IN THE COURT OF APPEAL
AT NAIROBI
CORAM: CHUNGA C.J., TUNOI & SHAH, JJ.A
CIVIL APPLICATION NO. NAI. 115 OF 2000

BETWEEN

KAPLAN & STRATTON .....APPLICANT

AND

1. L.Z. ENGINEERING CONSTRUCTION LTD

2. YAYA TOWERS LIMITED

3. RAMESH MANEK.....RESPONDENTS

RULING OF THE COURT

This is a reference from the decision of a learned single Judge of this Court brought under rule 54(1) (b) of the Rules of this Court (the Rules). It is a two pronged reference whereby the applicant seeks reversal of the decision of the learned single Judge firstly, as regards the refusal by him to disqualify himself from hearing the application, and, secondly, as against the refusal by him to grant the orders sought.

The application was lodged on 25th April, 2000 and was stated to be brought under rules 4, 41, 52(1) and 74(1) of the Rules. The applicant sought the following orders:

> ***"1.The time for lodging and serving the Notice of Appeal be extended;***
>
> ***2.The time for lodging and serving the memorandum and Record of Appeal be extended;***
>
> ***3.The applicant be permitted to treat the five volumes of the Record of App eal in the struck out Appeal No. 39 of 1998 as part of the Record of Appeal in the intended appeal without filing fresh copies in the Court of Appeal and without serving additional copies on the Respondents to the intended Appeal so that the Applicant need only file a Record of Appeal containing a fresh memorandum of Appeal and copy of the fresh Notice of Appeal;***
>
> ***4.Such further or other orders to meet the ends of justice as may be necessary be made;***
>
> ***5.The costs of this application be provided for."***

On 7th April, 2000 this Court struck out with costs ***Civil Appeal No. 39 of 1998*** on the basis that the Notice of appeal given by the appellant (i.e. Trade Bank Limited (In Liquidation)) against the whole of the decision of the superior court (Pall JA sitting as a Judge of the High Court) dated 9th January, 1998 was invalid as:

(a)M/s Kaplan & Stratton Advocates had no authority to sign the notice of appeal which formed the basis of Civil Appeal No. 39 of 1998 as the same was signed without compliance with Section 241(1)(c) of the Companies Act of Kenya in that no prior sanction of the superior court was obtained to sign and lodge the said notice of appeal which was lodged in the superior court on 19th January, 1998. The sanction to lodge such a notice of appeal was granted by the superior court on 6th February, 1998 and such sanction given ex post facto does not validate the notice of appeal.

(b)This Court has no power to validate a notice of appeal signed by a person who had not obtained the sanction of the superior court to lodge the notice of appeal prior to lodgment thereof. "

This Court in deciding as it did in Civil Appeal No. 39 of 1998 followed its own decision in Civil Appeal No. 14 of 1998. The issue in both the appeals was as regards the validity of a notice of appeal signed by advocates prior to obtaining sanction of the superior court for lodgment of notice of appeal.

On 18th day of September, 1998 this Court had struck out the notice of appeal and the record of appeal in its ***Civil Appeal No. 14 of 1998*** . The parties thereto were (1) ***Trade Bank Limited (In Liquida tion*** (the appellant)(TB) and ***L.Z. Engineering Construction Limited (LZ), Yaya Towers Limited (YAYA)*** and ***Deposit Protection Fund Board*** (DPFB) (the respondents). The simple argument advanced by Mr. Inamdar in ***Civil Appeal No. 14 of 1998*** was that the notice of appeal was invalid by reason of no prior sanction to lodge the same having been obtained from the superior court. Mr Inamdar's argument was opposed by Mr. Deverell on the basis that the authority the appellant had been granted by the superior court to appoint its advocates was wide enough to give retrospective sanction in that appeal in view of the complex nature of the proceedings. He relied on the case of ***Dublin City Distillery (Great Dublin) and Others vs. Doherty (1914)*** A.C. 823 to say that section 151 of the Companies (Consolidation) Act, 1908 of Ireland, which empowered the liquidator, in the case of winding-up in Ireland, to bring or defend legal proceedings with the sanction of the Court did not confer on third parties any right to object to the proceedings brought by a liquidator in the name of the company on the ground that such sanction had not been obtained. This Court distinguished the Irish case and ruled that sanction means approval in advance and ruled as follows:

"It follows, therefore, that the notice of appeal having been signed by a person or persons not authorized or sanctioned to sign on behalf of the appellant the notice of appeal is invalid and of no effect."

M/s Kaplan & Stratton Advocates were fully aware of the effect of the ruling of this Court delivered on 18th day of September, 1998. That ruling effectively told them that their notice of appeal lodged on behalf of ***Trade Bank Limited (In Liquidation)*** was invalid as it was lodged on behalf of TB as well as Yaya. This Court said:

"This decision by the learned Judge was a signal to Messrs. Kaplan & Stratton that their authority to act on behalf of Yaya Towers was actually in question and should not have filed a notice of appeal on its behalf."

We have set out in short what happened previously. This background is necessary to understand the nature and scope of the application which was before the learned single Judge and which is now, as pointed out earlier, the subject-matter of the reference before us.

The application before the learned single Judge was based inter alia on the following grounds:

"(a)Not relevant.

(b)This honourable Court has, on Friday 7th April, 2000, ruled in the struck out Appeal arising from the High Court Suit, that the Notice of Appeal filed on 19th January, 1998 by TB and Yaya was invalid and of no effect principally because

(i)No prior sanction of the High Court had been obtained by the liquidator of TB to appoint Kaplan & Stratton to act for the liquidator in the filing of a Notice of Appeal on behalf of TB;

(ii)TB was wrong in giving notice of an intention to appeal against the whole of the decision in view of the fact that part of the decision related to award of costs against Kaplan & Stratton, it being held that TB was not aggrieved by that part of the decision;

(iii)Because TB was not aggrieved by the orders for costs against Kaplan & Stratton, the Notice of Appeal did not make Kaplan & Stratton a respondent who could file a cross -appeal with the result that the cross -appeal of Kaplan & Stratton was struck out;

(c)TB's advocates genuinely believed that the authority obtained from the High Court Suit and to use Kaplan & Stratton as its Advocates extended to the filing of a Notice of Appeal in the High Court against a judgment in the High Court Suit.

(d)TB's A dvocates genuinely believed that TB was aggrieved by the award of costs against Kaplan & Stratton and that Kaplan & Stratton was properly joined as a Respondent who could file a cross appeal."

(e)Neither Yaya nor L.Z. will be prejudiced by the granting of leave to lodge a fresh Notice of Appeal and Record of Appeal which cannot be remedied by an award of costs."

When all counsel assembled before the learned single Judge on 5th July, 2000 Mr. Deverell made an informal application seeking his disqualification in regard to the hearing of the application before him. He referred to the fact of the learned single Judge having disqualified himself in ***Civil Application No. Nai. 304 of 1998.*** In that case the parties were TB, LZ, YAYA, DPFB and M/s Kaplan & Stratton Advocates. The learned single Judge in the interests of transparency disqualified himself from hearing that application which was for extension of time to deposit in court a sum of Shs.33,000,000/= by way of security of costs and it was the learned single Judge who had in the first instance ordered the time frame within which to deposit the said sum. The learned single Judge felt that his sitting on that bench might well be construed as sitting on an indirect appeal against his first instance orders.

Mr. Deverell also referred to the fact of the Judge having disqualified himself in ***Civil Application No. Nai. 282 of 1999*** , on 1st February, 2000. The parties in that application were TB, LZ and Yaya. In regard to that, the learned single Judge said that the Order in ***Civil Application No. Nai. 282 of 1999*** was based on an earlier order made on 11th May, 1999 which had nothing to do with any luncheon.

Mr. Deverell's objection was based on the surmise that if the learned single Judge were to hear the application before him there was a real danger that justice will not be seen to be done. The two lunches the learned single Judge had with Mr. Esmail who is counsel for LZ and director of Yaya two years prior to the hearing of the application, urged Mr. Deverell, were unwise acts even if innocent.

It cannot be gainsaid that members of the Bar who are appointed as Judges will have friends from the Bar. Such friendships cannot be thrown overboard because of the appointment. Furthermore, such friendships do not mean that the Judge will favour the particular member of the Bar. A Judge lunching with a former colleague in a restaurant open to the public in the gaze of all other diners cannot be accused that he will for ever be biased in favour of that member of the Bar. The suggestion that he will be biased because of the luncheon is, in our view, unmaritorious and an unsound suggestion. What must be shown so that a Judge would disqualify himself is that there would be real danger of bias.

Shah JA in ***Kenya Shell Limited vs. James G.K. Njoroge*** (Civil Application No. Nai.292 of 1998) (unreported) in which case there was an informal application for his disqualification referred to an English House of Lords' decision in ***Locabail Ltd Vs. Bayfield Properties Ltd*** [2000] 1 All. E.R. 65. At page 77 of that report their Lordships referred to a passage in the judgment of Callaway JA in the case of ***Clenae Pty Ltd Vs. Australia & Newzealand Banking Group Limited*** (1999) VSCA 35, Vic SC wherein Callaway JA observed at para 89(e):

"As a general rule, it is the duty of a Judicial Officer to hear and determine the case allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a Judge or Magistrate should not accede to an unfounded disquali fication application."

Their Lordships, after referring to the Clenae case proceed to say as follows in the Locabail case:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of b ias. Everything will depend on the facts, which may include nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class means or sexual orientation of the Judge. Nor, at any rate ordinarily, could an objection be soundly based on the Judge's social or educational or service or employment background or history, nor that of any members of the Judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions or extra -curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consult ation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same inn, circuit, local Law Society or chambers [KF TCIC V Icori Estaro Sp A (Court of Appeal of P aris, 28 June 1991, International Arbitration Report. Vol. 6 # 8 9/91)]. By a contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the cas e; or if the Judge were closely acquainted with any member of public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion."

If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar. The converse is also true.

In this matter, the learned single Judge declined to disqualify himself. It is against that refusal to recuse that one of the arguments was advanced before us as to let the application go before another single learned Judge in the event of this reference succeeding on that issue alone. The onus was on the applicant to show that the learned single Judge ought to have disqualified himself. The applicant attempted to discharge that onus by stressing that the two lunches that the learned single Judge had with Mr. Esmail were timed so as to show that there was a real danger that justice will not be seen to be done. The learned single Judge dismissed that suggestion in his discretion. We cannot substitute our own discretion in the matter. We can only interfere with the exercise of discretion of the learned single Judge if it could be shown that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the circumstances as a whole that the learned single Judge was clearly wrong in the exercise of his discretion and that as a result there was injustice. The learned single Judge had before him grounds upon which the application was based. He also had before him the facts deposed to which were largely not in dispute. He did not have to decide on the demeanour, for instance, of deponents. The luncheons issue was relatively trivial. Moreover, the application before the learned single Judge was a simple legal exercise, it was not a trial, there were no facts to be decided and the learned single Judge had the limited function of deciding an application under rule 4 of the Rules. The learned single Judge considered all the matters placed before him and declined to disqualify himself. It has not been shown before us that, in doing so, he exercised his discretion wrongly and accordingly, we reject this aspect of the reference. We are satisfied that what was placed before the learned single Judge did not show real danger of bias.

We now come to the merits of the application. As pointed out earlier, some 19 months before the date of lodgment of the application, this Court had decided in no uncertain terms that a notice of appeal on behalf of TB could only be signed by Kaplan & Stratton if the liquidator had obtained in advance the sanction of the High Court to authorize them to lodge the notice of appeal. This Court also pointed out that sanction meant approval in advance, not approval after the event.

Despite that unequivocal ruling of this Court, Kaplan & Stratton, entertained a pious hope that the Court will one day depart from the decision. Both, Mr. Esmail for the first two respondents and Mr. Gautama for the third respondent, pointed out categorically that if an advocate does not take notice of the Court's decision and waits for another day hoping that it may be varied or reversed, he does so at his own peril. It was pointed out also that the decisions which matter in Kenya are those of this Court and not a court in Ireland. This was in reference to ***Dublin City Distillery*** case (supra). It was also pointed out that a decision between immediate parties remains binding on the parties and the question of departing therefrom in another matter between same parties does not arise.

This Court in ***Civil Appeal (Application) No. Nai. 14 of 1998*** pointed out as follows

> ***"Adopting the dictum in Re Associated Travel Leisure & Services Limited (in Liquidation) (supra) (that is [1978] 2 All E.R. 273) by section 241(1)(c) of the Act (that is the Companies Act) the liquidator cannot appoint advocates without the sanction of the court or the committee of inspection and sanction means approval in advance . Moreover, there was no justification advanced by the appellant in the superior court to justify recourse to inherent jurisdiction.***
>
> ***It follows, therefore, that the notice of appeal having been signed by a person or persons not authorized or sanctioned t o sign on behalf of the appellant the notice of appeal is invalid and of no effect."***

The learned single Judge, in regard to grounds (b)(c) and (d) advanced by the applicant, as reproduced earlier by us, said:

> ***"I have not been told how such a belief ar ose, whether it was as a result of non -reading of any rules and, if so, which or any misunderstanding or in the belief that the court was mistaken. I am willing to extend to the applicant the benefit of doubt and hold that the applicant's belief initially was genuine and perhaps also a mistaken view. But when this Court delivered its ruling that belief was laid to rest as is acknowledged by Mr. Gachuhi, advocate and partner of the applicant in his affidavit sworn on 4th November, 1998. After all, this Co urt is the final court of the land and its decision cannot be not binding on the grounds that it did not know the law. The court is bound by its own previous decisions although it may depart from it for good reasons ---------- That being t he position it follows that the alleged belief and or mistake on the part of the applicant ceased to exist or be valid after the ruling of this Court in Civil Appeal (Application) No. Nai. 14 of 1998 delivered on 18th September, 1998."***

We see no misdirection on the part of the learned single Judge when he stated what we have just set out above. 19 months is a long time to wait to put one's house in order. The applicant ought to have taken hint from the decision dated 18th September, 1998 and taken steps, soon thereafter, to put its house in order.

Ground (d) relied upon by Mr. Deverell as reproduced by us earlier was that TB's advocates genuinely believed that TB was aggrieved by the award of costs against Kaplan & Stratton and that Kaplan & Stratton was properly joined as a respondent who could file a cross appeal. The flaw in this argument can be easily seen. Certainly it could not have mattered to TB if Kaplan & Stratton were ordered to pay costs. TB could not, in that regard, be an aggrieved party. Only Kaplan & Stratton would be the aggrieved party insofaras the order of costs made against them was concerned. Only Kaplan & Stratton could have filed a notice of appeal against that portion of the decision which ordered them to pay the costs.

It must be remembered that Kaplan & Stratton being aggrieved by that portion of the decision of the learned Judge (Pall JA sitting as a Judge of the High Court) whereby Kaplan & Stratton was ordered to

pay costs had actually filed a notice of appeal against the said portion of the decision on 19th January, 1998. Having so filed a notice of appeal, Kaplan & Stratton did nothing further to lodge their own appeal. Instead they waited until Civil Appeal No. 39 of 1998 was filed by them wherein they described themselves as the "fourth respondent". That was clearly wrong as ruled by this Court on 7th April, 2000.

It has been held more than once by this Court that a notice of appeal, once filed, remains on record until such time it is struck out by an application made in that regard. Although rule 82(a) of the Rules lays down that if a party lodging a notice of appeal does not file his intended appeal within the appointed time the said notice of appeal is deemed have been withdrawn, such deeming provision comes into play when the Court so orders. This is the effect of the words "unless the Court otherwise orders" in rule 82(a) of the Rules.

We think that the present application by Kaplan & Stratton for leave to lodge a fresh notice of appeal out of time, whilst the first notice of appeal still is on record, is misconceived.

There is one more point which was taken by Mr. Deverell. That point put shortly is: can a company, which is not in liquidation, appear by an advocate without a resolution by the company under its seal? The learned single Judge quite properly ruled that Mr. Esmail, a director of L.Z. can appear as its advocate within the meaning of rule 22 of the Rules.

Rule 22(2) says:

> ***"(2)A corporation may appear either by an ad vocate or by a director, manager or secretary thereof appointed by resolution under the seal of the company, a sealed copy of which resolution shall be lodged with the registrar.***

As this sub-rule is formulated the disjunctive "or" makes it clear that a company can appear either by an advocate or by its officer provided the officer has been so authorized by the company by a resolution so made and issued under its seal. This argument arose out of a dictum of this Court in the said ***Civil Appeal No. 39 of 1998***. It said:

> ***"To our minds, the absence of appointment in terms of r. 22(2) would result in invalidity of any appearance in Court by an advocate on behalf of a company. Similarly any document signed by that non appointed advocate in connection with an appeal would equally be invalid and ineffective."***

Quite obviously the Court was referring to an appearance or signing of document on behalf of a company in liquidation.

For all these reasons we dismiss this reference with costs and refuse the extension of time sought.

Dated and delivered at Nairobi this 5th day of March, 2001.

B. CHUNGA

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CHIEF JUSTICE

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.