



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Lakha, Bosire & Owuor JJ A)

CIVIL APPEAL NO 104 OF 2000

BENSON NGUGI MUIRURI APPELLANT

VERSUS

KENYA NATIONAL CAPITAL CORPORATION LIMITED.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Justice Moiyo Ole Keiwua) dated 10th day of February 1998 in

HCCC No 1981 of 1993)

RULING

On 13th February 2001, Kenya National Capital Corporation, the respondent, took out a motion under rule 80 of the Court of Appeal Rules seeking an order striking out the appeal on the principal ground that the notice of appeal was not served upon it as required under rule 76(1) of the Rules.

The appeal is against the judgment and decree of the superior court dated 10th February, 1998, in its Civil Case No 1981 of 1993. That court dismissed the appellant's suit for an injunction and damages. The appellant, Benson Ngugi Muiruri, was aggrieved and through his advocate promptly filed a notice of appeal and later lodged a record of appeal timeously. But when the appeal came up for a hearing it was found that the notice of appeal was incurably defective. As a result the appeal was struck out.

Following an extension of time he got pursuant to an application under rule 4 of the aforesaid Rules, he brought this appeal. The order granting him the extension was couched thus:

“In the result the applicant is permitted:

(a) to file a fresh notice of appeal within 7 days from today and that the notice of appeal filed on 14th October, 1998 be deemed to have been so filed, and

(b) to file a fresh record of appeal out of time that is within 30 days from today.”

The order is silent on the issue of service both of the notice of appeal and the record of appeal. The applicant did not lodge the record of appeal within the extended time and had therefore to seek a further extension of time within which to lodge the record which he got. The order cured the omission to file the

record of appeal timeously and Mr Khaminwa for the appellant contends it did also cure the default in the service of the notice of appeal. His submission in that regard went like this. The applicant had served with the application for extension of time a draft notice of appeal.

The record shows such a copy was received by the respondent on 14th October, 1998. It was the same notice which according to the order earlier on quoted was deemed as having been filed within the extended time. In his view therefore, since the respondent had already been served with it, it could be deemed to have been served as required by rule 76(1) of the Court of Appeal Rules.

Rule 76(1) aforesaid enacts that:

“An intended appellant shall before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal: Provided that the Court may on application which may be made *ex parte* within seven days after lodging the notice of appeal direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

From the rule it is clear that the service of the notice of appeal may be effected either before its lodgment or within 7 days of doing so. We have no doubt that a draft notice of appeal was given to the respondent. It was however given as an annexure to an application for extension of time. Service before lodgment is recognized if the notice of appeal is filed as prescribed in the rule. Where, however, as here the notice of appeal was not filed on time, and the Court was asked to extend the time within which to file it, it cannot be assumed that because the Court ordered that a notice of appeal filed out of time is deemed to have been filed, the order also covered the issue of service.

The filing of a notice of appeal is governed by rule 74 of the aforesaid Rules. The rule stipulates the period within which that needs to be done. Likewise rule 76 stipulates the time within which service of the notice has to be effected. The two are different steps in an intended appeal or an appeal. So in granting an order extending the time within which to file a notice of appeal, the Court needs also to expressly exercise its discretion one way or the other on the issue of service of the notice of appeal. Service is not a matter to be left to implication. Besides we have no evidence that the appellant in his application for extension of the time within which to lodge a notice of appeal, did pray for an order deeming that service of the same had been effected. Validation of filing and service of a draft notice of appeal must be by an express order of the Court.

The other grounds relied upon in the application lack merit. For instance the orders made by the superior court on 5th April, 2000 and 2nd October, 2000, are not the orders appealed from. Such orders require no certification before being included in a record of appeal. An order or decree is required to be certified if it is from it that an appeal has been brought (see rule 85(1) (h)).

Likewise the non-inclusion in the record of appeal of documents which are not in the primary category is not fatal to an appeal as the same may be brought on record with leave of the Court under rule 89 as read with rule 85(2A), by way of a supplementary record of appeal.

In the result and for the reasons we have endeavored to give, this appeal is incurably incompetent and is therefore ordered struck out with costs.

The applicant/respondent shall also have the costs of the motion dated 9th February, 2001.

Dated and Delivered at Nairobi this 30th day of March, 2001

A.A. LAKHA

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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