REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, SHAH & OWUOR, JJ.A)
CIVIL APPEAL (APPLICATION) NO. 80 OF 1999
BETWEEN

PEPCO CONSTRUCTION COMPANY LIMITED .... APPELLANT
AND
CARTER & SONS LIMITED .... RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Nairobi (Mr. Justice Shields) dated 26th November, 1992
in
H.C.C.C No. 5638 of 1989)
****

RULING OF THE COURT

This is an application under rules 42, 74, 80 and 85 of the Court of Appeal rules (the Rules) brought by Pepco Construction Company Limited, (the applicant) seeking the

> f"o1l.lTohwaitn gN ootridceer so:f- intended appeal lodged herein and dated 27th November, 1992 and the appeal lodged on 10th May, 1999 be struck out on the grounds:
>
> (1)That the Notice of Appeal lodged herein by the Respondent/Appellant, the 3rd Defendant is not in the prescribed form as there in no such thing as "Intended Notice of Appeal".
>
> (2)That the Notice of Intended Appeal lodged herein was filed in a name of the wrong Party i.e Pepco Construction and Transport Company Limited, whereas the true and correct party is Pepco Construction Company Limited., 3rd Defendant".

The applicant's second complaint is in respect of the record of appeal prepared by the respondent/appellant's advocate. He contends that the same is incomplete because it does not contain an exhibit produced before the superior court being the record of Civil Appeal No. 80 of 1999. The applicant also complains as follows:

> "4.That the typed record of proceedings used in the Record of appeal does not tally with the hand-written notes of the Judge of the superior Court and is riddled with hundreds of typing mistakes which are very crucial to the determination of the Appeal on merit.
>
> 5.That the Record of Appeal prepared by the Respondent/Appellant's advocate is hopelessly incomplete and is full of errors, omissions, and misplacement of the material which goes to the root of the matter".

Pursuant to the above, counsel contends that essential steps in the proceedings have not been taken by the respondent within the prescribed time and that therefore both the "Notice of Appeal" and the appeal

itself should be struck out.

The decision which the respondent/appellant is appealing against was given on 26th day of November, 1992 by Shields J. The plaintiff/applicant had filed a suit on 7th December, 1989 claiming inter alia , injunction, general damages for conversion and/or detention or dispossession by trespass of a Traxcavator, Fiat Allis FL 10B Machine and special damages for loss of user @ Ksh.15,000/= per day. The learned Judge gave judgment in favour of the applicant, ordered recovery of his machine from Karen Police Station, and ordered all the three defendants, Kenya Finance Corporation Ltd., Karugu Contractors (Kenya) Ltd. and Pepco Construction Co. Ltd. to pay to the applicant the sum of 7,200,000/= jointly and severally.

The stage was set for a few interlocutory appeals to this Court. However, for the purpose of this motion and as stated in the affidavit filed in support of the motion by Kartar Singh, the director of applicant (respondent to the appeal), the present respondent on 27th November 1992 indicated his wish to appeal against the decision by filing a Notice of Appeal. This is the Notice of Appeal that counsel contends is defective and does not conform to Form (D) of the 1st schedule to the Rules. The document is clearly headed and reads:-

"Notice of Intended Appeal"

> TAKE NOTICE THAT PEPCO CONSTRUCTION & TRANSPORT COMPANY LIMITED, being dissatisfied with the Judgment of the Honourable Mr. Justice J.F Shields given on 26th day of November, 1992 at Nairobi intends to appeal to the Court of Appeal against the whole of the said Judgment ...
>
> It is intended to serve a copy of the Notice on:
>
> (1) M.G Sharma Advocate Rajab Mansil
>
> Tom Mboya Street
>
> P. O. Box 47234
>
> NAIROBI".

Mr. Sharma, counsel for the applicant submits in respect of the above Notice of Intended Appeal, that there is no such thing as "Notice of Intended Appeal". We agree with him. Rule 74 (1) specifically states that:

> "Any person who desires to appeal to the Court of Appeal <u>shall give notice</u> in writing, which shall be lodged in duplicate with the registrar of the superior court" (the underling is ours)

Rule 74 (6) of the Rules mandates that a Notice of Appeal shall be substantially in the Form D in the first schedule to the Rules. To our mind a "Notice of intended appeal" filed in the superior court and contained in the record of appeal is not the document envisaged by rule 74 (6) and as prescribed in Form (D) of the 1st schedule, to the Rules.

The second objection that Mr. Sharma raised in respect of the Notice of Appeal is that it was filed in the name of the wrong party although the appeal itself is in the correct name, Pepco Construction Company Ltd. The party named in the Notice of Appeal is Pepco Construction & Transport Company Ltd. while the decree included in the record of appeal is in the name of Pepco Construction Company Ltd. The decree and the Notice of Appeal are therefore at variance. The name, Pepco Construction & Transport Company Limited was amended by order of Shields J. on 18th November, 1992 to read Pepco Construction Company Limited. The record shows that the Notice of Appeal, certificate of delay and the notice of address for service (the latter two documents having been lodged by Mr. Sharma) all refer to Pepco Construction & Transport Company Limited. It is on this basis that Mr. Regeru, counsel for the

respondent submits that the difference in the name of the said company is not important. This is the same submission that Mr. Regeru made in respect of the word "Intended" in the Notice of Appeal. According to him the word was not material nor was it consequential. It could be very easily crossed out and the Notice left unaffected. The "Notice of Intended Appeal" contravened rule 74 and was lodged in the name of the wrong party which factors make the same incurably defective. These errors are not the sort of errors which can be cured under rule 44 (not that any application has been made to us for the necessary amendment). The errors are serious mistakes which in our view render the whole notice invalid.

A Notice of Appeal is what gives this Court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules. A record of appeal must contain a valid copy of the Notice of Appeal. The omission to include such a valid copy renders the appeal incompetent and therefore the "Notice of the Intended Appeal" lodged on 27th November, 1992 cannot stand and renders the appeal incompetent.

Notwithstanding the above findings, we are compelled to consider two other matters that were argued before us by Mr. Sharma. Firstly, the issue of the numerous errors, misspellings, gaps and even whole paragraphs left out in the record of appeal. These have been listed out in the affidavit filed in support of the application. Mr. Regeru has not denied that they exist or that they are merely being made up. All that Mr. Regeru says is that the errors in the record do exist but they are, to use the words of Mr. Regeru:

> *"errors/omissions aforesaid and which emanate from the High Court Registry do not prejudice the applicant herein in any manner and would therefore not make it impossible to oppose the present appeal".*

Those errors as pointed out to us are too numerous and in some instances whole paragraphs have been left out. In our view these are not the kind of errors that do not affect the canvassing of the appeal. They are serious errors that make the record of appeal in as far as rule 85 1(d) is concerned, defective as well.

Finally, there is the question of the missing exhibit, namely the record of appeal in Civil Appeal No. 84 of 1990. This exhibit was produced and admitted in evidence by consent of the parties, by the learned Judge. Contrary to what Mr. Regeru submits, the record of Civil Appeal No. 84 of 1990 was essential to the extent that the judge himself began his own judgment by referring to the photographs of the two Excavators at page 81 and page 82 of that record of appeal. That record of appeal having been admitted in evidence as an exhibit was part of the proceedings before the learned Judge. It was a primary document and by not including it in the present record of appeal, the mandatory provision of rule 85 (1) (f) was breached. It cannot be introduced by way of supplementary record of appeal. In that regard the record of appeal is incurably defective with the result that the appeal is also incompetent.

The upshot of the foregoing is that this appeal is incompetent and is hereby struck out with costs to the applicant. The applicant will have the costs of this application also.

Dated and delivered at Nairobi this 24th day of March, 2000.

J. E. GICHERU

....

JUDGE OF APPEAL

A. B. SHAH

....

JUDGE OF APPEAL

E. OWUOR

....

JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>