



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, O’KUBASU, J.J.A & ONYANGO OTIENO,AG. J.A

CIVIL APPEAL NO. 180 OF 2003

BETWEEN

MOMBASA CASHEWNUT

PROCESSORS (K) LTD 1ST APPELLANT

AWADH SALEH SAID2ND APPELLANT

AND

NYARI INVESTMENT (1988) LIMITED 1ST RESPONDENT

DELPHIS BANK LIMITED 2ND RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Mr. Justice P.J. Ransley) Dated 13th November, 2002

in

H.C.C.C. NO 1987 OF 2001)

RULING OF THE COURT

This is an application stated to have been brought “under Rules 80, 81 and 42 of the Court of Appeal Rules” seeking an order to the effect that this Appeal be struck out on the following grounds:-

“1. Some essential step in the proceedings has not been taken within the prescribed time in that the Appeal has been filed/lodged out of time without leave of the Court. 2. The Certificate of Delay herein is not only misleading, defective and incorrect but cannot be relied upon by the Appellant as it contradicts the contents of the certified proceedings contained in the Record of Appeal .

3. The Notice of Appeal herein is incurably defective, invalid and deficient in material aspects.

4. No valid Notice of Appeal was served herein by the Appellant as the Notice served and contained in the Record of Appeal is invalid.

5. The Record of Appeal does not contain primary documents as set out in Rule 85 of the Court of

Appeal Rules and is therefore incompetent.”

The application is also supported by the affidavit of one Harris Horn, a Director of the 1st Respondent/Applicant.

Mr. K’Opere for the 1st Respondent/Applicant urged us to strike out this appeal on two principal grounds. The first ground was on the issue of time of filing the appeal. It was Mr. K’Opere’s submission that since proceedings of the superior court were ready and certified on 26th March 2003 by the time the appeal was filed on 26th July 2003 the appeal was out of time. Mr. Nyaoga for the appellant/respondent answered that submission by stating that the appeal was lodged, within time as there was a certificate of delay.

The second ground of Mr. K’Opere’s submission was that there was no valid notice of appeal as what appears at pp.495 – 496 is a notice of appeal which does not state when it was lodged and again, it is not signed by the Deputy Registrar. In answer to that Mr. Nyaoga argued that the notice of appeal filed herein was valid as it had been signed for and on behalf of the appellant. As regards the registrar’s signature, it was Mr. Nyaoga’s view that there was no legal requirement that the registrar must sign the notice. It was his view that the signature by the registrar was purely administrative since if parties were to wait for the registrar’s signature in most cases they would be out of time.

We have to deal with the issue of time first. Was the appeal filed out of time?

The ruling to be appealed from was delivered on 13th November, 2002. There is a Certificate of Delay which shows that an application for uncertified copies of the Proceedings and Ruling was made and lodged in Court on 27th November, 2002, and that by a letter dated 16th June, 2003 the Deputy Registrar High Court notified M/s Mohammed & Muigai Advocates that the copies of Proceedings and Ruling were ready for collection upon payments of Court fees. Court fees were paid on that same day when the copies of Proceedings and Ruling were collected. The letter dated 16th June, 2003 was copied to Mr. K’Opere. We agree with Mr. Nyaoga that time started to run from the date the letter was received. That being our view there can be no doubt that the appeal was filed within the prescribed period.

What about the notice of appeal? Perusal of pp.495-6 shows that there was a Notice of Appeal filed. Rule 74(6) of this Court’s Rules provides:-

“A notice of appeal shall be substantially in the Form D in the First Schedule hereto and shall be signed by or on behalf of the appellant.”

Looking at the Notice of Appeal filed herein and **Form D** in the First Schedule of the Rules we are satisfied that the Notice of Appeal is valid. In a ruling delivered at Nyeri on 14th May 2004 in **Kenya Bus Services Ltd (Stage Coach Bus Service v. Muna Isaack** – Civil Appeal (Application) No. 223 of 2001 this Court said:-

“Under rule 74 of the Rules, any person who desires to appeal to this Court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court. The date envisaged by the rule is the date upon which the Notice of Appeal is filed and requisite fees paid for it.

The date upon which the registrar endorses his signature and affixes the Seal of the Court is not material for the service of the Notice of Appeal.”

We believe the above answers Mr. K’Opere’s limb of submissions. And with that we are satisfied that the application to strike out the appeal must fail. However, as the application was not frivolous we order that the costs be in the appeal.

Dated and delivered at Nairobi this 21st day of May, 2004.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR