



IN THE COURT OF APPEAL
AT NAIROBI
CORAM: TUNOI, O'KUBASU & KEIWUA, J.J.A.
CIVIL APPLICATION NO. NAI 121 OF 2001 (69/2001 UR)

BETWEEN

APERIT INVESTMENTS S.A.

SATISHCHANDRA BHIMJI SHAH APPLICANTS

AND

SURYAKANT BHAGWANJI RAJA SHAHRESPONDENT

(An application to strike out a Notice of Appeal in an
intended appeal from a ruling of the High Court of
Kenya at Nairobi (Kuloba J) dated 21st December,2000

in

H.C.C.A. NO. 3906 OF 1991)

RULING OF THE COURT

By this application expressed to be brought under rules 42, 43, 74 (3), 80 and 81 of the Rules the applicants seek orders; firstly, that the notice of appeal filed by the respondent on 11th January, 2001, be struck out on the grounds that it does not specify the part of the decision complained of; and secondly, that the respondent has failed to take essential steps to institute the appeal herein.

Mr Shah, for the applicants, submitted that it is evident from the Draft Memorandum of Appeal that the respondent's intended appeal would be against part only of the decision of Kuloba J. delivered on 21st December, 2000 which entered judgment for the first applicant in the sum of \$31,646,306.28.

Further, that the respondent is not proposing to appeal against that part of the decision which dismissed the application of security for costs of the respondent but the notice of appeal is silent on the part of the decision the respondent is dissatisfied with.

As for the second limb of his prayer, Mr Shah has contended that the respondent is guilty of laches and is using delaying tactics by avoiding to have the proceedings in the superior court typed and processed nor is he availing himself at the Registry so as to fix a suitable hearing date on a priority basis for the disposition of the application.

Mr Dhanji, on behalf of the respondent, has countered these submissions. In answer to the second limb of the complaint he has averred that his conduct and that of the respondent in this matter is irreproachable. They applied without delay for the uncertified copies of the proceedings and the ruling. They have no

control over, neither can they dictate to the superior court in respect of the typing of the proceedings and therefore can only wait for an indication from that court that the said documents are ready for collection. They further contend that the delay in prosecuting the application has been occasioned by Mr Shah who has been constantly asking the file containing the pleadings and proceedings to be placed before Kuloba J for mentions with a view to try and persuade him to consent to amend his ruling.

Mr Dhanji has further submitted that the notice of appeal does fully comply with the provisions of rule 74 (3) and is valid. He argued that the notice of appeal shows manifestly clearly that the respondent is dissatisfied with the whole decision of the learned Judge and it is erroneous and misplaced to suggest that the respondent intended to appeal against parts of it only. Moreover, the draft memorandum of appeal was subject to change any time before the record of appeal was finally duly lodged in this Court.

On our part we are unable to say that the respondent has failed to take some essential step in the prosecution of the application or the appeal. The record of appeal has not been filed because the superior court has not written to the respondent and/or his counsel that the proceedings for which they applied on time are ready for collection. Moreover, the respondent is entitled to rely on the provisions of rule 81 as regards computation of time.

The draft memorandum of appeal, in our view, is only provisional and not final. It may be amended before it is incorporated in the record of appeal. It is correct to argue that it may not contain all the grounds of appeal that may be canvassed in the intended appeal. We do not find any fault with the notice of appeal. It expresses the respondent's desire to challenge the entire decision of the learned Judge.

The applicants cannot choose for him that part of the decision to which it should canvass on appeal.

This application must, in our opinion, fail and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 12th day of October, 2001.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR