

Freetown
July 17,
1962

[COURT OF APPEAL]

Ames P.
Dove-Edwin
J.A.,
Bankole Jones
J.

DANIEL FODAY *Appellant*
v.
MOHAMED KOROMA *Respondent*

[Civil Appeal 1/62]

Practice—Appeal—Preliminary objections to hearing of appeal—Compliance with rule of Court—West African Court of Appeal Rules, 1950, rr. 14 (4), 21 (1).

An order extending the time for appealing was made by the Court of Appeal on the application of the appellant in February, 1962. The notice of appeal was filed within the extended time, but no copy of the order extending the time was annexed to the notice of appeal, as required by rule 14 (4) of the West African Court of Appeal Rules, 1950. Respondent relied on this omission as ground for a preliminary objection to the hearing of the appeal, but respondent failed to give appellant three days' notice of the objection as required by rule 21 (1) of the Court of Appeal Rules. Appellant, however, after receiving notice of the objection, filed an affidavit in reply to it.

Held, striking out the appeal, (1) that, in the circumstances, appellant had waived the requirement of three days' notice of the preliminary objection to the hearing of the appeal; and

(2) that the appeal could not be heard, since the requirement of rule 14 (4) had not been complied with.

Beccles-Davies (holding the brief of *Ken During*) for the appellant.

E. Livesey Luke for the respondent.

AMES P. Mr. Luke, for the respondent, made a preliminary objection to the hearing of this appeal which is as follows: "That the appellant failed to annex the order granting extension of time to the notice of appeal herein, in contravention of rule 14 (4) of the Appeal Court Rules."

The relevant part of rule 14 (4) is as follows: ". . . When time is so enlarged, a copy of the order granting such enlargement shall be attached to the notice of appeal."

An order extending the time for appeal was made by this court on the application of the appellant in February. The notice of appeal was filed within the extended time. No copy of the order extending the time was annexed to the notice of appeal.

Those are the relevant facts, and apart from one consideration, they show that the preliminary objection must succeed. In March, in the appeal *Elijah J. Speck v. Gbessay Keister*, this court held that such an omission was fatal to the appeal.

A preliminary objection, such as this one, had to be made under the provisions of rule 21, which reads:

"(1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing setting out the grounds of objection and shall file such notice together with four copies thereof with the registrar of the court within the same time.

"(2) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit."

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The one consideration is the argument put to us by Mr. Beccles-Davies, based on rule 21 (1), that the objection ought not to be entertained because it was made with less than three clear days' notice.

The object of the rule is self-evident, namely, to prevent appellants coming to court to argue their appeal, only to be surprised by a preliminary objection, which they have not come prepared to argue.

Now what happened here? Notice of the objection was filed on the 10th. The appeal was put in the hearing list for the 13th, not on the application of either party but on the direction of the court because, other appeals higher up on the list for this session having been disposed of, it was thought that this one would be reached that morning, as indeed it was.

After service on him of the notice of the objection, the appellant filed an affidavit in reply thereto, on the 12th, setting out his factual excuses for the notice of appeal having been filed without the copy of the order. The last paragraph thereof reads:

"7. I make this affidavit in reply to the preliminary objection raised herein so that this honourable court would permit me to proceed with the prosecution of the appeal herein notwithstanding non-compliance with rule 14 (4) of the Court of Appeal Rules."

If there should be less than three clear days' notice, the objection does not necessarily fail. Rule 21 (2) makes that clear. In the circumstances here, I am of opinion that the appellant must be taken to have waived any need for three clear days' notice. He came to court aware of the objection, and prepared to argue why he should be allowed to proceed with the prosecution of the appeal: and he did so argue, although he also argued that the objection should not be listened to for lack of three clear days' notice.

I would uphold the objection and order the appeal to be struck out.

[COURT OF APPEAL]

Freetown
July 19,
1962

J. C. SAMUELS Appellant
v.
NORTHERN ASSURANCE CO. LTD. Respondent

Ames P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

[Civil Appeal 4/62]

Practice and Procedure—Whether trial judge should allow plaintiff to amend claim at close of case—Rule 1, Order 24, Supreme Court Rules.

Plaintiff sued the defendant company for the return of certain motor parts or their value. After both plaintiff and defendant had closed their cases, plaintiff asked for leave to amend his complaint. The judge ruled that it was too late to grant the amendment, and gave judgment for defendant. Plaintiff appealed.