



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civ Appli 161 of 2004

AKAMBA PUBLIC ROAD SERVICES LIMITED APPLICANT

AND

FLORENCE MNYANZI ISANYA1ST RESPONDENT

SHEILA ISANYA2ND RESPONDENT

**FLORENCE M. ISANYA suing as the Legal Representative of the Estate
of the late ISAAC JAVAN NAMUSENDE ISANYA3RD RESPONDENT**

**FLORENCE MNYANZI ISANYA suing as the Legal Representative of the
estate of the late RONNIE ISANYA4TH RESPONDENT**

PATRICIA AYESA ISANYA through her friend

FLORENCE MNYANZI ISANYA5TH RESPONDENT

MAURINE ISANYA through her friend

FLORENCE MNYANZI ISANYA6TH RESPONDENT

DENIS ISANYA through his next friend

FLORENCE MNYANZI ISANYA7TH RESPONDENT

(An application for striking out the Notice of Appeal dated 9th December, 2002 purportedly filed pursuant to the ruling of the High Court of Kenya Nairobi (Ransley, Commissioner of Assize) dated 26th November, 2002 in H.C.C.C. NO. 1852 OF 1998)

RULING OF THE COURT

This is an application citing *rules 1 and 44* of the Court of Appeal Rules (the Rules) but which in truth have no relevance to the application. The application seeks an order striking out the Notice of Appeal dated 9th December, 2002 in respect of a ruling made by P.J. Ransley C.A (as he then was) on 26th

November, 2002. It seems to us therefore that the relevant rule ought to be *rule 80* of the Rules. The application was made by Akamba Public Road Services Limited (the applicant). There are seven respondents to the application. The first respondent was Florence Mnyanzi Isanya (hereinafter Florence) and she was also suing as the Legal Representative or next friend of the 3rd, 4th, 5th, 6th and 7th respondents. The second respondent was Sheila Isanya.

The applicant, somewhat unusually, is seeking to strike out a Notice of Appeal given by the applicant itself.

The grounds set out in the Motion to strike out were as follows:-

- “1. THAT upon the ruling made by the Honourable Mr. P. J. Ransley C.A. on 26th November 2002 the applicant filed the Notice of Appeal dated 9th December 2002 and applied for proceedings under rule 81 of the Court of Appeal Rules on 9th December 2002 and has been awaiting communication from the superior court ever since and has severally attended the registry of the superior court to confirm that the proceedings are ready for collection to no avail.***
- 2. THAT the error in the date of the decision, namely 26th December 2002, as set out in the Notice of Appeal was inadvertent and caused by oversight but nevertheless has rendered the said Notice incurably defective.***
- 3. THAT the applicant intends to proceed with its appeal from the ruling of the High Court made on 26th November 2002 but will be unable to have the merits of the appeal ventilated in view of the incurable defect in the Notice of Appeal.***
- 4. THAT the Notice of Appeal should be struck out to enable the applicant file an application to file a fresh Notice of Appeal out of time.”***

In paragraphs 8 and 9 of the Affidavit of Elijah Oluoch Asher an advocate practicing with the firm of Mohamed Madhani & Company acting for the applicant he states:-

- “8. THAT upon scrutiny of the progress of this matter I have belatedly realized that the Notice of Appeal which was lodged in court on 9th December 2002 erroneously gives the date of the decision which is sought to be appealed as “26th December 2002” whereas the decision was actually made on 26th November 2002. This mis-dating was caused purely by inadvertence and is a typographical error.***
- 9. THAT this error being so fundamental is likely to prevent the applicant from fully ventilating its appeal which is likely to be struck out and accordingly the applicant prays that the said Notice of Appeal be struck out so as to enable it set in motion the process of appeal afresh without undue encumbrances caused by technical lapses such as that in issue herein.”***

From those grounds and the affidavit in support, it becomes clear that the only defect for which the Notice of Appeal is sought to be struck out is the mis-dating of the date of delivery of the judgment sought to be challenged.

Mr. Murgor learned counsel for the respondents opposed the application to strike out the Notice of Appeal, submitting that the Notice of Appeal should be dismissed instead as the applicant had taken two years to discover the error and the respondents will be prejudiced if the applicants are now enabled to file a fresh Notice of Appeal to replace the defective one, there being money due to the respondents which is being held up.

We agree with the applicant that the defect apparent on the face of the Notice of Appeal renders it incompetent and therefore liable to be struck out. An order of dismissal would only lie if the matter was heard on merits.

In the circumstances we accede to the application dated 5th July 2004 and order that the Notice of Appeal dated 9th December 2002 be and is hereby struck out.

The respondents' costs of this application shall be paid by the applicant.

Dated and delivered at Nairobi this 18th day of May, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR