



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 181 of 2007

MARINE DIVING & TECHNICAL SERVICES LTDAPPELLANT

V E R S U S

SOUTHERN ENGINEERING COMPANY LTD RESPONDENT

R U L I N G

By an application by way of a Notice of Motion dated 19th February, 2008 and brought under S. 3A of the Civil Procedure Act, the applicant, who is the Respondent in the main appeal, seeks the following orders-

1. *THAT the appeal be struck out as incompetent on the ground that the respondent failed to institute the said appeal within the time prescribed under Section 79G of the Civil Procedure Act; and*
2. *THAT the appellant (the respondent in this application) do pay to the applicant the costs of the appeal together with the costs of this application.*

The application is supported by the annexed affidavit of Kishore Nanji, Advocate, and is based on the ground specified in prayer (1) above. It is also opposed by way of a replying affidavit sworn by Melisa Morangi, the Advocate for the appellant.

The facts surrounding this matter are not in dispute. They are that on 10th August, 2006, the lower court delivered a judgment dismissing the plaintiff's suit with costs. The plaintiff then moved to this court on appeal against the dismissal of its suit, and filed a memorandum of appeal on 11th October, 2007. That was a good 14 months after the date of the judgment sought to be appealed from. It is the applicant's case that this appeal ought to be struck out as being incompetent since it was filed out of time and without the requisite leave of the court. On its part, the respondent contends that the appeal was filed in time after giving allowance for the time it took the lower court to prepare copies of proceedings and judgment in respect of which a certificate of delay was issued. In her replying affidavit, Ms. Morangi deposes that they applied for the said copies on 10th August, 2006 and the same were supplied to them on 12th September, 2007. The appeal was then filed on 11th October, 2007, which was within 30 days after receipt of the typed proceedings, and therefore the allegation that the appeal was filed out of time is frivolous, baseless and vexatious and an abuse of the process of the court. She therefore asks the court to dismiss the application with costs to the appellant.

After considering the pleadings and submissions of counsel, the issues for determination in this matter are whether the appeal was filed on time and whether it is competent. Section 79G of the Civil Procedure Act is relevant. It states as follows-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

It is common ground that the date of the judgment or order appealed from was 10th August, 2006. The appellant had 30 days from that day to file its appeal. But the appeal was not filed until 11th October, 2007, and the appellant did not seek and obtain the leave of court to appeal out of time.

Against that background, Ms. Morangi for the respondent states in paragraphs 6 and 7 of her replying affidavit as follows-

“6. THAT Section 79G of the Civil Procedure Act is crystal clear. It suffers no taint of ambiguity that the period of thirty (30) days excludes the period the lower court may certify as having been requisite for the preparation and delivery of the decree.

7. THAT we applied for the said copies on 10th August 2006 and the same were supplied to us on 12th September 2007. (Annexed herein ... is a copy of the certificate of delay).”

Counsel is absolutely right in her statement in paragraph 6. The delay which is condoned relates to the period which the lower court may certify as having been requisite for the preparation and delivery of the decree. Referring to the proviso to the definition of “decree” in Section 2 of the Act, she also argued that since “decree” includes judgment, the period it took the appellant to obtain the judgment is excluded from the computation of the thirty days within which an appeal should be filed under Section 79G.

Even assuming that the words “decree” and “judgment” may be used interchangeably under Section 79G as she said, the Section is very clear that what is required for the filing of an appeal is the decree. This does not extend to proceedings by any stretch of the imagination. What counsel applied for on 10th August, 2006 was neither the decree nor the judgment. She applied for “*typed proceedings and judgment.*” That explains why the process took so long. And the certificate of delay attached to her affidavit is not in respect of the preparation of the decree or order appealed against as required under Section 79G. It is in respect of proceedings and judgment. Nowhere does Section 79G refer to proceedings.

In the case of GREGORY KIEMA KYUMA v. MARIETTA SYOKAU KYEMA, Civil Appeal No. 16 of 1988, referring to S. 79G (supra), Kwach Ag. J.A said –

“A certificate of delay issued in accordance with the terms of that section covers only the period requisite for the preparation and delivery to the appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period, as is suggested in the certificate, which may be required to obtain copies of proceedings and judgment. So the certificate of delay filed and relied upon by the appellant was absolutely worthless and totally incapable of remedying the delay that had occurred ...”

These words are as true to this case as they were in the case before the Court of Appeal. Consequently, I find that the appeal filed in this matter on 11th October, 2007 was hopelessly out of time, and since leave of the court was not sought and obtained before it was filed, it was therefore incompetent.

The application before the court accordingly succeeds, and the appeal herein is hereby struck out with

costs. The Appellant will also pay the costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 22nd day of May, 2009.

L. NJAGI

JUDGE