



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Tunoi, Bosire & Owuor JJ A)

CIVIL APPLICATION NO NAI 340 OF 2002

AGRICULTURAL FINANCE CORPORATION.....APPLICANT

VERSUS

RONO.....RESPONDENT

(Application to strike out the Notice of Appeal and Record of Appeal in Civil Appeal No 223 of 2002 from ruling and order of the High Court at Eldoret (Tunya J) dated 11th July, 2002 and dated 28th August, 2000 in High Court Civil Suit No 14 of 2002.)

RULING

This is an application under rule 80 of the Court of Appeal Rules, for orders that the notice of appeal dated 18th July, 2002 in Nakuru High Court Case No 14 of 2002 be struck out and also the record of appeal filed pursuant to that notice of appeal. The Civil Case in which it was filed is No 223 of 2002.

The applicant's case is that as the respondent had applied before the superior court for both a temporary restraining injunction and a mandatory injunction he was obliged to seek leave to appeal against that part of the application which sought a mandatory injunction, in view of the fact that the trial judge said he would grant it pursuant to the provisions of section 3A of the Civil Procedure Act.

In our view although the respondent's application to the Superior Court was expressed to be brought under section 3A above, and Order XXXIX rules 1 and 9 of the Civil Procedure Rules, it would appear to us that there is no way one can say which prayer was granted and under which provisions. It has been held time and again that section 3A of the Civil Procedure Act merely preserves the inherent power of the Court, but does not specifically authorize the bringing of any motion under it. Clearly, in our view, the application before the Superior Court was brought under the provisions of Order XXXIX and no leave to appeal is required for appeals from orders made pursuant to an application under that order.

The second issue raised by the applicant is that the draft extracted order of the Court was not sent to the applicant for approval before it was forwarded to the Court for its sealing and signature. The respondent filed a replying affidavit in which he has deponed that indeed he forwarded the draft to the applicant's counsel, and it was only after the said advocates failed to approve it within a reasonable time that he

forwarded it to the Court. As the applicant has not countered that averment, we are unable to say that the respondent failed to comply with the provisions of order XX rule 7 of the Civil Procedure Rules. In the result, this application fails and is dismissed with costs assessed at Kshs 10,000/=.

Dated and delivered in Nakuru this 28th day of February, 2003

P.K.TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR