REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 249 OF 2011

BETWEEN

OCEANFREIGHT TRANSPORT CO. LTD ……. APPLICANT

AND

PURITY GATHONI ……..…..... 1ST RESPONDENT

SAMUEL KAMAU MACHARIA …….....2ND RESPONDENT

RULING

The Application

1. The application before the Court is a Chamber Summons brought under **Order 53 rule 1, 2** and **3** of the ***Civil Procedure Rules*** and the provisions of the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and it seeks the following orders;

(a) The applicant be granted leave to apply for an order of certiorari for the purpose of quashing the Certificate of Delay issued by the Deputy Registrar of this Court on 5th May 2011 in Nairobi HCCC No. 3958 of 1991.

(b) That costs of the application be provided for.

Applicant's Case

2. The application is grounded on the statement dated 24th October 2011 and the verifying affidavit of Livingstone Ndungu Waithaka sworn on 24th October 2011. The grounds upon which the application is made out are set out on the grounds set out in the face of the application as follows;

(1) The Certificate of Delay issued on 5th May 2011 contains information that is misleading and false in so far as it claims that it took a period of 3,418 days or about 9½ years to prepare the court proceedings in Nbi HCCC No. 3958/1991 required by the Respondents for the purpose of filing their appeal.

(2) The true and correct position is that those proceedings took a period of only 211 days or 7

months because by 23rd May 2002, the proceedings were ready and available for collection by any of the parties against payment of Shs.540/= as preparation charges.

(3) After the applicant's lawyers learned that the proceedings were ready on 23rd May 2002 they paid the Shs.540/= and collected their copy of the proceedings on the same day.

(4) By a letter dated the same 23rd day of May 2002, the Applicant's lawyers informed the Respondent's advocates that the proceedings were ready and available for collection. They also forwarded to them under cover of the same letter, a copy of those proceedings together with a copy of the judgment of 23rd October 2001 and the original decree sealed and issued by the court on 29th November 2001.

(5) The court proceedings which the Respondent have put in their Record of Appeal and which the certificate of delay claims were collected on 7th March 2011 are completely identical and an exact replica of the proceedings which the Applicant's lawyers collected from the court and forwarded a copy thereof to the Respondents' lawyers on 23rd May 2002.

(6) The Respondents is now dishonestly using that certificate of delay to claim that the proceedings have taken a total of 3,418 days to be prepared and to pretend that for 9½ years they did not have the proceedings they required to file their appeal.

3. In support of the application by Mr Raiji, counsel for the applicant, submits that the information contained in the Certificate of Delay is untrue and incorrect and that the same, having been prepared by the Deputy Registrar of this Court, it ought to be quashed. He further submits that the legal rights of the applicant are affected as it is being used to validate an otherwise incompetent appeal that was filed after a 9 ½ years delay. The applicant contends that such a delay is inexcusable. Mr Raiji posits that the act of the Deputy Registrar in preparing the Certificate of Delay is a ministerial act and not a decision of the High Court made by a Judge and is therefore amenable to order of judicial review.

4. Mr Raiji further submits that the issues raised in the application are arguable and not frivolous and that the application meets the test for grant of leave propounded in the case of ***W'Njuguna v Minister of Agriculture*** **(2000) 1 EA 184** and ***Peter Ngoge v Vetting of Judges and Magistrates Board*** **Nbi JR Appl. 181 of 2012 (Unreported).**

Respondents' Case

5. The respondent objects to the grant of leave through the filing of a notice of preliminary objection dated 21st November 2011. Dr Kuria, S.C., counsel for the respondents, argues that this court lacks jurisdiction to entertain this application as the Court of Appeal is already seized of the matter as the record of appeal has been filed. He asserts that an order of certiorari is used to quash decisions of Courts subordinate to the High Court and of persons or bodies exercising judicial or quasi-judicial authority but cannot be used to supervise the work of the High Court. The respondents call in aid **Article 165(6)** and **(7)** of the Constitution which prohibit the High Court from reviewing or exercising supervisory jurisdiction over Superior Courts. The respondents contend that the Certificate of Delay is issued by the Superior Court and as such it is not amenable to judicial review. The respondent also argue that leave cannot be granted as the application was made over six months after the Certificate of Delay was issued contrary to O**rder 53 rule 2** of the ***Civil Procedure Rules*** which provides that for prayers of certiorari to be granted, the proceedings must be filed in court within six months of the date of the order/decision being challenged.

Whether leave should be granted

6. The test for the grant of leave was enunciated in the case of ***W'Njuguna v Minister of Agriculture*** **(Supra)** where the Court of Appeal stated that, *"the test whether leave should be granted to an applicant for judicial review, is without examining the matter in any depth, whether there is an*

arguable case that the relief sought might be granted on the hearing of the substantive application." In other words, a court will refuse to grant leave if it is clear from the facts that the intended application is frivolous, or that it is so hopeless or weak that it cannot possibly succeed.

7. The issue in this matter concerns the Certificate of Delay which is prepared and issued in accordance with **rule 81** of the ***Court of Appeal Rules*** ("***the Rules***"). The rule deals with the manner in which appeals are instituted and provides as follows;

82. (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

8. Once the Certificate of Delay has been prepared, the appellant is entitled to lodge the appeal outside the 60 day time limit provided by ***the Rules***. Obviously an erroneous Certificate of Delay prejudices the rights of the respondent and should not be allowed to stand. But is such a defect capable of being cured by an order of certiorari quashing the Certificate from of Delay issued by Deputy Registrar of the High Court?

9. I take the position that once the Record of Appeal is filed, the Certificate of Delay merges into the record and becomes part of the proceedings subject to the jurisdiction of the Court of Appeal. This Court, the High Court, cannot issue an order that would interfere with what is already subject to the jurisdiction of the Court of Appeal. The remedy for a defective Certificate lies squarely within the Court of Appeal. My reasoning is fortified by the fact that the authority to prepare the Certificate of Delay is derived from the ***Rules*** made pursuant to the ***Appellate Jurisdiction Act (Chapter 9 of the Laws of Kenya)***.

10. The Court of Appeal has always asserted its jurisdiction to inquire into the validity of a Certificate of Delay if cogent evidence is placed before it. In ***Ratemo Oira t/a Ratemo Oira & Co. Advocates v Blue Shield Insurance Company Limited*** **CA Civil Appeal (Application) No. 177 and 178 of 2009 [2010]eKLR,** the Court observed as follows, *"When it comes to computation of time within which the appeal should have been filed, this Court has always relied on the certificate of delay, unless salient and cogent reasons are set out to challenge the certificate of delay. In the case of* ***Daniel Ng'ang'a Kanyi vs. Sophinaf Company Ltd and James Gatiku Ndulo Civil Appeal (Application) No. 315 of 2001 (unreported)*** *this Court dealt with a similar situation and it stated as follows:* ***"The certificate of delay confirms when delivery of the copies were made to the appellants. That is all that the rule requires of the Court to consider. We are satisfied as no evidence has been placed before us to confirm otherwise that any errors of omission or commission in this matter were made by the court."*** *Likewise, in this matter, as we have stated, all that Mr. Oira alleges is that as it took 11 days to type copies of proceedings and ruling, the days of delay stated in the certificate of delay cannot be correct. He has not placed any evidence before us as to how many other proceedings, judgments, rulings, etc. preceded the subject*

proceedings and why the Registry could not take all that time to prepare the subject proceedings. Without that evidence, we are bound to accept the period of delay stated in the certificate of delay.

11. It is therefore my finding that once the Certificate of Delay is merged into a Record of Appeal, it is only within the jurisdiction of the Court of Appeal to remedy any defect or grant relief to a party aggrieved by the defect. This Court cannot intervene in such circumstances by way of an order of certiorari.

12. In my view, the reference to an *"arguable case"* in ***W'Njuguna's Case*** is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view. The issue in contention must be real and not illusionary and in view of the jurisdiction of the Court of Appeal to inquire into the validity of the Certificate of Delay, the applicant's contention is really illusionary.

Disposition

13. For the reasons I have given above, the applicant's case does not have any prospects of success. I therefore refuse the application for leave with result that the Chamber Summons dated 24th October 2011 is dismissed with costs to the respondents.

DATED and DELIVERED at NAIROBI this 24th March 2014.

D.S. MAJANJA

JUDGE

Mr Raiji instructed by Maina Murage and Company Advocates for the applicants.

Dr Kuria, S.C., instructed by Kamau Kuria and Kiraitu Advocates for the respondents.