REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 194, 195 & 196 of 2006

RAJNIKANT KARSANDAS SOMAIA
.....APPLICANT

AND

1. **ORIENTAL COMMERCIAL BANK OF LTD (FORMERLY DELPHIS BANK LIMITED)**
2. **CHANNAN SINGH CHATTH**
3. **SATWANT SINGH CHATTHE**
4. **SUKHWINDER SINGH CHATTHE**
5. **RAGHBIR SINGH CHATTHE ALL T/A CHANNAN AGRICULTURAL CONTRACTORS**
6. **CHARANJIT SINGH HAYER …….....…RESPONDENTS**

(An application to deem the notice of appeal as having been withdrawn and/or struck out arising from the ruling of the High Court of Kenya at Kisumu (Mr. Justice Tanui) dated 5th May, 2005

in

H.C.C.C. NO. 164 OF 2003)

****

RULING OF THE COURT

In a ruling of this Court differently constituted dated 23rd March, 2007, these applications namely Number NAI. 194, 195 and 196 all of 2006 were consolidated. They came before us for hearing and were heard together. This ruling is therefore in respect of all of them.

In a plaint filed in the superior court at Kisumu on 3rd December, 2003 the second, third, fourth and fifth respondents in the application sued the first respondent in the applications, then known as Delphis Bank Limited, seeking three declarations and orders directing the first respondent to execute a discharge of the charge registered against land parcel Number South/Wanga/Lureko/1892, and payment of the sum of Kshs. 3,750,000 and interest thereon at court rates since October, 1999 upto the date of payment. The first respondent, in response filed statement of defence and counter-claim. In the counter-claim, it cited the applicant in these applications Rajnikant Karsandas Somaia as the third defendant to the counter-claim. The applicant filed statement of defence to the counter-claim.

On 9th March, 2005, the matter came before the superior court (Tanui, J) for hearing. The advocates for the defendants sought adjournment and the hearing was adjourned to 4th May, 2005. On that day the record shows that Miss Muiru for the defendant bank first applied to the court to refuse audience to Mr. Menezes who was the learned counsel for the first defendant to the counter-claim. The learned Judge in his ruling refused to grant that application and ordered the hearing to proceed with Mr. Menezes as one of the counsel representing one of the parties. Then Mr. Wasuna the then learned counsel for the third defendant to the counter-claim who was also a counter-claimant applied that the defendant bank presents its case first. Miss Muriu for the bank objected to that application. The learned Judge made an order directing the defendant bank to begin its case first. Miss Muriu was not amused by that order and promptly sought leave of the court to appeal against it. The learned Judge granted leave to the defendant to file an appeal against the ruling. Thereafter, Miss Muriu applied for adjournment and stay of proceedings for 7 days to enable her file a formal application for stay of proceedings. That application was opposed and in his ruling, the learned Judge refused it and ordered the hearing to proceed. It would appear that thereafter the matter was adjourned to 2.30 p.m. on the same day. At 2.30 p.m. the matter proceeded to hearing but the defendant was not represented.

An application was made that the Bank's counter-claim against all the defendants to the counter-claim be dismissed with costs. The court then made the following orders:-

"Order.

1. The defendants counter-claim against the three defendants to the counter-claim namely, Charanjit Singh Hayer, Rajnikant Karsandas Somaia and Ragbir Singh Chatthe is henceforth dismissed with costs.

2. The plaintiffs to proceed to prove their case against defendants and 1st and 2nd defendants to the counter-claim."

Thereafter no other orders were made on that day, 4th May, 2005, and the formal proof proceeded. We have given a detailed account of the events of 4th May, 2005 deliberately because, it is clear to us that on that day the superior court made several orders one of which was in favour of the first respondent in these applications which was the defendant bank in the superior court.

The first respondent felt aggrieved by those decisions. Naturally we would believe it was aggrieved by those decisions that went against it and certainly not the decision granting it leave to appeal which was in its favour. It filed Notice of Appeal dated 5th May, 2005. That Notice of Appeal read as follows in the body of it:-

"NOTICE OF APPEAL

Take notice that the defendant herein, THE DELPHIS BANK LIMITED being dissatisfied with

the decision of the Honourable Justice Tanui, given at the High Court Kisumu on the 4th day of May, 2005 intends to appeal to the Court of Appeal against the whole of the said decision.

The addresses for service for the Delphis Bank Limited is care of Njoroge Rugeru & Company, Advocates, Arbor House, Arboretum Drive P.O. Box 46971-00100, Nairobi."

Thereafter, and during the life of that Notice of Appeal the first respondent filed two other Notices of Appeal. One was dated 10th May, 2005 and the other was dated 16th May, 2005. The Notice of Appeal dated 10th May, 2005 is specific. It states that the first respondent was dissatisfied with the decision of the learned Judge given on 4th May, 2005 by which he allowed L. G. Menezes to participate in the proceedings. Thus the intended appeal as far as that Notice of Appeal was concerned is against the order allowing Menezes to participate in the proceedings before the learned Judge. As to the Notice dated 16th May, 2005, it was also specific. It was challenging the summary dismissal of the first respondent's counter-claim. There were thus three Notices of Appeal filed in respect of the rulings delivered by the learned Judge of the superior court on 4th May, 2005. The first Notice of Appeal was against the entire decision made on that day without specifying which of the decision or decisions the first respondent intended to appeal against. The second was against the order allowing Mr. Menezes to participate in the proceedings as an advocate representing one of the parties and the last notice was giving intention to appeal against the summary dismissal of the first respondent's counter-claim.

On being served with those notices of appeal, the applicant in these three applications Rajnikant Karsandas Somaia filed the three applications before us seeking in each of them that the Notice of Appeal be deemed as having been withdrawn or be struck out and that the first respondent do meet the costs of the Notices of Appeal and of the application. The grounds of the application were almost identical in each application and were that no appeal had been instituted within the stipulated time; that the notice of appeal in each case was not a valid and/or competent notice of appeal; that it was over twelve months since the notice of appeal was lodged and no appeal had been instituted, and that the Notice lodged by the first respondent was an utter abuse of the court process.

The applications were each filed on 6th July, 2006. Since then we have been told, the appeals have been filed and in our view, that being the case, the question as to whether the Notices of Appeal should be considered as withdrawn on account of there being no appeal filed since the Notices were filed is no longer available to us.

The first respondent, in response to the applications, filed replying affidavit in respect of each application. We have perused and considered all the replying affidavits. Mr. Wasuna, learned counsel for the applicant, submitted that the Notice of Appeal dated 5th May, 2005 was defective in that there were several orders made by the learned Judge on 4th May, 2006, one of which was in favour of the first respondent, but the Notice of Appeal failed to specify which order the first respondent intended to appeal against preferring to state that it was intended to appeal against the whole of the said decision. The other two Notices of Appeal though proper as they were specific in what the first respondent intended to appeal against, were nonetheless not properly filed as they were filed during the lifetime of the Notice of Appeal dated 5th May, 2005 and there cannot be two Notices of appeal in respect of one matter. Both Mr. Karanja, learned counsel for the 2nd, 3rd, 4th and 5th respondents, and Mr. Menezes for the 6th respondent, supported the position taken by Mr. Wasuna with Mr. Karanja adding that as the defective Notice of Appeal dated 5th May, 2005, was still on record, it was not open for the first respondent to file other Notices of Appeal without first having that of 5th May, 2005 struck out. That was an abuse of the court process. Mrs. Mwangi, learned counsel for the first respondent conceded that the Notice of Appeal dated 5th May, 2005, annexed in Civil Application Number 196 of 2006 is defective as it does not specify the actual decision it intends to appeal against. However, it was her contention that as the other two

Notices of Appeal were specific on the decision each sought to appeal against, they were proper and should stand. That is because there is no provision of withdrawing a Notice of Appeal, as the one dated 5th May, 2005.

The starting point is ***rule 74 (3)*** of the Court of Appeal Rules. It states as follows: -

"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the manner and address of all persons intended to be served with copies of the notice."

That rule is coached in mandatory terms and in our view, a Notice of Appeal that does not comply with the requirements of that Rule cannot be considered a valid Notice of Appeal. This Court considered a similar situation in the case of ***Richard Kanyago and two others vs. David Mukii Mereka CA No. 94 of 2001*** and stated as follows:

"As the appellant's Notice of Appeal does not accord with rule 74(3), above, which is worded in mandatory terms, and in view of the fact that the Rules do not permit amendment of primary documents the notice of appeal is incurably defective and renders the present appeal incompetent."

The Notice of Appeal dated 5th May, 2005 was clearly defective and invalid. Mrs. Mwangi conceded that it was not a valid Notice of Appeal as it did not specify which decision it was intended to appeal against and as it was so omnibus that it in fact intended to appeal against all the decisions one of which was in favour of the first appellant. We agree with her and on that point we agree with Mr. Wasuna, Mr. Karanja and Mr. Menezes as well.

Mrs. Mwangi however, argues that the other two Notices of Appeal in respect of which application numbers 194 and 195 of 2006 were filed were valid as they specifically stated the decision in respect of which the intended appeals were filed. We have considered that argument. With respect, we do not agree. The Notice of Appeal dated 5th May, 2005 stated that it was intended to appeal against the whole decision made on 4th May, 2005. Two of the decisions made on that day were that Mr. Menezes would continue participating in matters that were before the Court and that the counterclaim filed by the first respondent was summarily dismissed. It is a matter of common sense that the Notice of Appeal dated 5th May, 2005 which is against the whole of the decision made on 5th May, 2005 was clearly against those two decisions as well. Thus that Notice of Appeal which was the original Notice of Appeal was an omnibus Notice of Appeal and it cannot be separated from the other two Notices of Appeal which specifically mentioned the two decisions leaving out the others. Those two decisions were part and parcel of the whole decision against which the Notice of Appeal dated 5th May, 2005 intended to appeal against. That is our view of the matter.

What is the effect of that finding" It is clear to us from that finding that as at the time the Notice of Appeal dated 10th May, 2005 and that dated 16th May, 2005 were filed and for that matter at present, there is in existence a Notice of Appeal dated 5th May, 2005. That Notice has not been struck out even if as argued by Mrs. Mwangi, it could not have been withdrawn. It is a Notice of Appeal against the whole decision of the superior court delivered on 4th May, 2005. Parts of that decision are the subject of the notices of appeal dated 10th May, 2005 and 16th May, 2005. Thus these two other Notices of Appeal have been filed during the existence of the notice of appeal dated 5th May, 2005 which, as we have stated over and over again, is also a Notice of Appeal intended to appeal against those same decisions plus others. In our view the other two Notices of Appeal i.e that of 10th May, 2005 and that dated 16th

May, 2005 are not properly on record even if they were meant to originate two different appeals. In the case of ***South Nyanza Sugar Co. Ltd. Vs. Hesbon Onyuro, Civil Application NO. NAI. 233 of 2000***, Owuor JA (as she then was) had this to say on a similar issue:-

"In this regard I fully agree with counsel for the respondent in that so long as the original Notice of Appeal is still on record, I have no jurisdiction to extend time for and yet (sic) another Notice of Appeal."

And in the case of ***Trans National Bank of Kenya vs. Hassan Amdun CA No. NAI. 133 of 2005***, Bosire J.A stated:

"Another issue which arises from this application is the fact that on 7th April, 2005, before this application was filed, the applicant filed, out of time, without leave a Notice of Appeal. That notice is still on record and it is not proper, in my view, to allow the filing of another notice of appeal."

Lastly, in the case of ***Fortune Finance Ltd vs Geoffrey Ngugi Githaiga CA No. NAI. 22 of 1999***, this Court addressed itself thus:-

"A notice of appeal is a primary document within the meaning of rule 85 of the Rules and the learned Judge had clearly no jurisdiction to make an order for filing a fresh Notice of Appeal while the original was still extant."

In the applications before us, whether one looks at the Notice of Appeal dated 10th May, 2005 and that of 16th May, 2005 as two separate Notices of Appeal originating different appeals, the underlying fact remains that in each, the Notice of Appeal dated 5th May, 2005 is an original Notice of Appeal, and is defective. So long as it remains in the record, the other two Notices of Appeal cannot be allowed to be on record.

As we have stated, since the appeals have been filed, we do not consider it our duty to go into whether they are valid or not. Neither do we think we need to delve into the prayer seeking that the Notices of Appeal be deemed as withdrawn in view of the lapse of time before the appeals were filed. In our view that aspect would have been relevant if by the time these applications were being heard no appeal or some of the appeals had not been filed. Now that they are filed their validity or non-validity is not before us. However, the decision we have reached in these applications may help the parties to chart out the next course they need to take in those appeals.

In the result, these three applications are allowed. The Notices of Appeal dated 5th May, 2005, 10th May, 2005 and 16th May, 2005 are each struck out. The first respondent shall pay the costs of each application. Orders accordingly.

Dated and delivered at Kisumu this 30th day of November, 2007.

P.K. TUNOI

……..

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR