REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL 336 OF 2005

GAD DAVID OJUANDO …….……..…… APPELLANT

AND

1. **PROF. NIMROD BWIBO (CHAIRMAN MASENO UNIVERSITY COUNCIL)**
2. **PROF. F. N. ONYANGO (VICE CHANCELLOR MASENO UNIVERSITY)**
3. **MASENO UNIVERSITY…….....……....RESPONDENTS**

(Being an appeal from the judgment and decree of the High Court of Kenya At Kisumu (Warsame, J.) dated 23rd May, 2005

in

KISUMU H.C.C.C. NO. 101 OF 2003)

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RULING OF THE COURT

The main appeal was scheduled for hearing before us on 21st June, 2006 when learned counsel for the appellant, Mr. Miruka Owuor, drew our attention to a notice of motion taken out on behalf of the appellant on 5th June, 2006. He pleaded that the motion be heard before the main appeal, and so it was.

The motion seeks an order under ***rule 80*** of the ***Court of Appeal Rules*** (the Rules):

"**That the Respondents' notice of appeal lodged in Kisumu High Court Civil Case Number 101 of 2003 on 6th June, 2005 and the respondents Notice of cross – appeal dated 5th April, 2006 filed with this Honourable Court on 6th April, 2006 served on the applicant on 16th May, 2006 and any appeal if filed, by the Respondents, be and are hereby struck out."**

The background to the application is this:-

The superior court made its decision in the dispute between the parties on 23rd May, 2005. Both parties soon after intimated, by filing notices of appeal timeously, that they were not satisfied with that decision. The respondents for their part filed the notice of appeal on 6th June, 2005 and applied for copies of

proceedings and judgment on 2nd June, 2005. The proceedings and judgment were ready for collection by both sides on 28th July, 2005 but it is only the appellant who collected his together with a certificate of delay and thereafter filed the appeal on 15th December, 2005 after seeking and obtaining extension of time. The record of appeal was served on the respondents on 23rd December, 2005. It was subsequently set down for hearing on 29th March 2006 but was adjourned on the application of the respondents and relisted for hearing in the Court's June sessions in Kisumu.

Throughout that period, there was no indication from the respondents that they intended to pursue their intention to challenge the decision of the superior court despite having lodged a notice of appeal as early as 6th June, 2005. It was not until the 16th of May, 2006 that they served on the appellant/applicant a notice of cross-appeal filed in court on 6th April, 2006. The applicant was shocked and he says the notice is embarrassing and prejudicial to him, hence the serious objections raised by Mr. Owuor.

The first salvo he fired was against the notice of appeal filed by the respondents on 6th June, 2005 which they abandoned. It would follow under ***rule 82(a)*** of the rules, he submitted, that it was deemed to have been withdrawn automatically when the respondents failed to institute an appeal within the time appointed. The notice of appeal is thus non-existent.

The construction of ***rule 82*** has its peculiar difficulties and is unsettled as we stated in **Kali Security Co. Ltd. v Patrick Mureithi**, Kisumu Civil Appeal/Application No. 4/04. The conflicting decisions on the issue attest to this, among them: **Kamau Kibunja v Noordin Construction (k) Ltd** C. Appl. NAI. 172/88 (ur); **Bullion Bank Ltd v Fulchand Manek & Brothers**, Civil Appl. NAI. 239/97 (ur**)**; **Dolphin Palms Ltd v Al-Nasibh Trading Co. Ltd & 2 others** Civil Appl. NAI. 112/99 (ur); **K & K Amman Ltd vs. Mount Kenya Game Ranch & others [2003] 1 EA 106**. The Rules Committee will hopefully put an end to such uncertainty, but for purposes of this application, the construction that commends itself to us is the one placed on the rule by this Court in the ***Dolphin Palms Ltd Case*** (supra) when it stated:

"**As rightly pointed out by Mr. Khatib, for the first respondent, the court must be moved to make the order declaring a notice of appeal "deemed to have been withdrawn." Rule 82, in pertinent part, provides that:-……**

We concede there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase "unless the court otherwise orders…."clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules."

The application to strike out the notice of appeal has now been made before us. Learned counsel for the respondents Mr. Wasuna said nothing to persuade us that we should leave the notice on record when the respondents have already filed a notice of cross appeal. Accordingly the notice of appeal filed on 6th June, 2006 is for striking out with costs and we so order.

The second objection raised by Mr. Owuor relates to the notice of cross appeal filed on 6th April, 2006 and served on 16th May, 2006. That notice, he submitted, expresses the intention to appeal after an inordinate and unexplained delay of 255 days. It is another way of coming before the court through the back door. Even if it was accepted that the amendment to ***rule 90*** of the rules by ***Legal Notice No. 14*** of **19*84*** allows the respondents to file the notice of cross appeal 30 days before the hearing, Mr. Owuor submitted that the appeal had already been set down for hearing on 29th March, 2006 and there was no notice of cross appeal on record. As such, none can be subsequently filed and to allow a person who was not interested in appealing to do so without any explanation is unjust and prejudicial to the appellant who has acted prudently and diligently in filing his appeal and preparing for the hearing on the basis that the respondents had abandoned their earlier expressed intentions. Why, Mr. Owuor posed, should the rules require an appellant to comply with deadlines for filing an appeal and tender explanations for delay while a respondent intending to cross appeal need not face similar sanctions? That is where, in his submission,

this court must construe the rules widely in favour of striking out the notice of cross appeal.

For his part Mr. Wasuna took refuge under ***rule 90*** which provides for a notice of cross-appeal where a respondent desires to contend at the hearing of the appeal that the superior court decision be varied or reversed. ***Rule 2*** as amended by ***Legal Notice No. 14*** of **19*84*** provides:

"**(2) A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal, <u>or not less than 30 days before the hearing of the appeal, whichever is the later</u>.**

The underlined part was the amendment introduced in 1984 but it is not clear what mischief it was intended to address. Mr. Wasuna's view was that it was a useful addition which kept a respondent on guard in the event that he notices a reason to complain about the superior court's decision before the actual hearing of the appeal. The rule, he submitted, does not say that the notice be filed before the first hearing or before the suit is fixed for hearing; it refers to the actual hearing and disposal of the appeal and so, Mr. Wasuna submitted, the respondents were within the rule when they filed and served the notice of cross-appeal more than 60 days before the hearing on 21st June, 2006. That there was a notice of appeal filed by the respondents, which had been abandoned, was not a bar to the filing of a notice of cross-appeal under the rule. It was an option available to the respondents and they took the more convenient one since an appeal had already been filed by the applicant. There cannot therefore be an abuse of court process where a party is following procedures established by the law. For those reasons the application ought to be dismissed and the cross appeal be allowed on record.

We have anxiously considered the rival submissions of both counsel and we express considerable sympathy with the sentiments expressed by Mr. Owuor. The rhetorical question posed by him about the justice of requiring one party to an appeal to comply with stringent rules while apparently relaxing the same rules for the other, is not a lame one. Indeed he questioned the rationale for the amendment to ***rule 90(2***) and perhaps the need may arise for revisiting it. Nevertheless, our sympathy is not enough to override the natural construction of the rule which we think Mr. Wasuna has correctly placed on it. The amendmend to the rule makes no reference to the filing of the notice of cross-appeal before the main appeal is "fixed for hearing" either for the first time or at all. It envisages the hearing and disposal of the appeal and it is common ground that the appeal has neither been heard nor disposed of. The filing is not challenged on any other ground but for inordinate delay. In our view it was timeously filed in accordance with the rules and we have no reason to strike it out. However, we deprecate the conduct of the respondents who had all the time since the service of the record of appeal on them, and before the first abortive hearing of the appeal, to file the notice. We will express our displeasure by awarding costs against them.

The last limb of the application before us seeks the striking out of any appeal, if filed by the respondents. Mr. Owuor did not identify any appeal so filed and we do not find it necessary to conduct our own enquiries in that regard. The prayer is most amorphous and we do not grant it.

In the end we make the following orders:

1) That the notice of appeal filed by the respondents on 6th June, 2005 be and is hereby struck out.

2) That the prayer for striking out the notice of cross appeal dated 5th April, 2006 be and is hereby dismissed.

3) That the prayer for striking out any appeal, if any, filed by the respondents be and is hereby struck out.

4) That the costs of the struck out notice of appeal be and are hereby awarded to the applicant and are assessed at Shs.5,000/=.

5) That the costs of the application relating to the notice of cross appeal be borne by the respondents and are hereby assessed at shs.15,000/=.

6) That the costs assessed herein under (4) and (5) be paid before the next hearing date of the main appeal, and in default execution shall issue forthwith.

Those shall be our orders.

Dated and delivered at Kisumu this 14th day of July, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

…….**..……**

JUDGE OF APPEAL

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

DEPUTY REGISTRAR