



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL (APPLI) 36 OF 2004

PATRICK OLASA WABIDONGE
APPLICANT/RESPONDENT

AND

KOBIL PETROLEUM LIMITED RESPONDENT/
APPELLANT

(An appeal from the judgment and decree of the High Court of Kenya at Bungoma (Mbitio J) dated
24th August, 2000

in

H.C.C.C. NO. 44 OF 2000)

RULING OF THE COURT

This is a Preliminary Objection to the notice of motion dated 19th May, 2004 and filed in Court on the same day. At the hearing of the application, Mr. Siganga, learned counsel for the appellant (Respondent in the application) submitted that the application is incompetent and should be struck out with costs.

By the application, the subject matter of the preliminary objection, the applicant seeks:

“ORDERS THAT Civil Appeal No. (sic) of 2004 (means Civil Appeal No. 36 of 2004) filed on 13th February, 2004 be struck out with costs on the grounds that the appeal is incompetent due to the fact that the record of appeal omits to incorporate all the proceedings in the superior court and the advocates for the appellants are not properly on record and the defence exhibit is missing from the record”.

That application is made under:

“Court of Appeal Rules including Rules 1 (2); section 3 of the Appellate Jurisdiction Act and all other enabling provisions of the law”.

By an earlier notice of motion dated 19th February, 2004, (first application) the applicant had made an application for:

“ORDERS THAT Civil Appeal No. (sic) of 2004 (means Civil Appeal No. 36 of 2004) filed on 13th February, 2004 be struck out with costs on the ground that the appeal is incompetent due to the fact that the memorandum of appeal together with the record of appeal were filed out of time without leave of the court and the record of appeal omits to incorporate all the proceedings in the superior court”.

The previous application was made under:

“The Court of Appeal Rules including Rules 80, section 3 of the Appellate Jurisdiction Act, and all other enabling provisions of the law”.

The complaint in the first application was that *Civil Appeal No. 36 of 2004* was filed out of time by one day. On 5th May, 2005, the respective counsel for the parties filed a joint letter dated 29th April, 2004 and signed by the respective counsel asking the Court to record a consent order in terms of that letter.

By that letter, the parties agreed that the first application filed on 26th February, 2004 be withdrawn; that the time for filing the appeal be extended till 13th February, 2004; that the appeal be deemed filed in time and that the respondent do pay Shs.100,000/= being the respondent's agreed costs of the application. The consent order was recorded by the Court on 5th July, 2004. In the meantime, the applicant had filed the second application the subject of this Preliminary Objection on 19th May, 2004. That means that by 5th July, 2004 when the first application was withdrawn by the order of the Court, the second application dated 19th May, 2004 was still pending for hearing.

The first ground of Preliminary Objection is that the second application was filed 16 days outside the 30 days prescribed by **Rule 80** of the Court of Appeal Rules which provides:

“A person affected by an appeal may, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or appeal shall not be brought after expiry of thirty (30) days from the date of service of the record of appeal on the respondent”.

It is true that the respondent was served with the record of appeal on 13th February, 2004 and that the second application to strike out the appeal was filed on 19th May, 2004. Indeed, Mr. Odunga, learned counsel for the applicant concedes that the application was filed outside the 30 days prescribed in the proviso to **Rule 80**. He, however, submitted that the application is brought on the ground that the record of appeal is incurably defective. He contended that the appeal is incompetent for failure to include exhibits which is not one of the grounds on which an appeal can be struck out under **Rule 80**. He further submitted that the “*proceedings*” referred to in **Rule 80** start after the appeal has been filed and that there is no essential step which has not been taken in this case. He categorically stated that the application to strike out the appeal is not brought under **Rule 80**.

The application is specifically based on **Rule 1 (2)** and **section 3** of the Appellate Jurisdiction Act. None of those provisions sanction an application for striking out an appeal. The application is not even brought under **Rule 1 (3)** – the inherent power of the Court. There is no other Rule which specifically empowers the court to strike out a notice of appeal or appeal except **Rule 80** and if the application does not fall under **Rule 80**, then the Court has no power to strike out the appeal. The question is whether the grounds on which the applicant relies, that is, failure to include exhibits and part of the proceedings in the record of appeal are outside or within the scope of **Rule 80**. That question involves the true construction of the words “*proceedings*” in the phrase:

“some essential step in the proceedings”.

According to Mr. Odunga, “proceedings” start after the appeal has been filed. Thus, Mr. Odunga is equating “proceedings” to every procedural step after the appeal is instituted until the full judgment or order.

The word “proceedings” is a broad term the meaning of which depends on the context in which it is used. It may have a wide or narrow meaning depending on the context in which it is used. According to WORDS AND PHASES LEGALLY DEFINED Vol. 4 page 183:

“The term “proceedings” is frequently used to note a step in an action and obviously it has that meaning in such phrases as “proceedings in any cause or matter”. When used alone, however, it is in certain statutes to be construed as synonymous with, or including “action”.

By **Rule 80**, an application to strike out the notice of appeal or appeal can be made at any time “either before or after the institution of the appeal”. As **Rule 74 (1)** and **81 (1)** show, a notice of appeal is a prerequisite step before the institution of an appeal but it is not itself an appeal. The word “proceedings” in the **Rule 80** is a general word following the words “Notice” or “appeal” and should in our view, be construed *ejusdem generis* to those two words to mean the notice of appeal or the appeal. The word “proceedings” in **Rule 80** denotes notice of appeal or appeal.

By **Rule 81 (1) (a)** as read with **Rule 85 (1) (d)** and **(f)**, an appeal is instituted, *inter alia*, by lodging the record of appeal containing the judge’s notes of the hearing (proceedings) and documentary exhibits. In our view, failure to include proceedings and documentary exhibits in the record of appeal amounts to a failure to take an essential step in the appeal (i.e. proceedings) within the meaning of **Rule 80**. We have no doubt that the grounds upon which that application to strike out the appeal is brought are covered by **Rule 80**. Hence the application having been brought 16 days out of time is incompetent.

The second ground of Preliminary Objection is that the application is *res judicata*, the first application to strike out the appeal having been compromised. Mr. Siganga, submitted that one cannot file two applications to strike out the appeal Mr. Odunga did not address the Court on this ground.

There is no dispute that the applicant had made a previous application for striking out the appeal in the same appeal and that the application was withdrawn and an order validating the appeal was made. The ground on which the applicant relies in the second application was existing at the time the first application was filed. That ground should have been relied on in the first application and should be deemed to have been an issue in the first application. To make it worse, the second application was filed on 19th May, 2004 before the Court made an order determining the first application on 5th July, 2004, thereby rendering the making of the second application an abuse of the process of the Court.

Rule 80, in our view, envisages only one application to strike out a notice of appeal or appeal as the case may be.

In the above circumstances, the second application was not only incompetent but also an abuse of the process of the Court.

We accordingly uphold the Preliminary Objection and strike out the application dated 19th May, 2004 with costs to the respondent. Those are 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. M. GITHINJI

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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