



IN THE COURT OF APPEAL

AT NAKURU

(CORAM:GICHERU, SHAH & OWUOR JJ A)

CIVIL APPEAL NO 274 OF 1998

BETWEEN

TRIMBORN AGRICULTURAL ENGINEERING LIMITED.....APPLICANT

AND

DAVID NJOROGE KABAIKO.....1ST RESPONDENT

KENYA SHIELD SECURITY LIMITED.....2ND RESPONDENT

**(An appeal from the judgment of the High Court of Kenya at Nakuru (Lady Justice S C Ondeyo)
dated 20th June, 1999**

in

HCCC No 395 of 1992)

RULING

Owuor JA Kenya Shield Security Ltd, the applicant in this notice of motion is the 2nd respondent in Civil Appeal No 274 of 1998 filed in this Court on 30th November, 1998. The appeal is against the judgment of Ondeyo J delivered on 20th June, 1996.

The motion brought under rules 9, 42 and 80 of the Court of Appeal Rules and filed on 21st February, 2000 seeks an order to strike out the appeal on the grounds that:- The notice of appeal was filed out of time, the record is incomplete and that essential steps in the proceedings have not been taken or have not been taken within the prescribed time.

In the short affidavit which supported the notice of motion the applicant states *inter alia*:-

“3 That the decision against which the said appeal is preferred was delivered on 20th June, 1996.

4. That the notice of appeal was presented on 16th December, 1997.

5. I verily believe that the appeal was presented five hundred and thirty-one (531) days late.

6. No extension of time has been filed and /or allowed by this honourable Court.

7. That consequently no valid notice of appeal is included in the record of appeal.

8. Following par 4, 5, 6 and 7 above I verily believe that essential steps in the proceedings have not been taken or have not been taken within prescribed time”.

In objecting to the application, counsel for the respondent filed a replying affidavit in which he complained amongst other things that the applicant had waited till too late in the day before making this application. That might be true but he made no resistance and was accordingly heard in the application. The substance of his replying affidavit was that immediately after judgment in Nakuru HCCC No 395 of 1992 was delivered on 20th June, 1996, he drew and filed a notice of appeal on 25th June, 1996. He discovered that the notice of appeal was defective in that it had left out the name of the applicant herein. Subsequently, on 26th February, 1997 he filed Civil Application No Nai 73 of 1997 in this Court for leave to file a proper notice of appeal out of time.

The actual order sought in that application was that:

“a.The time allowed for lodging and serving a notice of appeal be extended to enable the applicant to lodge and serve a proper notice of appeal with the name of all the parties to the intended appeal”.

By counsel’s own admission, that application was never to be heard. He withdrew the application with the knowledge and consent of Mr Kagucia, counsel for the respondent. He thereafter filed yet another application in the superior court on 30th September, 1997 under the provision of section 7 of the Appellate Jurisdiction Act and section 3A of the Civil Procedure Act. He sought time for lodging and serving a notice of appeal to be extended to enable him to lodge and serve a proper notice of appeal with the names of all the parties. That application was heard and the Court granted the respondent fourteen days in which to file the notice of appeal and seven days from the date of filing of the notice of appeal for serving of the said notice of appeal. The order was given on 5th December, 1997 and according to the certificate of delay, proceedings were given to the respondent on 13th October, 1998.

However, the respondent filed the notice of appeal within eleven days from the date of the order. The applicant did not appeal against that order. He cannot therefore be heard to argue that the notice of appeal was filed out of time. The same having been filed within the period of the order of the superior court exercising its jurisdiction under section 7 of the Appellate Jurisdiction Act, Chapter 5 of the Laws of Kenya.

If I understood Mr Kagucia properly, his contention is not to the effect that the notice of appeal which is contained in the record of appeal is defective for lack of extension of time for filing the same. His objection is that, there cannot be two notices of appeal as is the case in the present appeal. By the applicant’s own admission both in his affidavit and in the submissions in Court, the notice of appeal filed on 25th June, 1996 and which he contends was defective, although not contained in the record of this appeal is in existence and is a primary document in terms of rule 85 (1)(j). Upon realising that it was defective he never had the same either struck out in terms of rule 80 or declared as having been withdrawn in accordance with rule 82. That being the case therefore, that notice of appeal was a valid notice of appeal and therefore a primary document and hence a document to be included in the record of appeal. So at the time the application for leave and extension of time was being canvassed in the superior court there was in essence and in fact a subsisting notice of appeal, though defective according to the respondent. The respondent therefore could not have began to act as though there was no notice of appeal until he had caused the previous notice of appeal to be withdrawn or struck out.

In that regard, the respondent could not have embarked on the process of putting his house in order when this other notice of appeal was still in existence, be it in the superior court or in this Court under rule 4 of the

Rules of this Court. In the result the proceedings before the superior court in as far as extending time for

filing and yet another notice of appeal were proceedings in futility. They were null and void and any purported order emanating from them cannot entitle the respondent to file another fresh notice of appeal. The clear principle being that one cannot;

“file a fresh notice of appeal until the original one has ceased to exist. To clear the deck for an application for extension of time to file a fresh notice of appeal, the original notice of appeal must either be struck out or deemed to have being withdrawn under rule 82 of the Rules. See *Attorney General vs Kamlesh Mansukhlal Damji Pattni and 2 others* CA No 59 of 1999”.

I am therefore in agreement with Mr Kagucia in that not only is the notice of appeal contained in the record of appeal null and void but also that the record of appeal as it stands does not contain the original notice of appeal filed on 25th of June, 1996 as it must. The record of appeal is therefore defective hence rendering the appeal itself defective. In the result, I would grant the motion and strike out the appeal with costs.

Shah JA This application is filed in this appeal, by the second respondent, seeking an order to strike out the appeal itself on the grounds that the notice of appeal was filed out of time, the record is incomplete and essential steps have not been taken within the prescribed time.

The decree of the superior court, appealed against, is dated 20th June, 1996. In this ruling I will refer to the applicant as the second respondent and the respondent as the appellant.

The appellant lodged his first notice of appeal on the 25th day of June, 1996 and applied for copies of proceedings and judgment of the superior court on the same day. Both these essential steps were taken in time. The problem for the appellant arose, however, as the notice of appeal lodged on 25th day of June, 1996, was defective. That notice of appeal in its heading did not include the names of two of the parties to the suit in the superior court. One of them is Kenya Shield Security Limited who was the first third party in the suit. The other one is Stephen Kiraigo trading as Hot Guards Security Services Limited who was the second third party in the suit.

It is a matter of regret that the judgment of the superior court does not set out all names of the parties in the superior court. Ideally the heading should have read:

In the High Court of Kenya at Nakuru

Civil Case No 395 of 1992

Between

David Njoroge Kabaiko.....Plaintiff

and

Trimborn Agricultural Engineering Ltd....Defendant

Kenya Shield Security Limited.....1st Third Party

Stephen Kariago T/A Hot Guards

Services Limited2nd Third Party

The courts below should see to it that all the names of the parties to the suit are properly included in the title of the suit in the judgments or rulings so that there can be no room for doubt. However, it is the duty of the intended appellant to see to it that all parties directly affected by the judgment are served with a properly headed notice of appeal.

The notice of appeal first lodged by the appellant is reproduced hereunder:-

“In the Court of Appeal

At Nakuru

David Njoroge Kabaiko.....Plaintiff

and

Trimborn Agricultural

Engineering Limited.....Defendant

Notice of Appeal

Take Notice that the defendant, above-named being dissatisfied with the decision of the Honourable Lady Justice Ondeyo given at Nakuru on the 20th day of June, 1996 intends to appeal to the Kenya Court of Appeal against the whole of the said decision.

The address for service of the appellant is care of M/s Bowry Maraga & Company, Advocates, Belpar House, Court Road, PO Box 671, Nakuru.

It is intended to serve the copies of this notice upon:-

1. A Otieno, Advocate, Nakuru
2. M/s Kagachia & Co Advocate, Nakuru

Dated at Nakuru this 25th day of June, 1996.

Signed

Bowry Maraga & Company

Advocates for the Defendant

Drawn & Filed by:-

Bowry Maraga & Co

Advocates

PO Box 671,

Nakuru

To: The Deputy Registrar,

High Court of Kenya,

PO Box 61,

Nakuru

Lodged at Nakuru this 25th day of June, 1996.

Signed

Deputy Registrar,

High Court of Kenya,

Nakuru”

This notice of appeal is deficient in three material aspects. As pointed out by me earlier, names of the first and second third parties are not included in the notice of appeal. Ideally these names ought to be included so that they would become respondents to the appeal as they are parties directly affected by the judgment of the superior court.

It has been held time and again that a notice of appeal is a primary document. It gives jurisdiction to this Court. The advocates for the

appellant realized the errors contained in the first notice of appeal, reproduced above.

Upon realizing their error, the advocates moved this Court for an extension of time to lodge a fresh but correct notice of appeal out of time. That application came for hearing before Cockar (the then Chief Justice), sitting as a single judge of this Court and he ‘advised’ the appellant’s advocates that they ought to have first moved the High Court for such extension. The appellant’s advocates moved the High Court, as advised. The High Court (Ondeyo, J) allowed the application despite objections by Mr Kagucia for the first third party. The advocate for the plaintiff did not object. It is not clear if the second third party was before the High Court. At any rate it appears he was not before the High Court at that stage. The application before the High Court was brought under section 7 of the Appellate Jurisdiction Act (the Act). The application was allowed, as a result of which the appellant lodged a fresh notice of appeal on the 16th December, 1997, that is prior to the lodgment of the record of appeal. The appeal itself, was lodged on 30th November, 1998 and the record of appeal includes the fresh notice of appeal.

Therefore, effectively, the position is that whilst the first notice of appeal was not yet struck out this appeal was lodged as being based on the second notice of appeal.

The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of *Peter Njoroge Mairo vs Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others vs Philip Gikaria Muthami*, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by section 7, above, but by rule 4 of the Rules. The rule, in effect, empowers the Court to reinstate the struck out appeal, while section 7, above, empowers the High Court

to, in effect, assist a litigant in distress who otherwise would not seek help of either Court for any interim relief before he lodged his appeal for the first time.”

In the *Peter Njoroge Mairo* case this Court also decided that extension of time to lodge a notice of appeal granted by the High Court does not automatically extend the time to lodge the record of appeal, and that therefore that appeal, as lodged, was incompetent.

The question that arises here is: what happens when a record of appeal is not yet lodged and the time to lodge the notice of appeal is extended by the High Court and whilst the first defective notice of appeal has not been struck out?

The answer to the question posed by me is that the first notice of appeal, until struck out by this Court, on an application made to it, remains and the High Court has therefore no jurisdiction to extend the time to lodge a fresh notice of appeal.

I said in the case of *Gabriel Kigi and others vs Kimotho Mwaura & another* Civil Application No Nai 197 of 1997 (unreported):

“But I must revert to section 7 of the Act. That section in my view gives discretionary powers to the High Court to allow extension of time to file a notice of appeal when there is as yet nothing before this Court. It is in this particular aspect that I agree with Bosire Ag JA in the *Robinson & others vs Muthami* application (*supra*)”

The situation here is that there is a defective notice of appeal still on record. It has not been struck out pursuant to an application made in that behalf. So long as that notice of appeal remains, the High Court has no jurisdiction to extend time to lodge a fresh notice of appeal. Rule 75 of the Rules of this Court shows that the notice of appeal lodged in the superior court is sent to this Court, at its appropriate registry. Omolo, JA sitting as a single judge of this Court said in the case of *Dolphin Palms Limited vs Al-Nasibh Trading Co Ltd & others*, Civil Application No 112 of 1999 (unreported):

“The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single judge; that is the province of a full bench. Mrs Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was no notice of appeal.”

What Omolo, JA said in the *Dolphin Palms* case is germane here, even more so. There he declined to deem, as having been withdrawn, a notice of appeal already lodged, until such time it was struck out by full bench on an application to it. If a single judge of this Court cannot so deem a notice of appeal to be withdrawn, a *fortiori*, a High Court judge cannot do so.

The ruling of Omolo, JA was the subject of reference to full bench under rule 54(2) of the Rules of this Court. The full bench said:

“As rightly pointed out by Mr Khatib, for the first respondent, the Court must be moved to make the order declaring a notice of appeal ‘deemed to have been withdrawn’. Rule 82, in pertinent part, provides that:

‘If a party who had lodged a notice of appeal fails to institute an appeal within the appointed time, (a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court otherwise orders, be liable to pay the costs arising therefrom of any of persons on whom the notice of appeal was served’.

We concede that there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase ‘unless the Court otherwise orders-’ clearly shows that a court order

is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules. That is the conclusion the single judge came to. We have no basis upon which to fault him on that. The reference, therefore fails and is dismissed with costs”.

The appeal sought to be struck out is incompetent because the extension of time to lodge the second notice out of time granted by the High Court was without jurisdiction. Also the first notice of appeal was incompetent for non-inclusion of the names of the two affected parties already referred to by me. I do not know if the first notice of appeal was served on the second third party. It ought to have been served. However it is incompetent and invalid for non-inclusion of the first and second third parties' names therein.

There is also the factor of the second third party not being served with the notice of appeal. The reason why he was not so served is not known to me. However, it is not for the intending appellant to decide whether or not to serve a notice of appeal on a party in the suit. Such intending appellant ought to, within seven days after lodging the notice of appeal, apply to the Court for direction that a party need not be served with a copy of the notice of appeal. See rule 76(1) of the Rules of this court. It is for the appellant to decide whether or not to seek extension of time limited by the proviso to rule 76(1).

Although Mr Kagucia's application is based on the grounds as shown in the application itself, his argument, in main, turned on the issue as to whether or not the High Court had jurisdiction to grant the extension of time as sought. He had raised that issue before the High Court. He ought to have, in those circumstances, appealed, with leave, against the ruling of the High Court. He did not do so and instead by a side-wind method argued the point before this Court.

I would therefore strike out Civil Appeal No 274 of 1998 not on the grounds advanced by Mr Kagucia but on the grounds already propounded by me. I would also strike out the first notice of appeal as it is admittedly defective. I would make no order as to costs.

Gicheru JA. By a notice of motion lodged in this Court on 21st February, 2000, Kenya Shield Security Limited, the second respondent in this appeal, sought to have the appellant's appeal struck out for the reasons that the notice of appeal was filed out of time; that the record of appeal was incomplete; and that essential steps in the proceedings had not taken or had not been taken within the prescribed time. That notice of motion was made under rules 9, 42 and 80 of the Court of Appeal Rules. The basis upon which this notice of motion was made was that the decree appealed from was given on 20th June, 1996 and the notice of appeal upon which the appellant's appeal is commenced was lodged in the superior court on 16th December, 1997 which, according to counsel for the second respondent, Mr Kagucia, was 531 days out of time. To that end therefore, according to counsel, no valid notice of appeal was in the appellant's record of appeal with the result that an essential step in the proceedings in the appellant's appeal had not been taken or had not been taken within the prescribed time. In the replying affidavit of counsel for the appellant, Mr Maraga, in opposition to the second respondent's notice of motion, a photostat copy of a notice of appeal drawn by counsel for the appellant dated and lodged in the superior court on 25th June, 1996 was annexed thereto. On 21st June, 1996 counsel for the appellant had applied in writing for a copy of the proceedings and judgment in connection with the decree in respect of which the appellant intended to appeal and a copy of that application was served on counsel for the second respondent. The aforesaid notice of appeal omitted the name of the second respondent although it was clearly indicated on the body of that notice of appeal that the same was to be served and indeed was served on the second respondent. Realizing that the second respondent could not be joined as a party to the appellant's intended appeal by an amendment to the notice of appeal in question, counsel for the appellant applied to the superior court under section 7 of the Appellate Jurisdiction Act, chapter 5 of the Laws of Kenya for extension of time within which to lodge a proper notice of appeal having the names of all the parties to the intended appeal. That application came before Ondeyo, J who extended the time of lodging the notice of appeal by 14 days from the date of her ruling in respect thereof 5th December, 1997 and a fresh notice of appeal was lodged in the superior court on 16th December, 1997. From the certificate of delay given by the superior court on 4th November, 1998, a copy of the proceedings and a certified copy of the judgment applied for by counsel for the appellant on 21st June, 1996 as is indicated above was supplied to him on 13th October,

1998. On 30th November, 1998 the appellant's appeal was lodged in this Court.

The existence of the original notice of appeal lodged in the superior court by counsel for the appellant on 25th June, 1996 was deponed to in the affidavit of counsel for the appellant in support of the appellant's application in the superior court for the extension of time within which to lodge a fresh notice of appeal. Yet, that notwithstanding, that Court proceeded to extend the time sought, the result of which was the lodging of a fresh notice of appeal so that two notices of appeal, the original of which was defective, were lodged in the superior court in respect of the appellant's appeal. The very existence of the original defective notice of appeal should have disentitled the appellant the extension of time it sought in the superior court to lodge another notice of appeal. This was not to be so with the result that although a copy of the original notice of appeal is not part of the appellant's record of appeal, there are in existence two notices of appeal in respect of the appellant's appeal one of which is defective thanks to the forthrightness of counsel for the appellant, Mr Maraga.

A notice of appeal is a primary document in relation to an appeal to this Court. Indeed, it is the first document in connection therewith. This Court has in the past held that a primary document cannot lend itself to an amendment see the case of *Parsi Anjumani v Mushin Abdulkarim Ali*, Civil Application No Nai 328 of 1998 (unreported). As I have indicated in this ruling, before the extension of time within which to lodge a notice of appeal by the superior court on 5th December, 1997 and the subsequent lodging of the same in that Court on 16th December, 1997 by the appellant, there was in existence another notice of appeal lodged by the appellant in the same Court within the prescribed time. Although that notice of appeal was defective and could not be amended, it was a legitimate notice of appeal in regard to the appellant's appeal and as long as it subsisted, any subsequent extension of time to lodge another notice of appeal and the lodging of such notice of appeal in the superior court in respect of the said appeal was null and void. Such was the status of the appellant's notice of appeal lodged in the superior court on 16th December, 1997 subsequent to the extension of time by that Court within which to lodge the same. It is the only notice of appeal in the appellant's record of appeal. The original notice of appeal, though defective is not part of the record of appeal. The second respondent is therefore right that the appellant's record of appeal is incomplete as a primary document a copy of the original notice of appeal does not form part of the record. Consequently, the appellant's record of appeal is fatally defective rendering its appeal incompetent. I would therefore strike out the said appeal but with no order as to costs in view of the candidness of counsel for the appellant Mr Maraga. As Shah, JA agrees that the appellant's appeal should be struck out but with no order as to costs, there will be a majority decision of the court in these terms.

Dated and delivered at Nairobi this 17th day of March, 2000.

J.E.GICHERU

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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.

DEPUTY REGISTRAR