



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI & SHAH, J.J.A.)
CIVIL APPEAL NO. 62 OF 1993**

BETWEEN

CARTER & SONS LTD.....APPELLANT

AND

1. KENYA FINANCE CORPORATION LIMITED

2. PEPCO CONSTRUCTION COMPANY LIMITED.....RESPONDENTS

**(Appeal from a Ruling and Order of the High Court of
Kenya at Nairobi (Hon. Mr. Justice Shields) dated
the 10th March, 1993**

in

H.C.C.C. NO. 5638 OF 1989)

RULING OF THE COURT

This is a Notice of Motion taken out by Pepco Construction Company Ltd (the second respondent) under rule 80 of the Court of Appeal Rules (the Rules), seeking an order striking out **Civil Appeal No. 62 of 1993**, filed by Carter & Sons Ltd (the appellant), on the ground that the appellant did not serve the notice of appeal dated 15.3.93, and lodged in Court on 18.3.93, on Karugu Contractors (Kenya) Ltd (Karugu Contractors), who was named as the second defendant in a suit brought by the appellant in the superior court against Kenya Finance Corporation Ltd (the first respondent), Karugu Contractors and the second respondent seeking, among other reliefs, a declaration that it was the owner of a certain earth-moving machine; an injunction restraining all the three defendants from interfering with the appellant's quiet possession of the machine; return of the machine or its value; and damages for conversion and loss of user.

The first respondent's defence to the appellant's claim was that the appellant had pledged the machine as security for a loan advanced to it by the first respondent. And that when the appellant defaulted on the agreed terms of repayment, the first respondent in exercise of its contractual rights under the loan agreement, sold the machine to Karugu Contractors. Karugu Contractors also filed a defence in which it confirmed that it purchased the machine from the first respondent as a bona fide purchaser for value without notice of any defect in title. In its turn, the second respondent stated in its defence that it had bought the machine from Karugu Contractors and raised a counterclaim for damages for loss of business.

The suit was heard by Shields, J. who gave judgment against all the three defendants jointly and

severally for the return of the machine which was lying at a police station in Nairobi and damages in the sum of Shs.7,200,000/-. Both the first and second respondents applied for a stay of execution of the monetary part of the decree pending appeal, but Karugu Contractors made no application. The Judge granted a stay on condition that the defendants paid a sum of Shs.720,000/-, being 10% of the damages awarded, to the appellant's Advocates. The appellant was unhappy with this order and sought leave to appeal to this Court, which was granted. It then filed a notice of appeal followed by an appeal. Neither of these documents was served on Karugu Contractors nor was Karugu Contractors joined as a respondent in the appeal. The first respondent is now in liquidation and for that reason we declined to hear Mr. Kowade on this motion.

It was submitted by Mr. Regeru, for the second respondent, that the appellant's failure to serve the notice of appeal on Karugu Contractors violated the mandatory provisions of rule 76 (1) of the Rules, which provides-

"76(1) An intended appellant shall, before or within 7 days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court on application, which may be made ex parte within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

He submitted that Karugu Contractors was a person directly affected by the appeal because it took part in the proceedings in the superior court and a decree was passed against it jointly and severally with the first and second respondents. And further that although it did not apply for a stay of execution of the decree, when the order was made on the application for stay of execution, it stayed the execution of the decree in relation to Karugu Contractors as well. Therefore, continued Mr. Regeru, any appeal seeking to challenge the propriety of that order must of necessity affect the interests of Karugu Contractors, and on that basis it must be a person directly affected by the appeal within the meaning of the rule.

But Mr. Sharma, for the appellant, did not agree with that submission. He submitted that although Karugu Contractors was a party to the suit, being one of the defendants, it was not a party to the applications for stay of execution of the decree made by the two respondents and that since the appeal is against the order made by the Judge in these applications, Karugu Contractors is not a person directly affected by the appeal.

With respect, Mr. Sharma's submission must be wrong because the order for stay affected the damages awarded against all the three defendants which, of course, included Karugu Contractors. If the sum of Shs.720,000/- was paid as ordered by the Judge, execution of the decree would be stayed against all the defendants, liability being joint and several. No execution could be levied against Karugu Contractors while the order remained in force. That is an advantage which accrued to Karugu Contractors without being involved in the application for stay and no step can be taken to alter that benefit to the detriment of Karugu Contractors without involving it in that process.

The purpose of rule 76(1) of the Rules was stated by Kneller J.A. (as he then was) in the case of **Abdul Waheed Sheikh v Abdul Shakoor Sheikh & Anor**, (Civil Appeal No. 12 of 1984) (Unreported), where the learned Judge said:

"The point is this. The object of the rule and of the proviso is that the rights of a party likely to be directly affected by the result of an appeal should not be affected without the party being provided with an opportunity of being heard."

That is the whole point of the rule. An order was made by the Judge the effect of which was favourable to Karugu Contractors. It cannot be challenged on appeal without an opportunity being accorded to Karugu Contractors of being heard. The proviso to rule 76 (1) actually caters for situations where the appellant may wish not to involve a party not directly affected by the intended appeal.

We are accordingly satisfied that Karugu Contractors is a person directly affected by the appeal and should have been served with the notice of appeal. And as no service was effected, and no application was made to dispense with service on Karugu Contractors, we grant the application and order that **Civil Appeal No.62 of 1993**, be and is hereby struck out with no order as to costs. We also deprive the second respondent of its costs on the motion because of a delay of more than 3 years in bringing the application.

Dated and delivered at Nairobi this 3rd day of December, 1996.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR