

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 151 of 1996

SAMUEL KURIA
.....APPELLANT

VERSUS

MBUGUA KIMANI
RESPONDENT

(Appeal from the judgment of the High court of Kenya Aluoch J) dated 17th February, 1994

IN

H. C.C. C. NO. 958 OF 1977)

RULING

The only thing which has caused me a lot of concern in this application is that the applicant failed to copy his letter asking for proceedings to the respondent. The judgment against which the applicant has in fact appealed was delivered on the 17th February, 1994. On the 1st March, 1994, the applicant filed his notice of appeal and by a letter dated the 22nd March, 1994, the applicant sent a copy of the notice of appeal to the respondent who was then acting in person. On the same day the notice of appeal was lodged, namely, 1st March, 1994, the applicant wrote to the Deputy Registrar of the High Court bespeaking the proceedings. That letter, as I have said, was not copied to the respondent. The Deputy Registrar of the superior court informed the applicant on the 30th July, 1996 that the proceedings were ready for collection and on the 31st July, 1996, the applicant paid for the proceedings and collected them. The applicant filed his appeal- Civil Appeal No. 151 of 1996 – on the 22nd August, 1996. These facts are all documented and if the applicant had copied his letter of 2nd March, 1994, to the respondent, there would not have been any difficulty at all in my extending the time as sought by him.

The proviso to Rule 81 (1) of the Court's rules provides that where an application for proceedings has been made, then in computing time for filing the appeal, any time which may be certified by the registrar as having been necessary for the preparation and delivery of the proceedings and judgment shall be excluded. But Rule 81 (2) specifically states that the exclusion of such period is only permissible where the application for proceedings is made in writing and a copy of that letter is sent to the respondent. Since the applicant did not send a copy of his letter of 1st March, 1994 to the respondent, the period between that date and the 30th July, 1996 when the proceedings were ready cannot be excluded from the computation of the time within which the appeal ought to have been filed. That is a delay of slightly over two years and the only plea Mr. Mureithi who represented the applicant before me offered on behalf of the applicant was that the failure to copy the letter to the respondent was due to an oversight on the part of the counsel who was then acting for the applicant. Whatever may have led to the failure to copy the letter to the respondent, the effect of that failure is that the applicant is no longer entitled to rely on the proviso under rule 81 (1) and the certificate of delay availed to him by the Deputy Registrar. Should that be the end of the matter in the circumstances of this application.

As I have said, the applicant filed his notice of appeal within time and he sent a copy of that notice to the respondent. It is clear that the proceedings were only made available to the applicant on the 30th July, 1996 and he promptly paid for the same . He filed his appeal on the 22nd August, 1996 and all these show the seriousness with which the applicant was treating the matter. He served the record of appeal on the respondent on 4th September, 1996, and the present motion before me was filed on 20th February, 1997. The only explanation the applicant could give for the period between 1st March, 1994 and 30th July, 1996 was that his advocates made a mistake in not copying the letter asking for proceedings to the respondent. That explanation is rather lame, but I do not think that in the circumstances of the application before me, it deprives me of my unfettered discretion to enlarge time. Taking everything into account, I allow this application, and grant the orders prayed for in paragraphs 2 and 3 of the notice of motion dated the 19th February, 1997 and lodged in this Court on the 20th February, 1997. I order that the applicant shall pay the costs of the motion to the respondent. Those shall be my orders.

Dated and delivered at Nairobi this 5th day of June, 1997.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR