



REPUBLIC OF KENYA



KENYA LAW
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Abdulrehman (Sued as the Attorney of the Wakf of the Late Harith Al-Amin Bin Mazrui) v Canarian Holdings Limited (Civil Appeal (Application) E104 of 2024) [2025] KECA 911 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 911 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E104 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 23, 2025

BETWEEN

MOHAMED SAID ABDULREHMAN APPELLANT
SUED AS THE ATTORNEY OF THE WAKF OF THE LATE HARITH AL-AMIN
BIN MAZRUI

AND

CANARIAN HOLDINGS LIMITED RESPONDENT

(Being an application to strike out an Appeal against the Judgement and Decree of the Environment and Land Court of Kenya at Mombasa (Matheka, J.) dated 23rd March 2022 in ELC No. 300 of 2018)

RULING

1. Before us is the applicant, Canarian Holdings Limited's application dated 25th June 2024. The applicant seeks orders that the Memorandum and Record of Appeal, both dated 23rd May 2024 and filed on 28th May 2024, be struck out; and that costs of the application and the appeal be awarded to it.
2. The application is based on the grounds set out on its face, the supporting affidavit of Alex Trachtenberg, a director of the applicant company of even date, and the applicant's further affidavit also sworn by Alex Trachtenberg on 9th December 2024.
3. It was deposed that the impugned Judgement and Decree were in the applicant's favour; that aggrieved, Mohamed Said Abdulrehman (Sued as the Attorney of the Wakf of the late Harith Al - Amin Bin Mazrui), the respondent, commenced this appeal; that the respondent, through the firm of M/s Macharia - Mwangi & Njeru Advocates filed a Notice of Appeal dated 1st April 2022 and duly served it upon the applicant's counsel on 8th April 2024; that the respondent applied for certified typed



- proceedings and judgement vide a letter dated 1st April 2022 lodged before the superior court on 4th April 2022 and served upon the applicant's counsel on 8th April 2024; that the respondent went into a lull for 28 months and obtained the proceedings belatedly on 28th March 2024; that the Certificate of Delay was issued on 9th March 2024; and that the respondent lodged the Record of Appeal on 28th May 2024, which is outside the mandatory 60 days as provided for under rule 84 (1) of the *Court of Appeal Rules*, 2022.
4. The applicant also deposed that it extracted a decree on 13th April 2022, which was approved by the respondent without amendments on 14th April 2022; that, pursuant to the terms of the decree, the applicant commenced taxation proceedings; that a Party and Party Bill of Costs dated 25th April 2022 was taxed and a ruling delivered on 21st September 2022; that the respondent applied for the proceedings relating to the taxation of the Bill by a letter dated 15th March 2023, which were duly certified on 4th April 2023; and that, in view thereof, it can only be concluded that the proceedings relating to the main suit must have been typed and certified much earlier, and that they were ready for collection before those relating to the taxation of the Bill.
 5. The applicant further pointed out that it obtained the certified typed proceedings on 17th October 2023; that there was no excuse on the respondent's part to wait for 219 days to belatedly lodge the appeal on 28th May 2024; that, despite there being a Certificate of Delay dated 9th March 2024, there exists salient and cogent reasons that the period from 17th October 2023 to 28th March 2024 was not required or necessary for preparation of the certified proceedings as there is evidence that they were ready as at 17th October 2023; that the length of the delay is inexcusable; and that, for the foregoing, the Record of Appeal is incompetent, fatally defective and should be struck out.
 6. The application was opposed by way of a replying affidavit sworn by the respondent on 3rd December 2024. The respondent confirmed that his counsel filed a Notice of Appeal dated 1st April 2022 together with the letter bespeaking the application for the proceedings of even date, and the Memorandum and the Record of Appeal dated 23rd May 2024 on 28th May 2024 respectively.
 7. According to the respondent, the delay in filing the Record of Appeal was occasioned by the delay in obtaining proceedings in the superior court; that a Certificate of Delay dated 9th May 2024 indicated that the proceedings were being typed from 4th April 2022 to 28th March 2024; that, if the proceedings were ready from 17th October 2023, there was no communication from the Deputy Registrar to that effect; that the striking out of pleadings is not only a draconian action, but also an exercise of discretion by the court, and which is exercised in exceptional circumstances; that no exceptional or peculiar circumstances obtain in the instant case as the Certificate of Delay does explain that the delay was occasioned by the time it took in typing the proceedings, which must comprise part of the Record of Appeal; and that, accordingly, the application should be dismissed.
 8. At the plenary hearing, learned counsel Mr. Okoth appeared for the applicant alongside Mr. Ochieng while learned counsel Mr. Kimani was present for the respondent. Counsel representing the parties confirmed that they filed their written submissions and relied on them entirely. Those of the applicant are dated 9th December 2024 while the respondent's are dated 10th December 2024.
 9. The respective submissions basically restated the averments in the affidavit in support of, and in opposition to, the application. Additionally, the applicant placed reliance on the cases of *Ratemo Oira T/A Ratemo Oira & Company Advocates v. Blue Shield Insurance Co. Limited* (Civil Appeal) (Application) (2010) KECA 483 (KLR); and *Oceanfreight Transport Co. Limited v. Purity Gathoni Gitbae & Another* (2017) eKLR for the proposition that a Certificate of Delay is liable to being challenged; *Mae Properties Limited v. Jospeh Kibe & Another* (2017) eKLR for the submission that



the timelines for doing certain actions under this Court's Rules are indispensable for the proper adjudication of appeals, and that, failure to comply invites dire consequences; Patrick Kiruja Kitbinji v Victor Mugira Marete (2015) eKLR, arguing that the Court can only entertain appeals that are filed within time; Martin Kabaya v. David Mungania Kiambi (2015) KECA (526) (KLR) for the proposition that court proceedings should be expedited for justice delayed is justice denied; and the Supreme Court decision in Okoti & 3 Others v. Cabinet Secretary for the National Treasury and Planning & 10 Others (2023) KESC 69 (KLR) where the need to observe compliance with timelines set by the Rules was stressed on the principle that justice should not be delayed.

10. On the other hand, the respondent relied on this Court's case of The Co-operative Merchant Bank Limited v. George Fredrick Wekesa Civil (Civil Appeal No. 54 of 1999) (UR) for the argument that, since the Certificate of Delay has not been impeached, striking out pleadings would be a draconian measure; this Court's decisions in Runji & 3 Others v. National Land Commission & Another (2022) KECA 670 (KLR); Daniel Nganga Kanyi v. Sosphinaf Company Limited & Another (2005) eKLR; Michael Mwalo v. Board of Trustees National Social Security Fund (2014) eKLR; and Rupa Cotton Millz (EPZ) Limited v Bank of Baroda (K) Limited (2016) eKLR to support his argument that a Certificate of Delay is *prima facie* evidence that the court took the period stated therein to prepare and deliver the proceedings; and that, therefore, the appeal was filed within time.
11. We were accordingly urged to find that the application has no merit and should be dismissed; and that we order that the appeal be determined on its merits since it has not been demonstrated that the applicant would suffer any prejudice or hardship.
12. We have considered the application, the affidavits in support of, and in opposition to, the application, the respective submissions and the law. The only issue that falls for our determination is whether we should strike out the Memorandum and Record of Appeal dated 23rd May 2024 and filed on 28th May 2024.
13. The applicant's argument is that the certified proceedings were ready by 17th October 2023. The evidence which the applicant relies on is the letter dated 13th October 2023 addressed to the Deputy Registrar asking for, among others, certified proceedings ('AT-9'), the receipts paid for certification of the documents ('AT-10') and the certified proceedings themselves ('AT-11'). Consequently, the applicant states that the Certificate of Delay issued to the respondent dated 9th May 2024, and which computes the time when the proceedings were being prepared to be the period between 4th April 2022 to 28th March 2024, was a façade.
14. To the contrary, the respondent avers that it received the Certificate of Delay from the Deputy Registrar that the proceedings were ready on 9th May 2024; and that, therefore, this Court should readily accept the Certificate of Delay as a true reflection of what caused the delay in filing the Record of Appeal.
15. From the applicant's arguments, he is not impugning the authenticity of the Certificate of Delay dated 9th May 2024. It only takes issue with the respondent's alleged failure to follow up on the proceedings aggressively enough.
16. The origins of a Certificate of Delay stems from the proviso to rule 84(1) of this Court's Rules, 2022 which provides for issuance of a Certificate of Delay to account for the time taken in obtaining the proceedings from the trial court if the appeal is not instituted within 60 days of lodging a notice of appeal. It reads as follows:
 1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-



- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- 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 after 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.

17. A Certificate of Delay is therefore prima facie evidence of the period it took to prepare and deliver the proceedings. This Court in *Daniel Nganga Kanyi* (*supra*) shed light on the importance of a Certificate of Delay in the following words:

“The certificate of delay confirms when delivery of the copies was made to the appellants. That is all that the Rule requires of the court to consider.”

18. In *Keibukwo Investments Limited & another v. Sayani Investment Limited & 3 others* (Civil Application E078 2021) [2025] KECA 305 (KLR)(21 February 2025)(Ruling), this Court found no reason to doubt the contents of the Certificate of Delay placed before them on account that the Certificate itself was not challenged and observed thus:

“We have examined the documents placed before us and find no reason to disbelieve the averments on behalf of the respondent. It has placed before us communication indicating that it was notified that the proceedings were ready on 17th July 2023. It has a certificate of delay indicating a total of 885 days as the period it took to prepare the proceedings. While the applicant, in its submissions, impugns the authenticity of the certificate of delay, it has not formally challenged the certificate, and we see no reason to doubt it.”

19. If indeed the proceedings were ready earlier than the 17th day of October 2023 as alluded to by the applicant, nothing stopped the superior court from communicating this fact to the respondent’s counsel as he had applied for the proceedings as early as 1st April 2022. Further to the foregoing, and in compliance with this *Court’s Rules*, upon receiving the Certificate of Delay on 9th May 2024, the respondent filed the Record of Appeal on 28th May 2024, within 19 days of the 60 days’ window period allowed to file an appeal.
20. Without any evidence to the contrary that the Record of Appeal ought to have been filed earlier than the period stated in the Certificate of Delay, we are bound to accept the period of delay computed and stated in the Certificate of Delay to be from 4th April 2022 to 28th March 2024 as the true reflection of the time taken to prepare the proceedings in the trial court.
21. In the result, had the applicant properly computed the days in the Certificate of Delay, the time spent with pursuing this application would have been utilised more profitably. It follows that the Notice of Motion dated 25th June 2024 is unmeritorious and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR



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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

