REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL (APPLI) 281 OF 2005

REPUBLIC …..……..…….....……..…….APPELLANT

EX PARTE

THE MINISTER FOR FINANCE &

THE COMMISSIONER OF INSURANCE AS LICENCING AND REGULATING OFFICERS

VERSUS

CHARLES LUTTA KASAMANI T/A KASAMANI & CO. ADVOCATES…....RESPONDENT

AND

UNITED INSURANCE COMPANY LTD …….....……AFFECTED PARTY

(An application to strike out civil appeal No. 281 of 2005 from the ruling and order of the

High Court of Kenya at Kisumu (Tanui, J.) dated 29th July, 2005

in

H.C.CMISC. C.A NO. 125 OF 2005)

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RULING OF THE COURT

The application before us seeks an order under ***rule 80*** of the rules of this Court that the main appeal be struck out on four grounds one of which was abandoned. The remaining three grounds are:

"b) that the notice of appeal contained in the record is fatally defective as it is not signed on behalf of the parties to the suit but is purportedly signed on behalf of the counsel for the parties.

c) that the appellant herein has not filed any notice of appeal to justify the filing of this appeal.

d) that the memorandum of appeal is not signed by or on behalf of the appellant but is purportedly signed on behalf of the counsel for the appellant."

The main appeal arose from orders issued by the superior court (Tanui J) on 25th July, 2005 in a Judicial Review application. The orders were granted in favour of ***Charles Lutta Kasamani T/A Kasamani &Co.***

Advocates who was named as the interested party in the application. His firm had provided legal services in various matters to ***M/S. United Insurance Company Ltd*** (the "Insurer") and he claimed that the insurer was indebted to him in the sum exceeding Shs.38 million in legal fees which it had not paid. There were also other creditors who sought in excess of Shs.257 million from the Insurer but the insurer was unable to meet its obligations and was literally insolvent. It was therefore ripe for winding up under the ***Companies Act (Cap 486)*** and was not capable of being licenced to carry on insurance business under the ***Insurance Act, 1984***. Instead of submitting an application to the court for winding up the insurer under ***section 122*** of the Insurance Act, the Minister for Finance and the Commissioner of Insurance, who are the licencing and regulating officers under the Act, licenced the insurer to continue with the business of collecting premiums from the public. The relief sought in the notice of motion before the superior court was:

"*1. That an order of Mandamus do issue directed at the Minister for Finance and the Commissioner of Insurance to institute/commence, prosecute and conclude winding-up proceedings against United Insurance Company Limited.*

2. That having licenced United Insurance Company Limited to continue operations with full knowledge of its insolvency, contrary to Section 41 of the Insurance Act, 1984 an Order of Prohibition do issue directed at the Minister for finance and the Commissioner of Insurance prohibiting them from issuing the affected party with a licence under the Insurance Act, 1984."

As stated earlier, those reliefs were granted on 25th July, 2005 and the order issued accordingly. The Minister for Finance and the Commissioner of Insurance were however aggrieved by the order and so instructed the Attorney General to challenge it on appeal. A notice of appeal was timeously filed on 4th August, 2005 and the main appeal was also timeously filed on 3rd October, 2005. Pending the hearing of the appeal an order of stay was granted by this Court on 7th October 2005. Ten days later, Mr Kasamani filed the application now before us.

The first objection raised by Mr Kasamani, through learned counsel Mr Odunga, is that the notice of appeal was not properly signed and was therefore incurably defective. The submission was made on the basis of **rule 74(6)** of the rules which prescribes a format for a notice of appeal and provides in mandatory terms that it shall be "*signed by or on behalf of the appellant"*. Mr Odunga referred us to the notice of appeal on record and drew our attention that although the notice was drawn up by the Attorney General who is on record for the Minister for Finance and the Commisioner of Insurance, it is neither signed by those officers nor the Attorney General himself. Instead, a Senior Litigation State Counsel, Antony Ombwayo, purported to sign the notice on behalf of the Attorney General. In effect therefore the execution of the notice was defective and contrary to the strict wording of the rule, thus rendering it invalid. He cited for support of that proposition the striking out of the notice of appeal in **Joseph Ogero Obonyo vs Thabiti Insurance Bankers Ltd, Civil Application NAI 215/00 (UR)** where the aggrieved plaintiff was Mr Obonyo but the notice of appeal was given and signed on behalf of Thabiti Insurance Brokers. He also cited **Lakeland Motors Ltd vs Harbajan Singh Sembi – Civil Appeal No. 303 of 1998 (unreported)** where the memorandum of appeal was struck out as it was not signed at all contrary to ***rule 84(3)*** of the rules.

Mr Antony Ombwayo appeared before us on behalf of the Attorney General and conceded that he had signed the notice of appeal on behalf of the Attorney General who had given notice to appear for the parties aggrieved by the order of the superior court. He stated however that he had full authority from the Attorney General to sign the notice of appeal and there cannot therefore be any impropriety in law about the notice.

We have examined the impugned notice of appeal and we think with respect, that the objection raised is frivolous. The notice is not objected to for want of compliance with Form D under ***rule 74(6)*** but purely for the reason that the Attorney General did not sign it personally. No authority was cited before us, and we are not aware of any, that prohibits the Attorney General from authorizing officers subordinate to him from executing documents pertaining to civil litigation. Mr. Ombwayo states that he is a Senior Litigation Counsel in the office of the Attorney General and had such authority which he exercised in this

matter. As such, his actions are those of the Attorney General and we have no reason to find that the notice of appeal was either not properly signed or not signed at all. The authorities cited on the point do not assist the applicant. That objection is for rejection and we reject it.

The second objection made by Mr. Odunga is subtle and intricate, but is not novel. It is basically this: the notice of appeal was filed by the Minister for Finance and the Commissioner of Insurance who were the aggrieved parties. They are essentially the appellants in the appeal, but the record shows that the Appellant is the "*Republic"* and the two officers are the respondents. ***Charles Lutta Kasamani*** who is also named a respondent had obtained orders in his favour from the superior court through the "*Republic"* which was the putative applicant and he was not aggrieved by those orders. The "*Republic"* cannot therefore be named as the "*appellant"* in the appeal as it did not file a notice of appeal and on that score, the record of appeal is incurably defective. For that proposition Mr. Odunga cited the case of an appeal between ***Aga Khan Education Service AND Republic***, ***through Ali Seif, Benson Waragu, Joseph Ngethe Gitau, Attorney General***, (all of whom were named as "*Respondents"*) Civil Appeal No. 257/03 [ur]. He also cited the appeal between **Municipal Council of Mombasa AND Republic (Respondent) AND Umoja Consultants Ltd (Interested Party) - Civil Appeal No. 185/01**. In his view the title and heading of the appeal before us ought to have followed the format where the aggrieved party is named as "*the appellant",* as failure to do so would render the appeal incompetent.

As correctly submitted by Mr. Ombwayo, the problems of intitulment of pleadings in judicial review matters is as old and intractable as the law that provides for that remedy. Indeed the predecessor of this Court was grappling with similar problems in the East African region half a century ago on matters of form in intituling proceedings under the ***Law Reform Ordinance***, as it then was by name, and has since remained in substance. The two cases which illustrate the historical foundation of the problem are **Mohamed Ahmed vs. R [1957] EA 523** and **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1957] EA 779**. The court also gave guidelines on the proper form to be adopted in such proceedings and the decisions have been cited with approval on many occasions by this Court. It is evident however that the problem still persists in our courts fifty years after a solution was made available but it is not for want of authoritative precedent. Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners. Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. This Court said so in **Dipak Panachod Shah & Another Vs. The Resident Magistrate Nairobi and the Attorney General - Civil Application NAI. 81/00 (UR).**

Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court. In the ***Ahmed Case*** (supra), the Court of appeal in considering provisions in the ***Ugandan Law Reform Ordinance 1953***, stated:

"**This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter."**

The court's reasoning was applied subsequently by the same court sitting in Nairobi in the ***Farmers Bus Service Case*** (supra) and it determined the proper form of title in judicial review matters stating:

"**Leave having been granted, the notice of motion should have been intituled:**

"**R**

v.

The Transport Licensing Appeal Tribunal

Ex parte (the applicants)"

So far as the appeal to this court is concerned, the persons really interested in resisting the appeal are the Overseas Touring Co. (E.A) Ltd. and the Kenya Bus Services ltd., who were the objectors before the Transport Licensing Appeal Tribunal. In the circumstances we think they should be added to the heading as interested parties. The appeal should therefore be intituled:

"**R. ……..…….....……..Appellant**

v.

The Transport Licensing Appeal Tribunal ……Respondent

And

The Overseas Touring co. (E.A.) Ltd.)

The Kenya Bus Services Ltd)…….....Interested parties

Ex parte (the applicants)"

In view of the those decisions we find no impropriety in citing the "*Republic"* as "*the appellant"* in this matter when in truth it is the Minister for Finance and the Commissioner of Insurance, who are the aggrieved parties in the appeal. That objection also fails.

The upshot is that the application dated 13th October, 2005 and filed on 17th October, 2005 shall be and is hereby dismissed with costs.

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

P.K. TUNOI

……

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR