



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Bosire & O'Kubasu JJ A)

CIVIL APPEAL (APPLICATION) NO 205 OF 2000

STEPHEN MUGO MUTOTHORI

MACHITHI TROUT FARM LIMITED..... APPELLANTS

VERSUS

KENYA COMMERCIAL BANK LTD

KENYA COMMERCIAL FINANCE LTD RESPONDENTS

(Appeal from the decree/Judgment of the High Court of Kenya at Nairobi

(Milimani Commercial Court) (Commissioner of Assize Ms Jeane Gacheche)

delivered on 22nd June 2000

in

HCCC No 2245 of 1991)

RULING

This appeal arises from two consolidated suits. The first suit in time is Nairobi High Court Civil Case No 2245 of 1991. Kenya Commercial Bank Ltd, and Kenya Commercial Finance Ltd, the respondents, were the plaintiffs with Stephen Mugo Mutothori and Machithi Trout Farm Limited, the appellants, as the defendants. The second suit is Nairobi High Court Civil Case No 2382 of 1991, in which Machithi Trout Farm Limited is the plaintiff with the respondents herein as the defendants. Both suits concern a parcel of land known as LR No 3452/1 (IR 4123), Nyeri, which is registered in the name of Machithi Trout Farm Limited, which as appropriate, we will refer to as Machithi.

The aforesaid property was given as security by Machithi, to secure repayment by it of a loan it had received from the respondents. Stephen Mugo Mutothori and one Priscilla Wangari Mugo, as Directors of Machithi, executed a legal charge over the property in favour of the respondents. Following Machithi's default in the repayment of the loan the respondents took steps to realize their security. They also brought their aforesaid action against both appellants, *inter alia*, for possession of the aforesaid property. Machithi, on the other hand brought its action against the respondents, *inter alia*, for a declaration that the respondents were not entitled to sell the suit property contending that the respondents' statutory right of

sale had not accrued.

By an order dated 1st July 1992, the two suits were consolidated with the respondents as the plaintiffs. Before the said consolidation the respondents had filed in their suit an amended plaint with leave of the Court. Thereafter, on 15th December, 1997, the respondents filed a re-amended plaint "pursuant to the order made on 25th November, 1997." In this ruling we are not concerned with what that order says, but it is instructive that the appellants, on 14th January, 1998, filed an amended defence. The reamended plaint introduced a third defendant, Priscilla Wangari Mugo.

Whether or not she was properly and regularly made a party is not an issue before us. It is, however, significant that thereafter she has all along been referred to as the 3rd defendant. Infact in the respondents' application for summary judgment dated 13th May 1999, her name appears as 3rd defendant, but no orders were specifically sought against her. The present appeal is from orders made pursuant to the application.

The respondents have brought a motion before us under rule 80 of the Court of Appeal Rules, seeking, *inter alia*, an order striking out the appeal as incompetent, on the ground that the 3rd defendant as a person directly affected by the appeal, was not served with the notice of appeal. Mr Njiru Boniface, who with Otieno Okeyo, appeared for the appellants as respondents in the application, conceded before us that the 3rd defendant was indeed not served with a copy of the notice of appeal. He however, submitted that the said third defendant was not regularly made a party in the suit and cannot therefore be said to be a person directly affected by the appeal.

Mr Gichuhi, for the applicants/respondents, submitted before us that the 3rd defendant was regularly and properly made a party in the suit as her name appears on some of the documents in the record of appeal, including the ruling and order from which this appeal arises, and that she jointly with the 1st appellant, as Directors of the second appellant, executed a joint guarantee to secure the repayment by their company of credit facilities the respondents had extended to the said company. Consequently, he said, she was a person directly affected by the present appeal.

Mr Njiru's submission is principally based on the alleged fact that no application was made under order I rule 10 of the Civil Procedure Rules for the joinder of Priscilla Wangari Mugo. Consequently, he urged, the mere inclusion of her name on some of the documents which were filed in Court in no way made her a party. A formal order, he said, was necessary to specifically bring her into the suit.

Rule 76(1) of the Court of Appeal Rules 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."

It was common ground that Priscilla Wangari Mugo, did not take part in the proceedings before the superior court. It was also common ground that her name appears on the heading and body of the decision appealed from. Besides it is not in dispute that what was before us was not the appeal itself but an application for striking out the appeal. We may not therefore scrutinize the facts to ascertain whether her joinder as a defendant was regular or otherwise. At this stage we can only act on what, *prima facie*, appears to be her status in the present appeal. We cannot go behind the documents included in the record of appeal.

The rule we have cited above is clear. An intended appellant has two options when it comes to the issue of service of a notice of appeal. He may either serve all the parties who *prima facie* appear to have interest in the intended appeal, or he may apply to this Court for a direction that service of the notice of appeal on a certain party be dispensed with. The appellants did none of those. The facts before us, *prima facie*, show that Priscilla Wangari Mugo, although she did not participate in the proceedings giving rise to this appeal was a named party, in the proceedings. If the appellants were in any doubt on that it was

incumbent upon them to apply to this Court for dispensation of service of the notice of appeal upon her. As was authoritatively said by this Court in *Vadag Establishment v Yashvin Shretta* (Civil Application No NAI 39 of 1999) (unreported), it was not within the province of the appellants to decide on who should or should not be served with the notice of appeal. The proviso to rule 76(1), *supra*, gives that power to the Court which, in exercise of its judicial discretion under that proviso will determine whether the justice of the intended appeal will require that any particular party be notified of the intended appeal. Since the appellants neither served Priscilla Wangari Mugo with the notice of appeal, nor sought dispensation of service of the notice upon her, it follows that they did not comply with the mandatory provisions of rule 76(1), above.

In the result as no extension of time has been sought or obtained within which to serve a copy of the notice of appeal on Priscilla Wangari Mugo, the present appeal, as it stands, is incompetent and is accordingly ordered struck out.

As regards costs, we are not minded to award any to the respondents regard being had to certain events involving the respondents' counsel which preceded the order appealed from. In the result we make no order as to costs.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL