REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal (Appli.) 158 of 2006

BEHAN & OKERO ADVOCATES …….…… APPLICANT/RESPONDENT

AND

NATIONAL BANK OF KENYA LTD …..…….. RESPONDENT/APPELLANT

(Application to strike out Civil Appeal No. 158 of 2006 from a ruling and order of the

High Court of Kenya at Kisumu (Tanui, J) dated 3rd December, 2004

in

H.C.C. Misc. Application No. 114 of 2004)

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RULING OF THE COURT

On 3rd December, 2004, Tanui J, sitting in the High Court of Kenya, at Kisumu delivered a ruling in Miscellaneous Civil Case No. 114 of 2004 – In the matter of Advocates Act (Chapter 16 Laws of Kenya) - in which he dismissed an application filed by National Bank of Kenya Limited (the respondent before us) against Behan & Okero Advocates (the applicant). National Bank of Kenya Limited felt aggrieved and filed Civil Appeal No. 158 of 2006 in this Court on 18th July, 2006. The record of that appeal was promptly served upon Behan & Okero Advocates. On 27th July 2006, that firm of Advocates filed this Notice of Motion dated 24th July, 2006 in which the firm of advocates is seeking orders that the respondent's appeal (referred to in the application as Civil Appeal No. KSM 29 of 2006) be struck out with costs. The grounds cited for seeking the same order are:-

"(a) That the appeal is incompetent due to the fact that both the notice of appeal and the order appealed against are fatally and incurably defective.

(b) That the order giving leave to appeal is not incorporated in the record of appeal and no direction dispensing with inclusion of the same has been sought and obtained."

The notice of motion is also seeking an order that the order of stay of execution granted on 21st July 2006 in Civil Application No. 178 of 2006 be vacated. The application is supported by an affidavit sworn by George Vincent Odunga, a counsel practising in the firm of Behan & Okero, Advocates. He also represented the applicant before us. The application was opposed by the respondent who filed a replying affidavit sworn by its counsel, Christopher Orina Kenyariri, who also pleaded the respondent's case before us. In the supporting affidavit, the applicant states that as the order granting leave to appeal has been omitted from the record of appeal and there is no direction dispensing with the inclusion of the same having been applied for and obtained, and as the notice of appeal annexed to the record of appeal indicates that the appellant intends to appeal against the whole of the ruling made on 3rd December, 2004 whereas the formal order extracted and annexed to the record contains three holdings one of which was in favour of the appellant, i.e. order granting stay of execution for 14 days, the record of appeal and the notice of appeal is incurably defective. Further,

the appellant contends in the same affidavit that the inclusion of the order granting stay of execution in the same extracted order which was annexed to the record renders the order incurably defective. Lastly, it states that as the title of the order and notice of appeal omits certain parts of the title of the proceedings appealed from, the record of appeal is incurably defective and for those reasons, the appeal should be struck out.

The respondent, in its replying affidavit, states that Behan & Okero Advocates is the proper business name for the applicant and there is no requirement that the prefix '*M/s'* be used in referring to the applicant. The respondent also believes that the order as extracted is proper and valid and represents the order issued on 3rd December, 2004. Lastly, it states at paragraphs 6 and 7 as follows:-

"6. The order appealed against was sent to the applicants (sic) for approval vide letter dated 20th June 2006, a copy attached hereto and marked COK1.

7. The applicants (sic) unconditionally approved the order aforesaid by stamping it with their (sic) firm's stamp, a copy hereto and marked COK2."

Before us, Mr. Odunga, the learned counsel for the applicant, did not urge two grounds for seeking to have the appeal struck out namely that the order giving leave to appeal was not incorporated in the record of appeal and that the order and the notice of appeal were defective on ground that the word "*M/s"* was omitted in them. In our view, that decision was well merited for indeed nothing turns on those two grounds. He however, concentrated mainly on the ground that the order appealed from was defective in that it was not properly extracted as it contains three holdings, one of which is in favour of the respondent i.e. the order granting stay of execution for 14 days which was granted later after the order appealed against had been delivered and thus should not have been incorporated in the same order extracted from the ruling delivered by the court which was the subject of the appeal. Secondly, he submitted that in so far as the notice of appeal stated that the respondent intended to appeal against the whole order made by the court and the order extracted incorporated an order in favour of the respondent, which meant the respondent was, according to the notice of appeal, intending to appeal against some orders in its favour, the notice of appeal was fatally defective. He referred us to the case of Republic vs. The Managing Director of Kenya Posts & Telecommunications Corporation - Civil Appeal No. 24 of 1999 reported in (1999) 1 EA 250 to buttress his contention that Civil Appeal No. 158 of 2006 was incurably incompetent and urged us to strike it out.

Mr. Kenyariri, on his part, maintained that as the order extracted was in respect of a decision made by the superior court at one sitting, it was proper that all that the court decided be incorporated in the same order of the court lest the respondent be accused of having left out in its extracted order certain important aspects of what the court stated at that sitting. In any case, Mr. Kenyariri continued, the extracted order annexed had been sent to the applicant and had been approved by the applicant. It was annexed in the records only after the applicant had approved it so that it was not fair for the same applicant, having approved the same order, to later complain about it. He also submitted a list of authorities on the matter.

We have anxiously considered, the rival arguments, the affidavits before us and the law. We have also considered the cases to which we were referred. The complaint raised by Mr. Odunga concerning the contents of the order appealed from is not altogether invalid. The order as drawn incorporates two orders one of which was made during the same sitting but was not the subject of the complaint as it was made soon after the ruling complained of was delivered, and it was not in itself the subject of the appeal. We have carefully perused the case of Republic vs. The Managing Director of The Kenya Posts & Telecommunications Corporation (1999)1 EA 250. It appears to us that what was before the court then was partly an issue similar to what is before us, and partly a different issue altogether namely that in that case, the name of the superior court Judge who made the order complained of was substituted for that of a Judge who never made the order. Points in that case were raised by the court *suo moto* as it was apparent from the face of the order that was before the court that several mistakes were committed and the order did not reflect the proceedings and the ruling of the court as in any case a wrong Judge namely Hon. Lady Justice Khaminwa had been cited as the Judge that heard and delivered the ruling in that case whereas that was not the case as the ruling from which the order in that case was extracted had been delivered by Hon. Mr. Justice Githinji. In this case, the complaint is that an order was wrongly drawn in that it incorporates two orders namely an order that "leave be and is hereby granted to the applicant to appeal and that there be a stay of execution for 14 days." That order as appears in the record of appeal, was extracted and a draft of it sent to the applicant for approval vide the respondent's letter dated 20th June, 2006. The respondent says in that replying affidavit's paragraphs 6 and 7 we have reproduced above that the applicant approved that draft. The applicant has not sworn any affidavit to dispute that allegation and although Mr. Odunga said from the bar that he merely acknowledged receipt of it but did not approve it, we are satisfied that the draft was approved by the applicant. In any case, the applicant accepts receiving the draft order in good time and did not at any time disapprove of it. In the case of Air Alfaraj Limited vs. Raytheon Aircraft Credit Corporation and Another - Civil Appeal (Application) No. 29 of 1999, this Court expressed itself thus on a similar situation:-

"Mr. Ahmednasir's comment on the fact that he approved the order as drawn was that his approval could not have

validated an irregular order. But he is an Advocate of the High Court of Kenya and therefore an officer of the court. He should not approve a wrongly drawn order, and then wait until an appeal against that order comes up for hearing and challenge the validity thereof. That is not being honest and amounts to a radical departure from the conduct expected of counsel. The conduct and etiquette at the Bar demands that a counsel ought not to approbate and reprobate. In the Sonko vs. Patel case (supra) the Court of Appeal for Eastern Africa said at page 26:-

"*This is an interesting, if technical, point on which no authority was cited and on which we find it unnecessary to express our opinion, for we hold that the first respondent is estopped by his conduct from now questioning the form or substance of the decree which is annexed to the memorandum of appeal. It was, as we have said, submitted to his advocate and approved without any reservation. That was an express representation that he accepted the decree as being correct in form and substance and the appellants have acted upon that representation by grounding their appeal on that decree. In these circumstances it would be unjust to allow the first respondent to approbate and reprobate and this objection also fails.*""

Having been satisfied that the applicant's counsel approved the order he is now complaining about, we too feel, like the Court of Appeal for Eastern Africa felt in the *Sonko & Another vs. Patel & Another* (1955) 22 EACA 23, that the applicant cannot be allowed to approbate and reprobate. That being our view of the matter, and as no prejudice to the applicant has been alleged, we see no reason to take the draconian action of striking out Civil Appeal No. 158 of 2006.

In the result, the application by way of notice of motion dated 24th July, 2006 is dismissed with costs to the respondent, and the appeal shall proceed to hearing. Order accordingly.

Dated and delivered at Kisumu this 15th day of June, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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