



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & ODEK JJA)**

**CIVIL APPEAL (APPLICATION) NO NAI 22 OF 2013**

**BETWEEN**

**RUPA COTTON MILLS (EPZ) LTD. .... APPELLANT/RESPONDENT**

**AND**

**BANK OF BARODA (K) LTD. .... APPLICANT/APPLICANT**

*(An application to strike out Record of Appeal lodged on 1<sup>st</sup> February 2013 in an appeal from the orders of the High Court of Kenya at Nairobi (Mr. Justice J.M. Mutava) dated the 15<sup>th</sup> day of March 2012 in WINDING UP CAUSE NO. 40 OF 2011)*

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**RULING OF THE COURT**

**[1]** On 12<sup>th</sup> February 2013, the Bank of Baroda (K) Ltd, (applicant) filed the instant notice of motion citing several Rules but it is principally an application under **Rules 84** of the Court of Appeal. It seeks to strike out the Record of Appeal lodged by Rupa Cotton Mills (EPZ) Ltd (respondent) in Civil Appeal No. 22 of 2012. This is on the grounds that the record of appeal was filed out of time. The application is supported by the affidavit of David Ogega Nyaboga, the account manager of the applicant's Industrial Area Branch. The matters in the said deposition as well as the applicant's counsel's written submissions bring out the following salient facts.

**[2]** That the High Court made a ruling on 15<sup>th</sup> March 2012 and the respondent filed a Notice of Appeal against the said ruling on 22<sup>nd</sup> March 2012. The respondent applied for copies of proceedings in the High Court by a letter dated 21<sup>st</sup> March 2012. The respondent's advocate's clerk collected the typed proceedings from the High Court on 26<sup>th</sup> April 2012 which was within the time for lodging the appeal. The applicant's advocates also had in their possession the certified copies of the proceedings which they obtained from the High Court on 24<sup>th</sup> July 2012 and a copy of the typed ruling. The respondent filed the record of appeal on 1<sup>st</sup> February 2013 while using a certificate of delay to justify the late filing of the record.

**[3]** The applicant challenges the certificate of delay issued on 30<sup>th</sup> January 2013, by the Deputy Registrar which shows that it took the High Court registry 314 days to prepare certified copies of the proceedings and ruling. Counsel for the applicant submitted that it was not necessary for the respondent to wait for certified copies of the proceedings and rulings. The respondent's director had deposed in an affidavit

before the High Court that they were in possession of the proceedings from 9<sup>th</sup> May 2012, which matter they have not controverted. Similarly, the applicants attached a copy of a hand written extract that shows on 26<sup>th</sup> April 2012, a copy of uncertified proceedings were received on behalf of R.M. Mutiso in WC 40/11 by somebody who signed for them. Counsel cited the case of:-**Embakasi Youth Development Project and Housing Finance Company Ltd** (2008) e KLR in which the appeal was struck out on the grounds that it was filed out of time without the leave of the court. The following are the exact words used in a pertinent portion of the said ruling:

**“The appellant required only uncertified copies of proceedings and not certified copies to file a competent appeal. Since the uncertified copies of the proceedings were ready for collection by 7<sup>th</sup> September 2007, and the appellant’s counsel was notified so by the Deputy Registrar, we think that the time started to run from the day following the receipt of the letter dated 7<sup>th</sup> September 2007. The appellants’ counsel does not explain the delay of about one month and three weeks from 8<sup>th</sup> September, 2007 to 2<sup>nd</sup> November 2007, when the proceedings were paid for. It is reasonable inference that that was the time needed for certifying the copy of the proceedings which time is not to be excluded in computing time. The appeal was lodged on the 7<sup>th</sup> December 2007. Again the delay from 3<sup>rd</sup> November 2007 to 6<sup>th</sup> December 2007, has not been explained.**

[4] Counsel for the applicant further submitted that the certificate of delay was defective and therefore, it was not binding. It was the respondent’s duty to ensure the error on the certificate of delay it relied on when filing the appeal was corrected. However since they made no efforts to that end, counsel urged us to strike out the appeal while relying the decision in the case of: **The Republic and Minister for Transport and Communications & Another and Kenya Posts & Telecommunications Corporation** Civil Appeal No. 279 of 1997

(unreported).

0. On the part of the respondent, learned counsel Mr. Mutiso also filed written submission and relied on the replying affidavit by Praboth K. Shah sworn on 20<sup>th</sup> May 2013 in response to the instant application. The respondent attributes the delay in filing the Record of Appeal to the time it took the High Court registry to prepare the proceedings and the certificate of delay. In their view, the time for lodging the record of appeal did not run under **Rule 82 (1) and (2)** until the certificate of delay which was issued on 30<sup>th</sup> January 2013 and the record was filed on 1<sup>st</sup> February 2013 as per the Court of Appeal Rules.
0. In further submissions, counsel for the respondent faulted the averments in the supporting affidavit of David Ogega Nyaboga whom he contends did not state how he came into possession of a hand written note that does not indicate the source nor did it bear the name of the author or any judicial insignia to indicate that it emanated from the court registry. Counsel went on to state that under the proviso to **Rule 82** of the Court of Appeal Rules, the interface between the court and the public in regard to correspondence is the Deputy Registrar. Similarly, the same deponent relied on a receipt issued by the court which shows a payment of Ksh. 1,140/= which was received from **Mucheru Oyatta** but does not indicate what the payment was all about much less how the deponent, an accounts manager with the applicant was dealing with the court’s finance office.

[7] The only issue for our consideration in this application is whether the certificate of delay issued by the deputy registrar on 30<sup>th</sup> January 2013 is valid. It is common ground that the Notice of Appeal was filed within time, it was served upon counsel for the applicant and also the letter bespeaking copies of proceedings and ruling were also written and served within time. The only problem is the Record of Appeal which was allegedly filed way out of time. In justifying such delay, the respondent relies on the certificate of delay issued by the deputy registrar. A certificate of delay is issued pursuant to the proviso to

**Rule 82 (1)** which provides as follows;

**“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.”**

[8] There are several contested matters of fact in this application which sadly cannot be resolved by the affidavit evidence before us. For instance, the applicant contends the respondent’s advocate’s clerk collected the uncertified proceedings on 26<sup>th</sup> April 2013 as per the hand written note attached to the application. Further, the applicant exhibits a receipt issued to **Mucheru Oyatta** for a sum of Ksh 1,140/= in WC 40 of 2011, but the receipt does not indicate what services were paid for. The applicant therefore argues that the certificate of delay was erroneously issued and it was in any event not necessary because the respondent did not require a certified copy of proceedings.

0. How do we establish that the respondent was furnished with the proceedings on 26<sup>th</sup> April 2013, and that the receipt exhibited by the applicant is in regard to the proceedings which were also availed to the respondent? In the absence of a letter from the registrar of the High Court, it is not possible for us to make a conclusive determination that the record ought to have been filed earlier than the period stated in the certificate of delay. We also find the facts of this application are distinguishable from the authorities cited by counsel for the applicant for the simple reason that in those cases, there was in evidence a letter by the Deputy Registrar, notifying counsel for the appellant that the proceedings were ready for collection. In this case, there is no such letter and although counsel for the applicant faults the certificate of delay, we are unable to agree with that submission as there was no letter from the High Court indicating the proceedings were ready. What we have on record is a certificate of delay duly signed by a Deputy Registrar as required by the Court of Appeal Rules which is challenged on the basis of a handwritten note that does not bear the signature of the author or any court stamp or insignia.
0. We are not in the least persuaded that the application before us has any merit; an appeal can only be struck out in very clear circumstances; as striking out an appeal may deny a deserving party access to justice which is a fundamental right under the Constitution. See the case of; **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others, Nyeri C.A. No. 18 of 2013;-**

***“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.”***

[11] From the foregoing, we are satisfied that the appeal was filed within 60 days of the delivery of proceedings and judgment. Accordingly, the notice of motion dated 11<sup>th</sup> February 2013 is hereby dismissed for lacking in merits with costs to the respondent.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of June 2016.***

***E.M. GITHINJI***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL J. OTIENO - ODEK***

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**