



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 163 of 2007 (UR 106/2007)

THE KENYA ANTI-CORRUPTION COMMISSION APPLICANT

AND

FIRST MERCANTILE SECURITIES CORPORATION.....RESPONDENT

(Application for stay of order by the superior court pending the lodging, hearing and determination of an intended appeal from the order of the High Court of Kenya)

NAIROBI (Nyamu, J) dated 28th June, 2007)

In

H.C. Misc. C. Appl. No. 695 of 2007)

RULING OF THE COURT

1. The preliminary objection taken by Mr. Ngatia, counsel for the respondent, is two pronged. It concerns both substantive and procedural law. Firstly, can two notices of appeal lawfully be filed in respect to a single decision made by the superior court? Secondly, can a notice of appeal be withdrawn by a letter?
2. By a Chamber Summons application dated 27th June, 2007, the respondent applied for leave to commence Judicial Review proceedings against the applicant, which leave was to operate as a stay of the implementation of what is known as Mutual Legal Assistance to the Swiss Confederation whose details are contained in the Statutory Statement underpinning the Judicial Review Proceedings.
3. By its order made and dated 28th June, 2007 the superior court, Nyamu, J, granted the application. Being aggrieved by the said order the applicant commenced appeal process.
4. On 11th July, 2007, the applicant through Stephen Macharia Kimani, Advocate, lodged a notice of appeal. It was served on Messrs Ngatia & Associates, Advocates, on the same day, at 3.20 p.m. Probably unknown to Mr. Kimani, who appears to be an in-house Advocate for the applicant, Messrs Mohamed Muigai, Advocates, lodged another notice of appeal in the High Court of Kenya at Nairobi and also caused it to be served upon Messrs Ngatia & Associates, Advocates, on the next day 12th July, 2007, at 11.02 a.m.
5. Both notices of appeal were in respect of the same decision. They show that the applicant intended to appeal to this Court against such part of the said decision as decided that the leave granted to commence Judicial Review proceedings is to operate as a stay of implementation of the impugned

Mutual Legal Assistance dated 3rd May, 2007; and barring the Kenya Anti-Corruption Commission from receiving any report from the requested party or acting upon any report that may have been received; or publishing any report so received from the requested party relative to the applicant, its directors or shareholders or consultants or agents.

6. Realizing that it had committed a procedural blunder Mr. Kimani, Advocate, wrote to the Deputy Registrar of this Court as follows:-

“I wish to withdraw the Notice of Appeal dated 11th July, 2007 filed on the same date.

I confirm that the firm of M/s Mohammed Muigai Advocates is acting for Kenya Anti-Corruption Commission in the matter.”

7. Mr. Ngatia in a forceful but persuasive submission has contended that only one notice of appeal can lawfully be filed in respect to a decision made by the superior court and that Mr. Kimani, Advocate, had no right to withdraw his notice of appeal by a letter. Mr. Ngatia argued that the letter is ineffective and Mr. Kimani’s notice of appeal must subsist and the Court cannot ignore the said notice of appeal. Thus, in the circumstances, he contended, the entire Notice of Motion is vitiated and must be struck out.

8. In reply to this submission, Professor Muigai for the applicant, submitted that the existence of two notices of appeal does not breach any rule and that it was not upon us at this stage to inquire into the validity of the notice (s) of appeal. He averred that the sole issue for determination before us in this preliminary objection is whether there is a notice of appeal upon which the application can be predicated.

9. We will deal with the second limb of the preliminary issues raised. It is trite law that there is no provision in the rules for withdrawal of a notice of appeal by a party filing it. A notice of appeal on record remains so until struck out or dealt with under the provisions of **rule 82** of the Rules of this Court where the appellant has failed to institute an appeal within the prescribed time. Also, a letter addressed to the Court cannot withdraw such a notice. It must, therefore, follow that the applicant could not and did not in law withdraw its notice of appeal dated 11th July, 2007 and lodged by Mr. Kimani, Advocate. The same still subsists on record despite the letter intimating withdrawal which letter was in fact, ineffective. See **Dolphin Palms Ltd v. Al-Nasibh Twins Freight Forwarders Ltd. & 2 Others**, Civil Appl. No. 112 of 1999 (unreported), **Raphael Maitha & 3 Others v. Jays Syndicate Limited & 3 Others**, Civil Appl. No. 99 of 2004 (unreported).

10. The factual situation, therefore, is that there are two subsisting notices of appeal on a single intended appeal challenging one decision.

11. In our view, where two notices of appeal have been lodged in respect of the same decision, it cannot be said that a notice of appeal has not been lodged just because two such notices have been lodged. **Rule 5(2) (b)** does not say “where one and not more than one,” notice has been lodged.

12. Since there is no rule permitting a Notice of Appeal to be withdrawn, the only way to remove a multiplicity of notices of appeal from the same decision is to apply successfully to strike out one or more or all of the existing Notices of Appeal. But, so long as there is at least one existing Notice of Appeal on record an application under **rule 5 (2) (b)** of the Rules of the Court has been validly lodged and can be considered.

13. In our view filing two or more notices of appeal on one and the same decision and raising the same issues betrays diligence on the part of the applicant but does not prejudice the opposite party in any way.

14. We would, for these reasons, dismiss the preliminary objection to the Notice of Motion for stay. Costs shall be in the application.

Dated and delivered at Nairobi this 12th day of October, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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.