



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 151 of 2012

JOSHUA NYAMACHE T. OMASIRE.....APPELLANT

AND

CHARLES KINANGA MAENA.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Kisii (Musinga, J.)

dated 27th July 2010

in

KISII HCCC NO. 153 OF 2003)

RULING OF THE COURT

Judgment in High Court Civil Case No. 153 of 2003, was delivered by Musinga J. on 27th July 2010. The respondent in this application who is the appellant in Civil Appeal No. 151 of 2012, Joshua Nyamache T. Omasire felt aggrieved by that judgment. He filed Notice of Appeal on 29th July 2010. That was timeous. He also requested for copies of proceedings and judgment vide letter dated 28th July 2010 addressed to the Deputy Registrar of the High Court by his former advocates M/s Bosire Gichana & Co. Advocates. In another letter dated 13th January 2012, the present advocate for the respondent in the application, M/s Andrew Ombwayo & Co., Advocates wrote to the Deputy Registrar seeking copies of proceedings in a ruling that sought stay of execution of the judgment. The record shows that on 1st March 2012, the Deputy Registrar, in a letter of that date informed the respondent's advocates that the required copies of proceedings were ready for collection on payment of additional fee of Kshs.2680/= before collection. That was paid on that same date and presumably the proceedings requested for were received by the respondent. On 20th March 2012, in a letter written to the Deputy Registrar by the respondent's advocate, the respondent sought to be furnished with a certificate of delay from 29th July 2010 to the date of that letter. They stated further as follows:

“In doing so, please take note of the following:

- 1. The plaintiff's previous sole advocates, M/s Bosire Gichana, had applied for proceedings vide a letter dated 28th July 2010 but presented to this court on the 29th July 2010.**
- 2. On 17th September 2009, this court directed that a ruling on an application for stay of execution of the judgment was to be delivered on the 14th October 2010.**

3. **However, due to misplacement of the file, the ruling was delivered on 30th December 2011.**
4. **We once more requested for typed proceedings vide (sic) our letter dated 13th January 2012.”**

In another letter dated 30th April 2012, the respondent's advocates requested the Deputy Registrar of the High Court to furnish them with certified Decree based on the judgment dated 27th July 2010 for purposes of the Respondent's intended appeal. We note that this was over a month after the proceedings had been collected by the same respondent. On 4th May 2012, the Deputy Registrar issued to the respondent Certificate of Delay, pursuant to **Rule 81** of this **Court's Rules**. That certificate of delay alleged that the letter from the respondent in respect of which it was issued and which requested for proceedings was dated 16th January 2012 and was addressed to the Deputy Registrar by the present advocates for the respondent, Andrew Ombwayo. Obviously, that was incorrect even on the face of the record for the first letter written to the Deputy Registrar bespeaking proceedings was dated 29th July 2010 and was written by respondent's former advocates and not Mr. Ombwayo. Consequently upon that mistake the time taken by the court to prepare and supply the copies of the proceedings and ruling or judgment was not properly computed for paragraph 4 of the certificate reads:

“4. The time taken by this court to prepare and supply the copies of the proceedings and ruling was from 16th January 2012 to 1st March 2012, that is 48 days.”

The record of appeal was filed on 23rd May 2012. This was some 19 days after the issue of the Certificate of Delay.

On the applicant in this application being served with the record of appeal, he filed this Notice of Motion before us on 5th June 2012 in which he seeks through his advocates orders namely that:

- “1. The Honourable court be pleased to strike out the Record of appeal dated 14th May 2012, albeit lodged by the respondent on 23rd May 2012 in respect of Civil Appeal No. 17 of 2012 (Kisumu).**
- 2. Consequent to prayer (1) herein being granted, the appeal filed by the respondent herein on the 23rd day of May 2012 be dismissed.**
- 3. Costs of this application and of the main appeal be borne by the respondent.**
- 5. Such further and/or other orders as the court may deem fit and expedient”**

The application was based on the grounds that as the respondent was supplied with copies of proceedings and judgment on 1st March 2012, if the period between the dates the letter dispatching copies of proceedings and judgment and the date the same copies were supplied is considered, the respondent should have filed the record of appeal latest by 1st May 2011, but the record of appeal was filed on 23rd May 2011, which was 22 days later and no leave of court was obtained before it was filed. Secondly that as the respondent applied for proceedings on 16th January 2012 and there was 48 days delay, there was no need for certificate of delay and that the record of appeal is defective and should be struck out.

The respondent opposed the application contending that he applied for copies of proceedings on 28th July 2010 through his previous advocate and in any case, he contended through his advocate Mr. Ombwayo that the period could not start running from 1st March 2012 when he got the copies of the proceedings because thereafter he continued chasing certificate of delay which he could not get because the file could not be traced as the Registry had been preparing proceedings in respect of an interlocutory appeal which was to be lodged by the applicant on this application against Musinga J's ruling on the application for stay of execution. Thus he could not get certificate of delay to annex to the intended appeal. On our side we note that the same certificate of delay says that the respondent eventually collected the copies of

proceedings on 1st May 2012. The respondent however annexes another certificate of delay obtained by the applicant in respect of that other matter which shows that the ruling on that other matter was dated on 26th January 2012 and that the proceedings in that other matter was supplied on 25th April 2012 and hence he contended that as proof that he could not obtain certified copies of decree and the certificate of delay as the same High Court file was the subject of another application for proceedings and another certificate as well. Thus the respondent maintains that when all that is considered, the record of appeal is not filed out of time.

Mr. Ogutu Mboya the learned counsel for the applicant and Mr. Ombwayo, the learned counsel for the respondent addressed us at length on their respective positions in the matter. On the main, the two learned counsel highlighted their respective positions with Mr. Mboya referring us to some decided cases of this court.

We have considered the application, the record before us, the affidavits filed by both sides, the able submissions by both counsel and the law. In our view, this application lacks merit and cannot stand. First, we say so because we do not think Mr. Mboya came before us with clean hands. He knew very well that the respondent applied for copies of proceedings on 28th July 2010 and he cites that date in his affidavit, yet when the certificate of delay makes a mistake and cites 16th January 2012 as the date the respondent wrote a letter bespeaking the proceedings, he uses that clear mistake to seek orders of the court. Secondly, he was served with the record which clearly shows that the decree issued in respect of the judgment, the subject of the appeal was certified on 4th May 2012 demonstrating that it must have been received by the respondent on that day or some days thereafter and thus occasioning delay which delay was caused by the Registry, yet in his affidavit, Mr. Mboya does not refer to that delay in obtaining certified decree and lastly, he knew that the same file was the subject of two applications for proceedings and other matters by the respondent and by himself and that as the file was being attended to in response to his application, the respondent's application was bound to be delayed yet he found it unnecessary to refer to this aspect of the matter.

In our view, if the delay to certify the decree is considered and the delay to obtain the certificate of delay is also considered then, it makes it difficult to appreciate that the record of appeal was filed out of time. In any case the doubts raised by these aspects demand that the appeal already filed, which in our mind raises important matters of law should be heard on merit.

In case we are wrong on our view above, we think this is a good case for the application of **Section 3 A** and **3 B** of the **Appellate Jurisdiction**, to ensure that the substance of the appeal is heard and decided on merit. We say so because in our mind there is enough evidence to show that the respondent has all along been keen to have the appeal filed and the record of the appeal together with the annexures to this application by both sides demonstrate keen interest by the respondent to have his side of the case heard. The days of delay even if we were to accept Mr. Mboya's version, are few and could have been days used in preparing the appeal. Such are the cases for which **Section 159** of the **Constitution** was entrenched.

We have said enough to indicate the reasons why this application must fail. It is dismissed with costs to the respondent in this Notice of Motion who is the appellant in civil Appeal No. 151 of 2012.

Dated and delivered at Nairobi this 28th day of November, 2012.

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR