REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appli 107 of 2005

ALLAN STEPHEN REYNOLDS …………………………. APPLICANT

AND

TWIGA CHEMICALS INDUSTRIES …....……..……….RESPONDENT

(An application to strike out Notice of Appeal from the Judgment and Decree of the High Court of Kenya

Nairobi ((Githinji, J) dated 12th November, 2004

In

H.C.C.C. No. 2772 of 1997)

****

RULING OF THE COURT

The application before us, expressed to be brought under rules *42(2)* and *80* of the Court of Appeal Rules, seeks an order striking out a notice of appeal filed on 19th November, 2004, by Twiga Chemicals Industries Limited, the respondent, on the grounds that no appeal lies and also that an essential step in the proceedings has not been taken or has not been taken within the prescribed time.

The applicant, Allan Stephen Reynolds, a South African and a former employee of the respondent, was the successful party in Nairobi High Court Civil Case No. 2772 of 1997, in which he had sued the respondent for various liquidated sums for alleged breaches of his contract of employment with the respondent which was terminated on 3rd October, 1997. These breaches related to, non payment of school fees by the respondent for the applicant's daughter, failure to meet removal expenses for the applicant's personal effects on his return to his country, and also the value of the applicant's goods which were sold by SGS Kenya as a result of the failure by the respondent to pay the shipping expenses. The total claim as pleaded came to about Kshs.8,116,767/-.

The applicant's claim was partially compromised in the course of the trial, the respondent having admitted the claim to the extent of Kshs.2,226,144/-. The trial proceeded on the remainder of the claim made up of Kshs.260,000/- for school fees and Kshs.4,550,000/-, being the value of the applicant's furniture which were auctioned by SGS to recover storage charges. Likewise the respondent's set-off was compromised to the extent of Kshs.1,919,515.66/- being the balance on the applicant's internal expenses account including advances and travel.

In his judgment the trial Judge, Githinji, J (as he then was) allowed the applicant's claim of Kshs.260,000/- for school fees, the admitted sum of Ksh.2,226,144/- and the value of the applicant's goods sold by SGS, amounting to Kshs.4,550,000/-. In his computation the total came to Kshs.9,036,144/- and upon discounting the Kshs.1,919,515/- set-off, he entered judgment for Ksh.7,116,628.34/-, in favour of the applicant, plus costs and interest at 12% per annum. It was against that judgment that the notice of appeal, aforesaid, was filed by the respondent and respecting which this application was brought.

The aforesaid notice of appeal was filed pursuant to the provisions of ***rule 74*** of the Court of Appeal Rules (the Rules), which, as material, reads as follows:-

"***74(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision, and where it is intended to appeal against part only of the decision, shall specify the part complained of …."***

In the application before us, the notice of appeal complained of stated that the respondents intended to appeal against the whole decision, implying that even the part admitted by the applicant was appealed against. The applicant's counsel, Mr. Mugambi, cited ***section 67(2)*** of the Civil Procedure Act, ***Cap 21*** Laws of Kenya, and the Case of **Richard Kanyago & two others vs. Mukii Mereka**, Civil Appeal No. 94 of 2001 (unreported) CA, as supporting the applicant's Motion. ***Section 67 (2)***, above provides that:-

"***No appeal shall lie from a decree passed by the Court with the consent of parties."***

And, in the **Richard Kanyago** case, supra, this Court in dealing with a situation almost similar to this one, rendered itself thus:-

"***But was it open to the appellants to appeal against the amount of special damages which they had assisted in fixing? With due respect to the appellants by indicating in their Notice of Appeal that they were dissatisfied with the amount of special damages the superior court awarded with their consent, they were, in effect trying to revive an issue which the parties had agreed would not be the subject matter of adjudication by the trial court ….. Clearly, the Notice of Appeal offends the provisions of rule 74 (3), above."***

In answer, Mr. King'ara, for the respondents, submitted before us that the decree in the case before us was not by consent . In his view, although certain issues had been compromised, the final judgment had an erroneous computation of the decretal sum, thus rendering the entire decision erroneous. Hence, although the error in computation was corrected, it was so corrected after the Notice of Appeal under challenge had been filed. Mr. King'ara seemed to think that there is a difference between a judgment and decree, and in his view, one can appeal against the judgment but not decree and vice versa.

There is no definition of "Judgment" in the Civil procedure Act, and Rules, but "decree" is defined as meaning, the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. So clearly an appeal lies against a decree or order.

The decision against which a Notice of Appeal was filed finally and conclusively determined the rights of the parties on the matters in controversy between them. It was a decree. But the decision had an error in computation. This, counsel for the applicant conceded, but submitted that it was such an error that could be corrected otherwise than by way of an appeal. But the amount the learned trial Judge, through his computation, found to be due was in excess of the applicant's claim as pleaded in the plaint. His total claim was in the region of Kshs.8,116,767/-, but according to the Judge's computation Kshs.9,036,144/- was due to him less the set-off of Ksh.1,919,515/-. Prima facie, therefore, the whole judgment was erroneous, and either party had the automatic right of appeal to correct it.

Besides, while it is true that part of the claim was compromised, the learned Judge having got his total figures wrong, every aspect of his decision attracted a review either by way of an appeal or by way of

review under Order XLIV of the Civil Procedure Rules. The respondents chose an appeal and they ought not be faulted for having done so. Clearly, their case is distinguishable from the **Richard Kanyago** Case, in which the Notice of Appeal declared that even aspects which had been consented to by the parties would be challenged.

In the result, we disallow the application and order that the application dated 25th April, 2005 and filed in Court on 25th April, 2005, be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of June, 2007.

P.K. TUNOI

……………………

JUDGE OF APPEAL

S.E. O. BOSIRE

……………………….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.