



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, LAKHA & O’KUBASU, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 22 OF 2001

BETWEEN

ASSOCIATION OF MEMBER EPISCOPAL

CONFERENCE IN EASTERN AFRICA (AMECEA) APPLICANT/DEFENDANT

AND

ALFRED ROMANI (T/A Romani Architects)

KARIUKI MUCHEMI (T/A Interconsult Engineers)

D.M. MUTONGA (T/A Synchroconsult Associates)

J.M. MATHENGE AND J.W. WAIHENYA

(T/A Builecon Associates) RESPONDENTS/PLAINTIFFS

(An application to strike out Civil Appeal No. 22 of 2001 arising from the ruling and orders made on 19th December

2001 (Hon. Philip J. Ransley, Commissioner of Assize)

in

H.C.C.C. NO. 63 OF 2000 AT MILIMANI COMMERCIAL COURTS,

NAIROBI)

RULING OF THE COURT

By a notice of motion dated 9 October 2001 but filed on 11 October 2001 the defendant is seeking to have struck out, under rule 80 of the Rules of this Court, Civil Appeal No. 22 of 2001 from a decision of the superior court (Hon. P.J. Ransley, Commissioner of Assize) given on 19 December 2000 the respondents obtaining leave to appeal therefrom by an order of the superior court (Khamoni, J) given on 22 December 2000 .

The striking out of the appeal is sought on the ground that the respondents “irregularly” obtained such leave to appeal in proceedings which were ex-parte. The only ground of the application as stated in the notice of motion is one which, in our opinion, admits of no other argument. There was an argument in the case of a more serious and substantial nature. It was that the order was a nullity. But this is not relied upon or stated in the notice of motion or canvassed. The word is not even mentioned. The grounds on which an application is based must be stated. The grounds of the present application are stated in the notice of motion. This fact and the use of the word “irregularly” certainly suggest that the main matter – indeed the only one matter – which the draftsman of the notice of motion had in his mind was the reliance on the contention that the order had been obtained “irregularly”. In those circumstances we do not think it would be right to construe the notice of motion as one upon which an argument based on a nullity could be raised.

It is perhaps desirable and instructive at this stage to examine the distinction between orders which are nullities or orders in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rules which draws a line between these two classes, and exactly where that line lies may not, in certain circumstances, be easy to discover. The existence of the distinction is, however, one which has been recognised in the language of many authorities. One such authority is the Privy Council decision in the case of

MACFOY V. UNITED AFRICA CO. LTD. [1961] EA 1169 at pg. 1172:

“the defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which maybe waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.”

This decision was referred, cited and applied in:-

(a) *H.M. Court of Appeal for Eastern Africa in Ali bin Khamis v. Sali m bin Khamis Kiroba and 2 others, 23 EACA 195; and*

(b) *This Court in Omega Enterprises (Kenya) Ltd v. KTDC and 2 others , Civil Appeal No. 59 of 1993 (unreported).*

No court has ever attempted to lay down a decisive test for distinguishing between the two. In this case, no appeal has been preferred from the decision of Khamoni, J. granting leave. Nor has any application been made to set it aside. Since it is only an irregularity, it is good until avoided.

Once this stage is reached, it becomes plain that there is no ground for striking out the appeal based on the order made by Khamoni, J. on 22 December 2000.

Accordingly and, for the reasons above stated, the notice of motion dated 9 October 2000 fails and is dismissed with costs.

Dated and delivered at Nairobi this 7th day of June, 2002.

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR