IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, O'Kubasu & Githinji JJ A)

CIVIL APPEAL NO 276 OF 2001

HARIT SHETH T/A HARIT SHETH ADVOCATE…....…...……..APPELLANT

VERSUS

K. H. OSMOND T/A K H OSMOND ADVOCATE…………..RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at

Milimani Commercial Court Nairobi (Justice Ole Keiwua) dated

16th October, 1998 in HCCC No 311 of 1998 (OS)

RULING

The respondent in this appeal had by a notice of motion dated 27th June, 2003 applied for an order that the appeal lodged on 26th October, 2001 be struck out on the ground that the appellant did not seek either the leave of the superior court or of this court to lodge the appeal contrary to rule 39 of the Court of Appeal Rules "the rules" hereinafter. When both the application and the appeal came for hearing on 29th July, 2003 Mr Egala, learned counsel for the respondent (in the appeal) withdrew the application with leave of the court on the ground that it was brought after expiry of more than 30 days from date of service of the record of appeal in contravention of the proviso to rule 80 of the rules. It was however the view of the court that since the issue of lack of leave to lodge an appeal touches on the jurisdiction of the court, that issued should be heard before the hearing of the appeal on the merits and the court so ordered. This ruling therefore concerns the issue of whether or not leave of the superior court or of this court is required to appeal against an order dismissing an originating summons for the enforcement of an advocates undertaking under order LII rule 7 Civil Procedure Rules.

The appellant filed an originating summons in the superior court under order 52 rule 7 and 10 of the Civil procedure Rules and section 3A of Civil Procedure Act seeking an order that the respondent do honour his professional undertaking to pay the appellant Kshs 15,512,829/05 together with the specified interest. The originating summons was heard on the merits by M Ole Keiwua, J (as he then was), who dismissed it on 16 October, 1998. This appeal is against that dismissal. Mr Egala had raised the issue of absence of leave to appeal because order XLII rule 1(1)(dd) does not include an order under rule 7 of order LII as one of the orders appellable as of right. Indeed, Rule 1(1)(dd) of order XLII specifies orders made under

rules 4,5,6 and 6A of order LII as the only ones that are appellable as of right. Order LII rule 7 provides as follows:

"7(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made:

(a) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(b) In any other case, by originating summons in the High Court

(2) Save for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made".

There is a marginal note to rule 7 which states:

"Application for order of enforcement of an undertaking".

Order LII rule 6A which does not now exist and which is referred to in order XLII rule 1(1)(dd) of the Civil Procedure Rules was in identical terms with the current order LII rule 7 including the marginal notes. Mr Nagpal for the appellant submitted that rule 6A of order LII does not exist and that it has been renumbered as rule 7 by a 1996 amendment. He further submitted that the current rule is verbatim rule 6A; that the Rules Committee failed to make consequential amendment to order XLII rule 1(1)(dd); that this court should view the omission as just an omission which was not intended to deprive a litigant an automatic right of appeal and that it is a serious matter to deprive a litigant a right of appeal. Mr Egala on the other hand, admitted that rule 6A of order LII does not exist and that it had been replaced by rule 7.

Nevertheless, he contended that leave to appeal is required because rule 7 of order LII is not covered by order XLII rule 1(1)(dd) despite two recent amendments to Civil Procedure Rules by L N 36 of 2000 and L N 128 of 2001 respectively.

Our own research reveals part of the history of the amendment to Civil Procedure Rules as hereunder. The Civil procedure Act revised edition 1972, contained order LII. Order LII was however an interpretation provision which contained only two rules. It did not cover matters under the Advocates Act as now contained in order LII. That order (order LII) was deleted and substituted with another by The Civil Procedure (Amendment) Rules 1973 – LN No 60 of 14th April, 1973. The 1973 amendment, *inter alia*, introduced for the first time 9 rules relating to the Advocates Act including rule 6(1) and 6(2). The Civil Procedure Rules were amended again in 1975 by the Civil Procedure (Amendment) Rules 1975 – LN No 119 of 19th September, 1975 which introduced rule 6A of order LII for the first time. That rule (6A) was retained in the 1978 and 1985 editions of the Civil Procedure Act.

The Civil Procedure (Amendment) Rules 1978, *inter alia*, deleted and replaced rule 1(1) of order XLII as amended by LN No 66 of 1973 and LN No 119 of 1975. The 1978 amendment, in particular, introduced rule (1)(dd) of order XLII which reads as follows:

"(dd) Order LII rules 4, 5, 6 and 6A (Advocates)".

The Civil Procedure Amendment Rules 1996 – LN No 5 of 9th February,

1996 *inter alia*, by paragraph 10 deleted the entire order LII and replaced it with a new order which as

already stated omits rule 6A.

The Civil Procedure Rules are subsidiary legislation made by the Rules Committee under the authority of section 81 of the Civil Procedure Act.

They have the same force of law as the Civil Procedure Act which authorizes their promulgation. It follows therefore that the canons of interpretation of statutes essentially apply to the interpretation of subsidiary legislation, (ie Civil Procedure Rules).

In this particular case the rules must be construed in accordance with the intention of the Rules Committee. They must be construed as a whole so to avoid any inconsistency or repugnancy either with section or as between the section and other parts. Further the rules must be construed as far as possible in the sense which make them operative. The last part of paragraph 582 of *Halsbury laws of England* 3rd edition Vol 36 states:

"Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of the draftsman unless such language is intractable".

It is manifest from the Civil Procedure (Amendment) Rules 1978 that by deleting and replacing of rule 1(1) of order XLII, the Rules Committee intended to expand the scope of the orders appellable as of right. More specifically by including rule 6A of order LII among the orders appellable as of right, the Rules Committee intended that an order made by court in an application for enforcement of an advocates undertaking should be appellable as of right. Although rule 6A of order LII was omitted in the reform of order LII by the Civil Procedure (Amendment) Rules 1996, the provisions of that rule were retained as rule 7 in identical terms. The 1996 amendment did not however contain a corresponding amendment to rule 1(1)(dd) of order XLII deleting rule 6A and replacing it with rule 7 of order LII. Since rule 6A does not now exist in order LII rule 1(1)(dd) of order XLII as it relates to rule 6A f order LII would have no meaning if interpreted literally as suggested by Mr Egala.

In our view, order XLII rule 1(1)(dd) should not be construed literally. Rather, it should be construed together with order LII in the present form and be given a sensible meaning so as to make it operative for there is nothing to show that the Rules Committee intended to deprive a litigant a right of appeal against an order made under order LII rule 7 Civil Procedure Rules.

Having regard to the history of the amendments to order XLII as stated above and for the foregoing reasons, we are satisfied that the Rules Committee inadvertently omitted to update order XLII Rule 1(1)(dd) in the Civil Procedure (Amendment) Rules 1996 and that rule 6A of order LII in order XLII rule 1(1)(dd) should be read as referring to rule 7 of order LII.

Consequently, we hold that the order of the superior court dated 16th October 1998 is appellable as of right and that the appeal should proceed to hearing on its merits on a date to be fixed at the registry. The costs of these proceedings to be costs in the appeal.

It is fitting that for the benefit of legal practice, a recommendation be made to the Rules Committee, which we hereby make, that appropriate amendments to rule 1(1)(dd) of order XLII Civil Procedure Rules be made as soon as possible.

Dated and delivered at Nairobi this 1st day of August, 2003

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

……………….

JUDGE OF APPEAL

E.M. GITHINJI

……………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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