



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & O'KUBASU, J.J.A)
CIVIL APPLICATION NO. NAI 83 OF 2001**

BETWEEN

DAIMA BANK LIMITED LIMITED

AND

SAMUEL KAMAU MACHARIA RESPONDENT

(An application to strike out a notice of appeal from a judgment of the High Court of Kenya, Nairobi (Hon. Mr. Justice Onyango Otieno) dated 18th May 2000

in

H.C.C.C NO. 628 OF 1998)

RULING OF THE COURT

Before us is a notice of motion stated to have been brought under Rules 42, 43, 74, 80 and 81 of the Court of Appeal Rules, in which the applicant, Daima Bank Limited seeks the following orders:

"1.THAT the Notice of Appeal filed herein on 19th May, 2000 by the respondent be struck out.

2.THAT the costs of the application be borne by the respondent in any event."

This application is brought on the following grounds:-

"1.THAT the Notice of Appeal dated 19th May, 2000 is incurably defective both in form and substance.

2.THAT the respondent herein has failed to take essential steps to institute the appeal.

3.THAT the time permitted by the rules for lodging the appeal has since expired".

When this matter came up for hearing on 6th June, 2001, it was submitted by Mr. Njuguna for the applicant that the notice of appeal was on the face of it defective since the judgment to be appealed from was delivered on 18th May, 2000 while the notice of appeal is back-dated 19th May, 1999, with the result that the backdating renders the notice of appeal incurably defective being a primary document.

In his reply, Mr. Gachoka for the respondent conceded that the notice of appeal bears the date of

19th May, 1999 but he urged us to look at the rubber stamp which shows that the notice of appeal was lodged on 23rd May, 2000.

The notice of appeal which is the subject of this application is to be found at page 7 of the record. The portion of that notice of appeal that has led to the present application is as follows:- "LODGED in the High Court of Kenya at NAIROBI this 19th day of May, 1999".

But the intended appeal is against the judgment of Onyango-Otieno J delivered on 18th May, 2000. A casual look at the notice will reveal that it was lodged one year before the judgment to be appealed from was delivered. This is, of course, absurd.

We must now consider what the rules of the Court provide for a notice of appeal. Rule 74(6) provides:- "A notice of appeal shall be substantially in the form D in the First Schedule hereto and shall be signed by or on behalf of the appellant".

The notice of appeal filed herein, and, which is the subject of this application was pursuant to Rule 74(6) of the Court's rules. The rule requires that a notice of appeal shall be substantially in the form D in the first schedule and so we must consider the notice filed herein in that context.

Having considered Rule 74 and the notice of appeal the subject of this application we are satisfied that so far as the notice purports to have been lodged in the High Court of Kenya at Nairobi on 19th May, 1999 and the judgment to be appealed from was delivered on 18th May, 2000 then clearly that notice of appeal is defective, as it purports to have been lodged well in advance of the judgment to be appealed from. Being a primary document, it cannot be amended. Consequently, the defect is incurable.

In view of the foregoing, we have no alternative but to order that the notice of appeal be and is hereby struck out. We make no order as to costs.

Dated and delivered at Nairobi this 15th day of June, 2001.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E. O. O'KUBASU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR