



**IN THE COURT OF APPEAL  
AT NAIROBI**

**CORAM: KWACH, TUNOI & BOSIRE, J.J.A**

**CIVIL APPEAL NO. 50 OF 2002**

**BETWEEN**

**PRIME CAPITAL & CREDIT LTD.....A PPLICANT**

**AND**

**NATIONWIDE ELECTRICAL INDUSTRIES LTD .....RESPONDENT**

(Appeal from the ruling of the High Court of Kenya  
at Milimani Commercial Courts, Nairobi (Mr. Justice  
Onyango Otieno) dated 27th April, 2001

in

H.C.C.C. NO. 534 OF 1998)

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**RULING OF THE COURT**

***Prime Capital & Credit Limited***, the respondent in this appeal (hereinafter called “the plaintiff”) sued ***Nationwide Electrical Industries Ltd***, the appellant, (hereinafter called “the defendant”) in the superior court to recover Shs 30,939,781/- together with interest on the foot of 4 promissory notes issued to a company called Shah Motors Ltd (Shah Motors). The defendant filed a defence denying the claim and dismissed the defendant’s counterclaim with costs. It is against that judgment and decree that the defendant has appealed to this Court. The appeal is yet to be heard, but in the meantime the plaintiff has taken out a Notice of Motion under rule 80 of the Court of Appeal Rules (the Rules), seeking an order that the notice of appeal and the appeal lodged by the defendant be struck out. The grounds upon which this order is sought is that the notice of appeal dated 3rd May, 2001 is defective as it does not comply with the mandatory provisions of rule 74(3) of the Rules and that the defendant in breach of rule 76(1) of the Rules failed to serve the notice of appeal on all the parties interested or likely to be affected by the appeal.

The affidavit in support of the application was sworn by Mr Ochieng’ Oduol, who also appeared for the plaintiff in this application. His complaint regarding the form of the notice of appeal is that in the notice filed on 4th May, 2001, the defendant did not specify whether it was aggrieved by the whole or only part of the judgment and decree of the superior court. The notice states in the material part that the defendant:-

“being aggrieved and dissatisfied by the judgment of Mr Justice Onyango Otieno delivered on 27th April 2001, intends to appeal to the Court of Appeal against the said judgment and decree in its

entity” (emphasis added).

It was Mr Ochieng’ Oduol’s submission that the part of the notice of appeal which we have reproduced above did not specify whether the defendant intended to appeal against the whole or only part of the judgment and decree. He said that in the context in which the word **entity** was used, it is meaningless and does not clearly indicate the defendant’s intention. With respect, we cannot accept this submission. Looking at the notice as a whole, the use of the word entity was either a case of misspelling or just pure malapropism. The word makes no grammatical sense in the context in which it was applied. We think the word which the person who drew the notice had in mind was entirety. If you substitute the word entity with entirety, the sentence makes sense and brings out the true intent of the defendant, which was to appeal against the judgment and decree in its entirety. That was a very minor error which in our opinion does not render the notice of appeal defective.

The second ground relied on by Mr Ochieng’ Oduol is that the defendant failed to serve the notice of appeal on a person directly affected by the appeal. He said that the suit in the superior court and the appeal in this Court is in respect of promissory notes issued by the defendant to Shah Motors Ltd which were discounted by the plaintiff. He further said that the alleged indorsement of the promissory notes by Shah Motors Ltd and its liability in respect of them was in issue. All this may well be true but the plaintiff knew long before filing the suit that Shah Motors Ltd was a party with a vested interest in the result of the action one way or another. There was evidence that a gentleman called Suresh Shah was a director of the defendant as well as Shah Motors Ltd. There is an explicit averment in paragraph 3 of the plaint showing the extent of the involvement of Shah Motors Ltd in the transactions giving rise to the claim. Yet the plaintiff chose not to join Shah Motors Ltd as a defendant. As the plaintiff made a conscious decision to leave out Shah Motors Ltd, it must live with that choice. It is too late in the day now to change tack and assert that Shah Motors Ltd is a person directly affected by the appeal. We hold that on the facts of this case it is not.

For these reasons, the application fails and it is dismissed with costs to the defendant.

***Dated and delivered at Nairobi this 14 th day of March, 2003 .***

***R. O. KWACH***

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***JUDGE OF APPEAL***

***P. K. TUNOI***

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***JUDGE OF APPEAL***

***S.E.O. BOSIRE***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**