



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 3 of 2003

SULTAN HASHAM LALJI

BAHADURALI HASHAM LALJI

ESMAIL HASHAM LALJI

APPELLANTS/RESPONDENTS

AND

AHMED HASHAM LALJI

DIAMOND HASHAM LALJI

ATTA (KENYA) LIMITED

DIAMOND JAMAL

AZIM VIRJEE

RESPONDENTS/APPLICANTS

(An application to strike out an appeal from the ruling of the High Court of Kenya at Nairobi (O’Kubasu J) dated 21st day of July, 2000

in

H.C.C.C. NO. 189 OF 1998)

RULING OF THE COURT

The 1st and 2nd applicants **AHMED HASHAM LALJI** and **DIAMOND HASHAM LALJI**, respectively, seek an order that *Civil Appeal No. 3 of 2003* be struck out with costs under **Rule 81 (1) and (2)** of the Court of Appeal Rules (Rules).

The three appellants in the appeal and a company named **ATTA (1974) Limited** (Company) filed a civil suit in the superior court, *H.C.C.C. No. 189 of 1998* against the two applicants jointly with three others seeking certain reliefs.

The five defendants in the suit (respondents in the appeal) subsequently applied for an order that the claims of the appellants be struck out and the action in their names be dismissed. The application was heard and allowed by the superior court, O’Kubasu J (as he then was) on 21st July, 2000. The three appellants being aggrieved by the ruling of the superior court striking out the suit ultimately filed *Civil Appeal No. 3 of 2003* against the ruling of the superior court. The appeal is the subject matter of this application.

The application is based on three grounds, namely, that:

“(i) This Appeal has not been filed within the time limited by Rule 81 (1) and 2 of the Court of Appeal Rules.

(ii) One of the respondents, namely, Atta (1974) Limited, who was the fourth plaintiff in the High Court, has not been made a party to the Appeal, and

(iii) The Appeal has been filed on behalf of the Appellants by a firm of Advocates who are not yet properly on record on their behalf”.

We shall consider the three grounds in seriatim.

The first ground of the application is based on **Rule 81 (1)** of the Rules which requires that an appeal be instituted within 60 days of the date when the notice of appeal was lodged and the proviso thereto which states:

“Provided that where an application for a copy of the proceedings in the superior court in accordance with subrule 2 has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy”.

It is not in contention that by a letter dated 3rd March 2000, M/s. Kembi Gitura & Company Advocates then on record for the appellants applied to the Deputy Registrar of the High Court for certified copies of the proceedings in all interlocutory applications together with a certified copy of the ruling delivered on 21st July 2000; that the letter was copied to the applicants’ advocates as required by the **Rule 81 (2)**; that by a letter dated 20th August 2002, the Deputy Registrar informed the appellants’ advocates that the copies of proceedings and ruling were ready for collection on payment of Shs.3,360 and that the copies would be certified soon after payment; that the said letter was received by the appellants’ advocates on 26th August 2000; that the appellants’ advocates made the payment on 30th August 2000 and collected the copies of proceedings and ruling on 21st November 2002; that on 13th January 2003 the Deputy Registrar issued a certificate of delay certifying that the time taken to prepare and supply the copies of the proceedings and ruling was from 3rd August 2000 to 21st November 2002 and that the appeal was ultimately filed on 23rd January 2003.

Mr. Inamdar, the learned counsel for the applicants contended that since respondents could have collected the proceedings and ruling from 26th August 2002 but which were collected on 21st November 2002, the period between 26th August 2002 and 21st November 2002 should be excluded from computing time. It is further contended that 60 days began to run from 27th August 2002 and expired on 25th October 2002 thereby rendering the appeal filed on 23rd January 2003 hopelessly out of time.

Mr. Oraro, learned counsel for the respondents, contended, on the other hand, that, after the payment for the proceedings and ruling, the court failed to avail them until 21st November 2002 despite requests in writing and visits to the registry and that this is not a case of a party failing to collect proceedings when ready but rather a case where a party has paid for the proceedings which were not availed.

In this case the respondents' letter bespeaking the proceedings was filed within 30 days and copied to the applicants' advocates as required by the Rules. It is a question of fact whether or not the proceedings and ruling were ready for collection on 20th August 2002. If the contents of the letter dated 20th August, 2002 was correct, then there would be no question that the proceedings and ruling were ready for collection on 20th August 2002. The applicants' counsel sought aid of the original record of the superior court to show that the proceedings were indeed ready for collection by 20th August 2002. He referred to an endorsement in free hand in red ball pen on the copy of typed proceedings which reads:

"20/8/02

File copy".

The Respondents have exhibited a copy of the letter dated 27th September 2002 written by their advocates to the Deputy Registrar which in the relevant part states:

"On 20th August 2002, you wrote to us informing us that the proceedings were ready for collection on payment of Kshs.3,360.00. We made the payment on 30th August 2002 under your Receipt No. M.078320.

Please note that to date, we have been unable to collect the proceedings as they are said not to be ready yet. Please check the position and let us have the proceedings urgently".

That letter was received by the Central Registry of the High Court on 30th September 2002. There was a reminder to the Deputy Registrar dated 16th October 2002, thus:

"Could you please let us have an urgent reply to our letter of 27th September 2002".

That reminder was received by the Central Registry of the High Court on 18th October 2002.

It has not been contended that the two letters referred to above written after 20th August 2002 are not genuine. Indeed, they bear the receipt stamp of the Central Registry. They support the contents of the replying affidavit of the 2nd respondent that inspite of the Deputy Registrar's letter of 20th August 2002 the proceedings and ruling were not ready for collection. The endorsement on a copy of the proceedings, like the letter of 20th August 2002, is not reliable. The Deputy Registrar of the superior court in pursuance of the proviso to **Rule 81 (1)** of the Rules certified the period from 3rd August 2002 to 21st November 2002 as having been required for the preparation of the copies of proceedings and ruling. That certificate takes precedence to any other document having been issued by the officer authorized by the Rules unless it is shown to be inaccurate or misleading, which is not the case here.

In addition, it has been submitted from the bar that it was wrong to apply for certified copies of the documents and that time needed to obtain certified copies is to be excluded. The issue was considered in the earlier application for striking out the Notice of Appeal between the same parties, namely, *Civil Application No. Nai. 157 of 2001 ATTA (KENYA) LIMITED VS. SULTAN HASHAM LALJI & 7 OTHERS* where the Court summarized the effect of such error thus:

"So the ratio decidendi of the two cases, L. Z. Engineering and Joreth Limited is that if as a result of bespeaking certified copies of proceedings the appellant runs out of time he would be out of time in lodging the appeal by the number of extra days it took to certify the copies of proceedings and the judgment or ruling, if that appeal is lodged within 60 days of the delivery of such certified copies".

The applicants have not shown that the uncertified proceedings and ruling could have been ready on a date earlier than 13th January 2003 when they were certified and collected.

Mr. Inamdar, submitted in support of the second ground of the application that since Atta (1974)

Limited is a respondent in the appeal by virtue of the fact that Notice of Appeal was served on the company, it should have been made a party to the appeal and failure to join the company as a party renders the appeal incompetent.

Mr. Oraro in reply submitted that the respondents have already made the company a respondent in the appeal by serving it with a Notice of Appeal and that there was no further requirement to join it as a party nor to serve it with the record of appeal as it did not lodge and serve a notice of its full and sufficient address for service pursuant to **Rule 78 (1)**.

This ground is not intelligible. The company was a co-plaintiff in the suit. Its claim against the applicants was not struck out and is still subsisting. It cannot therefore be a party in the appeal as an appellant. In any case, the company as a legal person could have filed its own appeal if it was aggrieved by the order of the superior court. The respondents have no duty to join the company in the appeal as an appellant.

Similarly, the respondents could not name the company as a respondent in the appeal because the ruling appealed from was not made in favour of the company. The respondents were only required by **Rule 76 (1)** to serve a copy of the notice of Appeal on the company if it was directly affected by the appeal. The respondents indeed served a copy of the Notice of Appeal on the company. Moreover, the definition of a **respondent** in **Rule 2** in relation to civil appeals is as follows:

“Respondent in relation to a civil appeal includes any person on whom a notice of appeal has been served”.

By that definition, the company is technically a respondent in the appeal although it was not served with the record of appeal having failed to file and serve a notice of the address for service.

Lastly, as regards the 3rd ground of the application, it is true that appeal has been lodged on behalf of the respondents by M/s. Kipkenda, Lilan & Company Advocates and not by M/s. Kembu Gitura & Company Advocates who represented the respondents in the superior court and lodged the Notice of Appeal on 2nd August 2000. **Rule 23 (1)** of the Rules requires, among other things, that a party to application or appeal who changes his advocates should lodge with the Registrar and serve a Notice of Change of Advocates. Since the definition of an “*appeal*” in **Rule 2** includes an “*intended appeal*” (as signified by a notice of appeal) then the respondents were required to file a notice of change of advocates. There is a notice of change of Advocates dated 20th January 2003 filed under **Rule 23 (1)** of the Rules at page 403 and 404 of the record of appeal signed by M/s. Kipkenda, Lilan & Company Advocates who lodged the appeal. The same advocates have also filed a statement of address of service in the record of appeal pursuant to **Rule 85 (1) (b)** of the Rules. It is however, contended by the applicants’ counsel that the notice of change of advocates dated 20th January 2003 at pages 403 and 404 of the record of appeal was incorporated in the record without the original having been filed in court and that the notice of change should have been filed before the appeal was filed.

There is no evidence that the original notice of change of advocate dated 20th January 2003 was not filed in the registry or that it was filed after the appeal was lodged. The notice of change of advocates incorporated in the record of appeal is dated 20th January 2003 and has no appeal number thereby indicating that it was at least prepared before the appeal was lodged.

Even assuming that the notice of change of advocates was not filed at the registry before the appeal was filed, it can be inferred that it was contemporaneously filed with the appeal since it was incorporated in the record of appeal and served as part of the record of appeal. That being the case, and having regard to the purpose of a notice of change of advocates, there is, in our respectful view, a substantial compliance with **Rule 23 (1)** of the Rules.

In the result, the application has no merit. We dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 13th day of October, 2006.

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR