953) 20 EACA 17** at page 18 where it was stated that:-

***“It is well settled law that a right of appeal can only be founded on a statute and that any party who seeks to avail himself of the right must strictly comply with the conditions prescribed by the statute.”***

This was reinforced by the decision of this Court in **Rafiki Enterprises Limited And Kingsway Tyres & Automart Limited Civil Application No. Nai 375 of 1996 (C.A.)** where it was stated as follows:-

***“and of course it is now trite law that a right of appeal must expressly be given by law and such a right cannot even be implied or inferred.”***

See also **Niazsons (K) Limited And China Road & Bridge Corporation (Kenya); Civil Appeal No. 187**

*of 1999.* These cases have laid down principles regarding the right of appeal which the appellant has not satisfied.

For these reasons, we are constrained to allow the application by Notice of Motion dated and filed in this Court on 7<sup>th</sup> April 2006 and to hold that we have no jurisdiction to entertain the Notice of Appeal dated 13<sup>th</sup> February and filed herein on 15<sup>th</sup> February 2006 or the appeal filed in this Court on 8<sup>th</sup> March 2006 which we order struck out.

Cost of the Notice of Motion and the appeal shall be borne by the appellant.

***Dated and delivered at Nairobi this 30<sup>th</sup> day of May 2008***

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

I certify this is a  
true copy of the original.

**DEPUTY REGISTRAR**