



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 274 of 1998

TRIMBORN AGRICULTURAL ENGINEERING LIMITED.....APPELLANT

AND

DAVID NJOROGE KABAIKO.....1ST RESPONDENT

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

(An application in an appeal from the judgment of the High Court of Kenya at Nakuru

(Lady Justice Ondeyo) dated 20th June, 1996

H.C.C.No.395 of 1992)

RULING OF OWUOR. J.A

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 H.C.C.C 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 and 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 for 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 it is in existence and is a primary document in terms of rule 85(I)(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 begun 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 been withdrawn under rule 82 of the Rules. See *Attorney General vs Kamlesh Mansukhlal Damji Pattni and 2 others* C.A 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.

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

E. OWUOR

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JUDGE OF APPEAL