



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gicheru CJ, Omolo & Waki JJ A)

CIVIL APPLICATION NO NAI 46 OF 2003 (KSM.6/03)

JIVRAJ RAISHI & BROTHERS LTD APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD & 3 OTHERS.....DEFENDANT

(Application to strike out the Notice of Appeal from the Ruling and
order of the High Court at Kisumu (Tanui, J) given on the 3rd June, 2002
in HCCC No 146 of 1999)

RULING

By its Notice of Motion stated to be under rules 80 and 81(1) of the Court's Rules, "the rules" hereinafter, Jivraj Raishi & Brothers Ltd, the applicant, is asking the court for an order that:-

"The 1st respondent's Notice of Appeal filed in the superior court in Kisumu HCCC NO 146 of 1999 – Jivraj Raishi & Brothers Ltd, and Sanyuu International Ltd vs National Bank of Kenya Ltd – on 7th June 2002 from the ruling of the Hon Mr Justice B K Tanui delivered on 3rd June, 2002 be struck out on the ground that:-

- (a) The 1st respondent has failed to file its intended appeal within the time prescribed by the rules or at all.
- (b) The 1st respondent has failed to pay the requisite fees demanded by the superior court for the typing, preparation and delivery to the 1st respondent of the copies of the proceedings and ruling.
- (c) The time for lodging the 1st respondent's proposal (sic) appeal has elapsed and the 1st respondent cannot benefit from the provision (sic) to rule 81 of the honourable court's rules."

For the purposes of this ruling, it is enough to state that on 3rd June, 2002, Tanui, J delivered a ruling within this protracted litigation. The substance of that ruling is immaterial for the purposes of the matter before us. The National Bank of Kenya Ltd, the first respondent herein, was aggrieved by that ruling and it made clear its intention to appeal against the ruling.

The first respondent duly lodged its Notice of Appeal on 7th June, 2002; that was clearly within the time

prescribed under and in accordance with the provisions of rule 74 of the rules. The notice was also served upon the applicant in the manner prescribed by the Rules. The notice was also served upon the applicant in the manner prescribed by the Rules. That is the Notice of Appeal which the motion before us asks us to strike out.

On 6th June, 2002, the first respondent wrote a letter to the Deputy Registrar of the superior court asking to be supplied with a copy of the proceedings and the ruling in order to enable the first respondent lodge its intended appeal. That letter was written within the thirty days prescribed under the provisions of rule 81 and it was copied to all the parties involved in the dispute. Upto this stage the first respondent had strictly complied with the requirements of the Court's Rules.

What happened next was that on 9th July, 2002, more than one month after the first respondent's letter bespeaking the proceedings and ruling, the Deputy Registrar of the superior court wrote a letter to the advocates for the first respondent asking them to "pay Kshs 400/= deposit before typing process is commenced."

Mr David Otieno, one of the advocates for the first respondent, swears in his replying affidavit that he never received that letter. On 2nd May, 2003 the Deputy Registrar again wrote to Mr Mainye stating that the Deputy

Registrar required Shs 300/= as deposit so that typing of the proceedings could start. That letter specifically referred to the 1st respondent's letter of 6th June, 2002 which had asked for the proceedings and ruling. But the Deputy Registrar's said letter is singularly silent with regard to the earlier letter of 9th July, 2002 asking for a deposit of Shs 400/= to facilitate the typing of the proceedings and ruling. As we have said, Mr Otieno swears that they never received that letter. Neither the applicant nor its counsel have sworn, indeed they could not possibly swear, that the first respondent received the letter of 9th July, 2002. Mr Otieno swears in paragraph 13 of his replying affidavit that when he was told on 29th April, 2003 that some deposit was required, he paid Shs 500/= on the same day. That payment is supported by a receipt for that amount issued by the Deputy Registrar on the same day. Taking into account all these circumstances, we are satisfied and we find and hold that even if the letter dated 9th July, 2002 was written it was probably never sent and if it was sent, it did not reach the advocated for the first respondent. If they had received the letter, there would have been no earthly reason for their not paying the shs.400/= demanded on that letter. So that, even if we were to come to the conclusion that a Deputy

Registrar is entitled to demand same deposit before typing of the proceedings and ruling can be embarked on- probably to avoid a situation in which the proceedings are fully typed and an applicant for them has lost interest in the matter and no longer wishes to appeal – our conclusion that the letter was never received by the advocates for the first respondent clears them of any default in the matter. They have now obtained the proceedings, ruling and a certificate of delay from the Deputy Registrar.

In these circumstances, it would be singularly unjust to strike out the first respondent's Notice of Appeal as the applicant wants us to do. We refuse to do so with the result that the applicant's Notice of Motion lodged in this court on 25th February, 2003 must be and is hereby dismissed with the costs thereof to the first respondent. Those shall be our orders.

Dated and delivered at Nairobi this 20th day of June, 2003

J.E. GICHERU

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CHIEF JUSTICE

R.S.C OMOLO

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR