



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU**

**Civil Appli. 161 of 2006**

**BENSON ONDIMU MASESE T/A**

**B.O. MASESE & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**KENYA TEA DEVELOPMENT AGENCY LTD ..... RESPONDENT**

***(An application to strike out Civil Appeal No.16 of 2006 at the High Court of Kenya at  
Kisumu (Barabara Tanui J.) delivered on 28<sup>th</sup> October 2005***

**in**

**H.C.C.C. NO.75 OF 2004)**

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**RULING OF THE COURT**

In a defamation suit by *Benson Ondimu Masese* trading as B.O. Masese and Company Advocates, the Superior Court (Tanui J.) gave judgment against the defendant, Kenya Tea Development Agency Limited (the applicant) and awarded general and exemplary damages. He declined to award aggravated damages which had, in addition, been prayed for in the plaint. The applicant was aggrieved and filed a Notice of Appeal under rule 74 of the Court of Appeal Rules, which in part reads as follows:

*“TAKE NOTICE, that Kenya Tea Development Agency, being dissatisfied with the judgment of the Honourable Mr. Justice B.K. Tanui delivered on the 28/10/2005, intends to appeal to the Court of Appeal against the whole of the said judgment.”*

The applicant before us was the plaintiff in the aforesaid suit. He has applied under rule 80 of the Court of Appeal Rules and section 3 of the Appellate Jurisdictions Act, Cap 9 Laws of Kenya, seeking an order striking out the aforesaid Notice of Appeal for being incurably defective. Counsel for the applicant, Maurice Ouma, has sworn the affidavit in support and therein depones that as the trial court had declined to award aggravated damages, that was a decision in favour of the respondent, and could not properly be appealed against. In his view therefore the Notice of Appeal offends the provisions of rule 74, (3) aforesaid, which, as material, provides that:

*“74(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision...”*

In Richard Kanyago & 2 Others v. David Mukii Mereka, Civil Appeal No.94 of 2001 (unreported)

this court, differently constituted, held that a notice of appeal which specified that the appellant was intending to challenge the decision of the superior court including the award of special damages which had been agreed on by consent was incurably defective as it offended both rule 74(3), above, and section 67(2) of the Civil Procedure Act, Cap 21 Laws of Kenya. The applicant must have been provoked by that decision to bring this motion.

We agree that where an intending appellant expresses a desire to appeal against even a decision in his favour, renders the notice of appeal expressing that desire defective. But in the case before us, it is quite clear to us that one cannot extricate damages from the question of liability upon which any award of damages would be based. In the Richard Kanyago case, the appellants had negotiated the quantum of special damages. Their conduct of seeking to challenge what they had consciously agreed upon was clearly an abuse of the court process and in any event violated statutory provisions which expressly prohibited what they sought to do. In the matter before us the respondent did not agree on anything. It filed a defence, denying liability. At the hearing of the suit its counsel's application for adjournment was rejected with the result that the respondent did not call any evidence. In such circumstances, as rightly pointed out by Mr. Yego for the respondent, the entire decision of the superior court is under challenge.

Mr. Yego raised a legal point, namely, that under rule 80, under which the application was brought, only two grounds are stipulated for seeking an order. The first of those grounds is that no appeal lies, and the second, that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. He contended that the application before us is not based on any of those grounds. Besides, he contended, there is variance between the motion and the affidavit in support of the motion. We have considered the issues, but we do not think that it is now necessary to deal with them in view of the decision we have come to that the notice of appeal dated 6<sup>th</sup> December, 2005 is not defective.

In the result we dismiss the notice of motion dated 19<sup>th</sup> May 2006.

As Counsel for the parties herein, who are also the counsel for the parties in Civil Application No. NAI.162 of 2006 between Kenneth Ondieki T/A K.O. Obae and Co. Advocates, agreed that the decision in this matter shall apply to that application the issues therein being the same as herein, we order that Civil Application No. NAI.162 of 2006 be and is hereby dismissed for the same reasons.

Dated and delivered at Kisumu this 20<sup>th</sup> day of June, 2007.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**