REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 83 OF 2000

BETWEEN

YASHVIN SHRETTA.....APPLICANT

VERSUS

1. VADAG ESTABLISHMENT

2. NUMISED A.C.

3. HEZEKIAH WANG'OMBE GICHOHI & GEORGE KIMEU

(AS INTERIM LIQUIDATORS OF LEISURE LODGES

4L.TD LEISURE LODGES LTD

5. PRIME CAPITAL & CREDIT LTD

6. PRIME BANK LTD.

7. ANNE OLGA ERIKSON, P.H. SHAH, T.J. BIRNNIE (AS RECEIVERS AND MANAGERS OF LEISURE LODGES LTD.)

8. DEUTSCHE INVESTMENTS UND ENTWICKLUNGSGESCHAFT mbn (DEG)

9. WILLY LIENS

10. SAFE RENTALS LTD

11. MOHANSONS FOOD LTD.....RESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Hon. Justice T. Mbaluto) given on 3rd March, 2000 in H.C.WINDING CAUSE NO. 28 OF 1996)

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RULING OF THE COURT

The applicant, Yashwin Shretta, by a notice of motion lodged on 29th May, 2000 and stated to be brought under rules 13, 76, 80 and 85 of the Rules of this Court (the Rules), applies to strike out the appeal lodged by the first respondent, Vadag Establishment (the appellant) on the following grounds.

> "1.That the first respondent (the appellant) has excluded from its record of appeal primary documents namely:-
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> a)The first respondent's replying affidavit sworn on 16th June, 1999, a reply to the appellant's (through Mr. Virendra Ponda) further affidavit sworn on 26th May, 1999 in support of the appellant's application dated 19th January, 1998 to strike out the petition;
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> b)The appellant's proposed consent letter dated 20th September, 1999 addressed to Deputy Registrar, High Court (Milimani Commercial Division);
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> c)The first respondent's proposed consent letter dated 20th September, 1999.
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> 2.The appellant did not serve its notice of appeal dated 6th March, 2000 on persons directly affected by this appeal, namely Bipinchandra Jamnadass Kantaria, Zorba Limited, Patcham Holdings Limited, Numised AG, Willy Liens, Safe Rentals Limited and Mohansons Foods Limited.
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> 3.The appellant has included in its record of appeal, documents which are not clear and easily legible.
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> 4.The appellant's notice of appeal dated 6th March, 2000 is defective in that the appellant proposes to appeal against determination of the High Court from which no appeal lies by virtue of a consent letter dated 15th October, 1999.
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> 5.The appellant has not arranged the pleadings and documents in a chronological order."

When this application came up for hearing before this Court on 7th June, 2000 Mr. Kamau Kuria for the applicant sought and obtained leave to argue a further ground in support of the application which boils down to this:

> That the notice of appeal is incompetent in that it does not have names of all parties or persons on whom it is to be served: that it is not sufficient to name the parties' advocates only; that the parties must be named; that therefore there was non-compliance with rule 74(3) of the Rules.

The notice of appeal which appears at pages 2001 and 2002 of the record of appeal names only advocates who are to be served with the notice of appeal. Mr. Kuria urged that that is not sufficient. The names of the parties whom the advocates act for must be shown. Rule 74(3) of the Rules requires the naming of the parties, so Mr. Kuria urged. Rule 17(1) of the Rules provides that when any document is required to be served on any person, in the absence of any special direction, such documents shall be served personally or on any person entitled under rule 22 to appear on his behalf . Rule 17(2) provides, further, that if more than one party is represented by an advocate, it shall be sufficient if one copy of that document is served on that advocate. Rule 22 of the rules provides for appearance in Court by any party to any proceedings either in person or by an advocate.

It is quite clear therefore that when an advocate is on record as acting for a party a notice of appeal can be served on the advocate. Non-naming of the party itself is not fatal or even irregular. It may be prudent to name the parties but a notice of appeal is not invalid by reason of non-naming of the parties when their advocates are named and served. Rule 74(6) of the rules prescribes that the format of a notice of appeal, that is Form D, should be substantially complied with.

A notice of appeal which substantially complies with Form D cannot be void by reason of a deviation which does not affect the substance of the document- See Section 72 of the Interpretation and General Provisions Act, Cap.2, Laws of Kenya. Even Order III rule 3(1) of the Civil Procedure Rules clearly points out that a process served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs. The persons or parties who had appeared in the superior court had given their addresses for service care of their advocates and in our view it is sufficient to name, in the notice of appeal, such addresses. We see no merit in this ground and reject the same.

We come now to the first of the grounds relied upon by Mr. Kuria, that is, non-inclusion in the record of appeal of the affidavit of Mr. Shretta sworn on the 16th day of June, 1999 (the Affidavit). Non-inclusion of the Affidavit as well as the non-inclusion of the appellant's proposed consent letter dated 20th September, addressed to the Deputy Registrar of the superior court and the first respondent's proposed consent letter of the same date, in the record of appeal according to Mr. Kuria's contention, is fatal to the competency of the appeal as these are all primary documents. Mr. Kuria opened up his argument on the non-inclusion of the affidavit by urging that the same amounted to a pleading and that therefore rule 85(1)(c) of the Rules required inclusion thereof in the record of appeal. Rule 85(2A) does not allow filing of a supplementary record of appeal, with leave, if a pleading is not included in the record of appeal. Mr Kuria expanded his argument by urging that the Affidavit fell under rule 85(1)(f) and also under rule 85(1)(k) of the Rules. When confronted with the definition of the word "pleading" in section 2 of the Civil Procedure Act Mr. Kuria more or less abandoned his argument to the effect that the affidavit was a pleading. "Pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counter-claim of a defendant. Certainly an affidavit sworn in support of say, an originating summons or a petition to wind up a company, may well be a pleading but not an affidavit in response to or in support of an interlocutory application. Such an affidavit could qualify for inclusion in the record of appeal under rule 85(1)(k) of the Rules. Mr. Kuria, at first conceded that much, but on reflection he urged that the non-inclusion of the Affidavit rendered the appeal incompetent by virtue of rule 85(1)(f) as read with rule 85(2A). Rule 85 (1)(f) provides for inclusion in the record of appeal:

"(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof:"

The question that falls to be decided therefore is: is the Affidavit a document that falls under rule 85(1)(f) because if it does then the appeal is incompetent?

Mr. Oraro responded to Mr. Kuria's arguments by pointing out that the affidavit had nothing to do with supporting the application to strike out the petition under Section 222 of the Companies Act Cap 486. That application was filed in the superior court on 20th January, 1998 and was ruled on by the superior court (Ole Keiwua, J, as he then was) on 31st July, 1998. Ole Keiwua, J did not strike out the petition but he stood over the petition to enable the disputing parties to agree on terms upon which the issue of price (value) of the applicant's shares in the company (Leisure Lodges Limited) may be referred to arbitration. He ordered further that if the said parties did not agree on the said terms the matter may be listed, for arguments on any such question of disagreement, before the superior court. The applicant sought to appeal against that ruling of Ole Keiwua, J but he did not succeed in mounting an appeal so that the determination by Ole Keiwua, J stands as final insofaras what he ordered.

Then the appellant filed an application in the superior court, invoking its inherent powers, seeking the removal of the joint interim liquidators (Messrs. Gichohi & Kimeu). That was on 14th September, 1998. One of the grounds upon which that application was based was that the superior court having found that there is an alternative remedy available to the applicant and having stayed further proceedings in the winding-up petition, the office of the Joint Interim Liquidators was rendered otiose. The appellant also put forward another ground in support of its application saying in effect that the Joint Interim Liquidators were not taking into account the wishes and interests of the appellant, the majority shareholder in the company.

The Affidavit was lodged on behalf of the applicant in response to the affidavit sworn by Mr. Ponda (on behalf of the appellant - the majority shareholder) and filed in court on 26th May, 1999. A close examination of that affidavit shows that the same was sworn to hasten the process of determination of fair market value of the applicant's shares and was seeking the court's intervention for further directions to determine such fair market value. The applicant states in paragraph 7 of his affidavit in support of the present application as follows:

"That the ruling which the appellant is appealing against is on the applicant's application dated 19th January, 1998 which appears at pages 987 and 988 of the record."

Now that is not a factual statement. That ruling was in respect of an application to strike out the petition which we have already referred to. The appellant is appealing against the ruling of Mbaluto, J delivered on 3rd March, 2000. The learned Judge points out as follows:

"The purpose of this ruling is to determine the basis upon which the differences between the parties hereto may be referred to arbitration."

It is clear therefore that the ruling of Ole Keiwua, J delivered on 31st July, 1998 is not the one being appealed against by the appellant. Mr. Shretta's Affidavit filed on 16th July, 1999 in resonse to Mr. Ponda's affidavit of 26th May, 1999 was filed in the superior court before this Court put a final seal on the applicant's proposed appeal against the ruling of Ole Keiwua, J. Mr. Shretta talks of his right of appeal against the ruling of 31st July, 1998 and says that if his intended appeal succeeds there will be no need to refer the matter to arbitration. Mr. Shretta's affidavit is primarily aimed at stopping the court from referring the issue of determination of fair market value of his shares to arbitration as his intended appeal was yet to be mounted. It was not what one could refer to as a further or opposing affidavit in response to Mr. Ponda's original affidavit sworn on 19th January, 1998. Reference by Mr. Kamau Kuria to Mr. Shretta's affidavit before Mbaluto, J was really in response to the appellant's representative's affidavit to get the court to hear the application for reference to arbitration for determination of fair market value of Mr. Shretta's shares. That was resolved by consent order of 14th September, 1998 and the terms of agreement for reference to arbitration were recorded by consent of parties on 15th September, 1999 before Mbaluto, J. Therefore Mr. Shretta's affidavit (the Affidavit) in opposition to the appellant's representative's affidavit to settle the terms of arbitration was not in response to the application for striking out of the petition. The submissions before Mbaluto, J. in that regard were on points of differences on the issue of terms of reference to arbitration.

It is for these reasons that we think that the affidavit falls under rule 85(1)(k) of the Rules at best. It was not an affidavit read or put in evidence at the hearing. Such being the case the appeal is not incompetent. If the applicant feels that the affidavit is required to be referred to he can put it on record by way of a supplementary record pursuant to rule 89(1) of the Rules, or the appellant can apply under rule 85(2A) for leave to put the same in by way of a supplementary record. We see no merit in this point also and we reject the same.

The two letters, both dated 20th September, 1999 addressed to the Deputy Registrar of the superior court and earlier referred to by us are not exhibits or documents put in evidence at the hearing. At best they qualify to be referred to as documents under rule 85(1)(k) of the Rules. Again the applicant could have brought those in by way of a supplementary record under rule 89(1) of the Rules. They were not proffered at the hearing but were addressed to the Deputy Registrar of the superior court, as already pointed out. We do not classify these documents as primary or core documents and the objection by Dr. Kuria is not meritorious.

We come now to the question as to whether or not the notice of appeal has been served on all parties directly affected by the appeal. It has been served on Messrs Kamau Kuria & Company, M/s Asige Kiverenge & Anyanzwa, Satish Gautama Esquire, Inamdar & Inamdar, Kaplan & Stratton, Kishore Nanji Esq., M/S A.B. Patel & Patel, all of whom are either firms of advocates or individual practitioners. It has also been served on Numised A.G. M/S Kamau Kuria & Kiraitu act for Mr. Shretta and Numised A.G., M/S Asige Kiverenge & Anyanzwa act for the interim liquidators Messrs Gichohi and Kimeu. Satish Gautama Esquire acts for Leisure Lodges Limited (the Company). M/s Kaplan & Stratton act for 7th and 8th Respondents that is Receivers & Managers of Leisure Lodges Limited and Deutsche Investments Limited. M/s Inamdar & Inamdar act for 5th & 6th respondents, Prime Capital & Credit Limited and Prime Bank Limited respectively. Mr. Kishore Nanji acts for the last three respondents who appeared as creditors in the petition.

What is important is who are the parties directly affected by the appeal. To find this out we must have recourse to the consent order recorded before Mbaluto, J. on 15th September, 1997. It reads:-

> "Order by consent the terms of the agreement to refer are as follows:-
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> 1.THAT all differences between Vadag Establishment (`Vadag') the majority shareholder, Yashwin Shretta ("the petitioner") and or Numised A.G. ("Numised") and Leisure Lodges Limited ("the Company") be and are hereby referred to arbitration, and
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> 2.THAT the parties hereto namely Vadag, the Petitioner, Numised and the Company do agree upon the terms of reference within seven (7) days of the date hereof and in default of such agreement the parties agree that this Honourable Court do determine the basis upon which the reference is made as well as the actual terms of the reference and such determination by this court shall be final and binding on all the said parties.

Signed:

1.Dr. Kamau Kuria for Petitioner and or Numised.

2.Mr. Ochieng Oduol for Vadag.

3.I.T. Inamdar for Satish Gautama for the Company.

4.Mr. J.J. Asige for the interim liquidators."

It is clear therefore that the ruling of Mbaluto, J which is appealed against was in regard to or should have been in regard to the determination of the basis upon which the reference to arbitration was to be made as well as actual terms of reference as between the four parties abovementioned. In any event Numised A.G. was served. Dr. Kuria's complaint is that Mr. B.J. Kantaria, Zorba Limited, Patcham Holdings Limited, Numised A.G., Prime Bank Limited, Willy Liens, Safe Rentals Limited and Mohansons Foods Limited who were parties directly affected by the appeal were not served and that it is not for the appellant to decide whom not to serve; it is for the Court to decide in terms of provision made in the proviso to rule 76(1) of the Rules.

Mr. Shretta himself says that Numised A.G. is the trustee for Zorba Limited (Zorba) and Patchman Holdings Limited (Patchman). Mr. Shretta quite clearly brings the disputes to the fore for himself and Patcham. Dr. Kuria quite clearly holds himself out as acting for Numised A.G. Zorba & Patcham are the beneficiaries, the trustee being Numised A.G. Mr. Shretta now says that this appeal cannot proceed unless the said beneficiaries are served with a notice of appeal. Order XXX rule 1 of the Civil Procedure Rules provides as follows:-

> "1.In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties."(underlining supplied).

The superior court did not think fit and neither Patcham nor Zorba sought leave to appear through separate counsel. In these circumstances we are unable to say that Zorba & Patcham are not before this Court. They are here through Numised AG. We are certain that if there is any conflict of interest between Zorba & Patcham, advocates on record for the parties to the reference can take care of the situation. It is also set out in Halsbury's Laws of England, fourth edition, volume 37, paragraph 243 that:-

> "243. Trustees and personal representatives. Trustees, executors and administrators may sue and be sued on behalf of or representing the estate of which they are trustees or representatives, without joining the beneficiaries."

We see no merit in the contention by Dr. Kuria to the effect that Zorba and Patcham are not before the Court. As pointed out earlier Numised AG is before the Court. B.J. Kantaria is the holder of a power of attorney from Numised A.G. Prime Bank is before the Court. Willy Liens, Safe Rentals Limited and Mohansons Food Limited are also before the Court through Mr. Nanji although they chose not to appear. These three are creditors. Now that the winding-up proceedings before the superior court do not fall for the main purpose the same were intended for, there being now an order for purchase by the majority shareholder of the shares of Mr. Shretta, the creditors go out of the picture, in any event.

The next ground taken up by Dr. Kuria to obtain an order for striking out of the appeal is that some documents in the record of appeal are not clear and not easily legible and some contain portions underlined. Documents containing portions underlined are documents as presumably served on Mr. Oraro's office. Nothing turns on that. If the documents not quite legible are or do become necessary for arguments in the appeal there is nothing to stop either the appellant or the applicant from lodging a supplementary record of appeal. An upside down page is a kind of error which can creep into the record when a huge record is prepared. It can be supplied if necessary and included. These complaints do not qualify for striking out of a record of appeal.

The other ground taken up by Dr. Kuria is that the appellant is proposing to appeal against a consent order. Normally there can be no appeal against a consent order but if during the course of arguments on the terms of a consent order other matters crop up or are ruled on and are disputed an appeal will lie with leave of the superior court. The record shows that after the delivery of the ruling on 3rd March, 2000 counsel said:

> "Mr. Oraro"There were two applications before the court. One was to strike out the petition and the other were consequential order (sic) arising from all the proceedings before the court. I apply in respect of this ruling for leave to appeal to the Court of Appeal.

Mr. S. Inamdar:I endorse what Mr. Oraro has said.

Dr. Kamau Kuria:No objections to the application.

Mr. Asige:I leave it to court.

Order:Leave to appeal, if required is granted."

A consent order can be varied by consent. Dr. Kuria had no objection to the granting of leave to appeal to this Court. The appellant is estopped from now contending that there can be no leave to appeal and as already pointed out if there are differences or disputes as regards the effect of or the result of what emanates from a consent order, there may well be a right of appeal with leave.

We come now to the last of Dr. Kuria's objections that is that the record of appeal is not in a chronological order. On this point, we see no prejudice either to the applicant or any one else not following fully the chronological order. The record of appeal is clearly comprehensible and the points of appeal could can well be argued without difficulty. It is not always that it is possible to put all documents in chronological order.

The upshot of all this is the application dated 26th May, 2000 is dismissed with costs.

Dated and delivered at Nairobi this 7th day of July, 2000.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

……

JUDGE OF APPEAL

A.B. SHAH

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.