IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 638 OF 2019

BETWEEN

KABUITO CONTRACTORS LIMITED.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Being an application to strike out the Notice and Record of Appeal from the decision of the High Court at Nairobi (J.K. Sergon, J.) dated 25th May 2018

in

Civil Suit No. 284 of 2008)

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RULING OF THE COURT

Kabuito Contractors Ltd, the applicant, brought an action against the Hon. the Attorney General, the respondent, for judgement in the sum of ksh.1,122,668,596/71, interest at commercial rates from the date of filing suit, costs of the suit and interest in relation to a contract awarded to it by the former Ministry of Local Government to carry out emergency repairs along certain roads within the city of Nairobi that had been damaged by the El Nino rains. The respondent in his defence denied the claim.

Satisfied that there was a valid and enforceable contract, the learned Judge (Sergon, J.) gave judgment in favour of the applicant as follows:

> **"i. Ksh.3,170,908,263/25 as at 30th June 2017.**
>
> **ii. The aforesaid amount to attract interest at court rates from the date of judgment until full payment.**
>
> **iii. Costs of the suit".**

The respondent evinced his intention to challenge the outcome by filing a notice of appeal and subsequently the record of appeal. It is the applicant's contention in the present application that the said record was lodged in contravention of **Rule 82** of the Court of Appeal Rules. The applicant specifically pleaded that the appeal was filed and served on it one year and seven months after the lodgement and service of the notice of appeal; that the respondent's letter requesting for proceedings was written six months after the judgment and was therefore hopelessly out of time; that the letter was not copied or served upon the applicant contrary to **Rule 82**; that the respondent knew the applicant's address of service but failed to effect service on it; and that the certificate of delay was inaccurate and the averments of the Deputy Registrar were misleading.

In opposition, the respondent maintains that the notice of appeal and a copy of a letter requesting for proceedings were both served on the applicant's advocates on 30th May, 2018 and duly received as evident from the date stamp of Muriithi Kireria & Associates, at 4.07pm. The respondent further contended that after lodging the request for the proceedings, their office file disappeared. Having received no response from the Deputy Registrar regarding typed proceedings for months, they wrote a reminder on 26th November, 2018 without the benefit of their file which contained copies of the notice of appeal and a letter requesting proceedings; and that confronted by this dilemma they opted to reconstruct their office file. They emphasized that the letter dated 26th November 2018 was only a reminder, the initial one having been duly served, as stated above, on 30th May 2018, which was five days from the date of delivery of judgment and in compliance with **Rule 82**;

that the respondent was issued with a certificate of delay indicating that the proceedings were ready for collection and that the certified proceedings were indeed collected on 6th November, 2019.

We bear in mind that Sergon, J. rendered the judgment in question on 25th May, 2018. The respondent dissatisfied, timeously lodged the notice of appeal on 28th May 2018. By the provisions of **Rule 82** the appeal was to be instituted within 60 days of 28th May 2018, that is, on or before 20th August, 2018. The record of appeal was instead filed on 19th December, 2019.

Though an appeal has to be instituted within 60 days from the date when the notice of appeal was lodged, the proviso to **Rule 82** aforesaid acknowledges that situations may arise when this timeline may not be kept. The proviso identifies one such situation as;

> **"… 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".** (Our emphasis).

We have stressed the fact that for a party to invoke the proviso, the letter bespeaking copies of the proceedings must be sent out within 30 days of the date of the decision against which it is desired to appeal, and secondly, a copy of the letter for such proceedings must be served upon the respondent.

If any of the steps that are essential in lodging the appeal has not been taken or has not been taken within the prescribed time, then any person who is affected by the appeal **"may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal".**

Equally critical in deciding whether or not to strike out a notice of appeal or an appeal is the question whether the application to do so was brought without delay. The rule stipulates that;

> **"Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be".** See proviso to **Rule 84.**

The application raises the question; whether or not the appeal was lodged out of time. No doubt it took the respondent considerable period of time after the judgment to bring the appeal. We however do not think he was to blame. We are satisfied that he wrote to the Deputy Registrar asking for copies of the proceedings on 28th May 2018, the same date he filed the notice of appeal. The letter was not only copied to the advocates for the applicant but also served, received and acknowledged by one Olive on 30th May, 2018 at 4.07pm, well within time; that the respondent's file disappeared from his chambers; and that, not making any progress with the High Court registry with regard to proceedings, he wrote a second letter on 26th November, 2018. What is significant, however is that on 10th December, 2019, the Deputy Registrar issued to the respondent a certificate of delay in which it is specifically confirmed that the respondent applied for certified copies of proceedings and judgment on the 26th May 2018; that the respondent was notified that these were ready for collection on 4th November 2019; that two days later they were collected on the 6th November 2019; and that time taken to prepare and supply copies of the proceedings and judgment was from 26th May 2018 to 14th November 2019, a total of 528 days.

Upon collecting these documents on 6th November, 2019, the respondent lodged the appeal within 2 weeks, on 19th December, 2019. It is therefore, not the respondent but the court below that caused the delay, as expressly admitted in the certificate of delay. As has been stated time and time again a certificate of delay is *prima facie* evidence that the court took the period to which it relates to prepare and deliver the proceedings.

> "**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."**

See: **Daniel Ng'ang'a Kanyi V. Sophinaf Company Ltd & Another,** Civil Appeal (Application) No. 315 of 2001.

A certificate of delay will always be relied upon as the basis for excusing delay, unless there are cogent reasons challenging it. All the applicant has argued is that the certificate of the day is inaccurate because it shows that the respondent applied for proceedings on the 26th of May, 2018 and collected the same on 6th November, 2019 and secondly, that on perusal of the record, the proceedings were collected on 26th December, 2018, and time ought to be computed from that date. There is nothing untoward in applying for proceedings on 26th May, 2018 and collecting them on 6th November, 2019, if that is when they were ready. On the second argument, the applicant did not direct us to where on record there is evidence that proceedings were collected on 26th December, 2018.

Finally, it is ironical that the applicant should apply for the striking out of this appeal for failure to comply with rules, which it has itself violated in bringing this application. It has been brought outside the 30 days from the date of service of the record of appeal contrary to **Rule 84**. The applicant was served with the record of appeal on 19th December, 2019, and waited until 2nd March, 2020 to file this application.

For all the above reasons, there is not merit in the application. We accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR