REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal Appli No.274 of 1998

TRIMBORN AGRICULTURAL ENGINEERING LIMITED....APPELLANT

AND

DAVID NJOROGE KABAIKO

KENYA SHIELD SECURITY LIMITED..... RESPONDENTS

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

in

H.C.C.C. NO. 395 OF 1992)

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RULING OF SHAH, J.A.

This application is filed in this appeal, by the secondrespondent, seeking an order to strike out the appeal itself on thegrounds that the notice of appeal was filed out of time, the recordis incomplete and essential steps have not been taken within theprescribed time.

The decree of the superior court, appealed against, is dated20th June, 1996. In this Ruling I will refer to the applicant asthe second respondent and the respondent as the appellant.

The appellant lodged his first notice of appeal on the 25thday of June, 1996 and applied for copies of proceedings andjudgment of the superior court on the same day. Both theseessential steps were taken in time. The problem for the appellantarose, 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 limit ed 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 1992Between

David Njoroge Kabaiko..... Plaintiff

and

Trimborn Agricultural Engineering Ltd.....Defendant

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

Stephen Kariago T/A Hot Guards Services Limited.....2nd Third Party

The courts below should see to it that all the names of theparties to the suit are properly included in the title of the suitin 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 itthat all parties directly affected by the judgment are served witha 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

andTrimborn AgriculturalEngineering Limited..... Defendant

NOTICE OF APPEAL

TAKE NOTICE that the Defendant, above-named beingdissatisfied with the decision of the HonourableLady Justice Ondeyo given at Nakuru on the 20th dayof June, 1996 intends to appeal to the Kenya Courtof Appeal against the whole of the said decision.

The address for service of the appellant iscare of M/S Bowry Maraga & Company, advocates, Belpar House, Court Road, P.O. Box 671, Nakuru.

It is intended to serve the copies of thisnotice upon:-

1. A. Otieno, 2. M/S Kagachia & Co.

Advocate, Advocate,

Nakuru Nakuru

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

SIGNED

Bowry Maraga & CompanyAdvocates for the Defendant

Drawn & Filed by:-

Bowry Maraga & Co. AdvocatesP.O. Box 671, NAKURU

TO: The Deputy Registrar, High Court of Kenya, P.O. 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 parities 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 ofthe superior court.

It has been held time and again that a notice of appeal is aprimary document. It gives jurisdiction to this Court. Theadvocates for the appellant realized the errors contained in thefirst notice of appeal, reproduced above.

Upon realizing their error, the advocates moved this Court foran extension of time to lodge a fresh but correct notice of appealout of time. That application came for hearing before Cockar (thethen Chief Justice) , sitting as a single Judge of this Court and he'advised' the appellant's advocates that they ought to have firstmoved the High Court for such extension. The appellant's advocatesmoved the High Court, as advised. The High Court (Ondeyo, J) allowed the application despite objections by Mr. Kagucia for thefirst third party. The advocate for the plaintiff did not object.It is not clear if the second third party was before the HighCourt. At any rate it appears he was not before the High Court atthat stage. The application before the High Court was broughtunder Section 7 of the Appellate Jurisdiction Act (the Act). Theapplication was allowed, as a result of which the appellant lodgeda fresh notice of appeal on the 16th December, 1997, that is priorto the lodgment of the record of appeal. The appeal itself, waslodged on 30th November, 1998 and the record of appeal includes thefresh notice of appeal.

Therefore, effectively, the position is that whilst the firstnotice 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 Njoroqe Mairo vs. Francis Gicharu Kariri & Another, Civil Appeal (Application) No. 186 of 1999, (unreported), said:

"In our view section 7, above, should be given aconstruction which would obviate ridiculous result.The intention of the legislature in enactingSeciton 7, above, clearly appears to us to be thatit can only be used and more specifically the veryfirst time the intending appellant manifests hisintention to appeal. It is for this reason that weagree with the remarks of Bosire Ag., JA (as hethem was) in the case of Edward Allan Robinson & 2others vs. Philip Gikaria Muthami, (CivilApplication 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 appealshave been struck out for incompetence and whodesire to file competent appeals. Once alitigant files a valid notice of appeal andhad obtained the necessary leave to appeal, where necessary, the matter respecting whichan appeal is intended, is thereby removed fromthe jurisdiction of the superior court, exceptfor limited matters in which specificjurisdiction has been conferred on it to dealwith. Section 7, above, presupposes that anintending appellant has not taken any othersteps in pursuance of that appeal.'

Besides, from a careful reading of the provisionsof rules 74 and 81 of the Rules of this Court, itis clear that they are intended to deal with thefiling of appeals for the first time. Thejurisdiction to restart the appellate procedures isnot donated by Section 7, above, but by rule 4 ofthe rules. The rule, in effect, empowers the courtto reinstate the struck out appeal, while Section7, above, empowers the High Court to, in effect, assist a litigant in distress who otherwise wouldnot seek help of either court for any interimrelief before he lodged his appeal for the first time."

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

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

The answer to the question posed by me is that the firstnotice of appeal, until struck out by this Court, on an applicationmade to it, remains and the High Court has therefore nojurisdiction to extend the time to lodge a fresh notice of appeal.

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

"But I must revert to section 7 of the Act. Thatsection in my view gives discreditionary powers tothe High Court to allow extension of time to file anotice of appeal when there is as yet nothingbefore this Court. It is in this particular aspectthat I agree with Bosire Ag. J.A. 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 enablethe 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 bea decision to be made by a single Judge; that isthe province of a full bench. Mrs. Gudka at firsttold me that I should treat the notice of appealbefore me to be deemed to have been withdrawnpursuant to rule 82. I do not know that a singleJudge of the Court can validly deem a notice ofappeal to have been withdrawn and then proceed toact 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 struckout by full bench on an application to it. If a single Judge ofthis Court cannot so deem a notice of appeal to be withdrawn, afortiori, 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 thefirst respondent, the court must be moved to makethe order declaring a notice of appeal "deemed tohave been withdrawn". Rule 82, in pertinent part, provides that:

'If a party who had lodged a notice of appealfails to institute an appeal within theappointed time, (a) he shall be deemed to havewithdrawn his notice of appeal and shall,unless the court otherwise orders, be liableto pay the costs arising therefrom of any ofpersons on whom the notice of appeal wasserved'.

We concede that there is no express provisionrequiring a party to move the Court in that regard,however, a careful reading of rule 82 clearlyreveals that such an application is necessary. Thephrase "unless the court otherwise orders-" clearlyshows that a court order is necessary and suchorder can only be validly made by a full bench inan application brought under rule 80 of the Courtof Appeal Rules. That is the conclusion the singleJudge came to. We have no basis upon which tofault him on that. The reference therefore failsand is dismissed with costs".

The appeal sought to be struck out is incompetent because theextension of time to lodge the second notice out of time granted bythe High Court was without jurisdiction. Also the first notice ofappeal was incompetent for non-inclusion of the names of the twoaffected parties already referred to by me. I do not know if thefirst notice of appeal was served on the second third party. Itought to have been served. However it is incompetent and invalidfor non-inclusion of the first and second third parties' namestherein.

There is also the factor of the second third party not beingserved with the notice of appeal. The reason why he was not soserved is not known to me. However, it is not for the intendingappellant to decide whether or not to serve a notice of appeal ona party in the suit. Such intending appellant ought to, withinseven days after lodging the notice of appeal, apply to the Courtfor direction that a party need not be served with a copy of thenotice of appeal. See rule 76(1) of the Rules of this Court. Itis for the appellant to decide whether or not to seek extension oftime 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 onthe issue as to whether or not the High Court had jurisdiction togrant the extension of time as sought. He had raised that issuebefore the High Court. He ought to have, in those circumstances, appealed, with leave, against the ruling of the High Court. He didnot do so and instead by a side-wind method argued the pointbefore this Court.

I would therefore strike out Civil Appeal No. 274 of 1998 noton the grounds advanced by Mr. Kagucia but on the grounds alreadypropounded by me. I would also strike out the first notice ofappeal as it is admittedly defective. I would make no order as tocosts.

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

A.B. SHAH

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JUDGE OF APPEAL