



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: BOSIRE, GITHINJI & VISRAM, J.J.A)

CIVIL APPLICATION NO. NAI. 246 OF 2010

BETWEEN

MAX INTERNATIONAL CO. LTD APPLICANT/RESPONDENT

AND

BRUNO PEZZOTTA RESPONDENT/APPELLANT

(An application to strike out notice of appeal dated 27th July, 2010 and lodged in the High Court of Kenya at Malindi on the same date

in

H. C. C. No. 72 of 2007)

RULING OF THE COURT

This is an application by way of notice of motion brought under **Rules 80 and 42** of the Court of Appeal Rules (the Rules) in which the applicant (respondent in the appeal) seeks an order that the notice of appeal be struck out on the ground that the same was served on the applicant out of time, contrary to **Rule 76 (1)** of the Rules.

The facts are not in dispute. The notice of appeal was lodged at the superior court registry on 27th July, 2010 within the required fourteen days after delivery of the judgment by the superior court, the subject of the appeal herein. However, it was not served upon the respondent until 23rd September, 2010, a delay of almost two months.

In his replying affidavit, Mr. William Wameyo, learned counsel for the respondent, admits these facts, and attributes the delayed service to “oversight and confusion” in his office.

Mr. Ayub Muhuni, learned counsel for the applicant, has not demonstrated to us what prejudice, if any, his client has suffered because of this omission. Although we deprecate non-compliance with the Rules, we are of the view that in this case the respondent has offered a reasonable explanation for the omission, and we are minded to excuse the error. We are fortified in our decision by the newly enacted **sections 3 A and 3 B** of the Appellate Jurisdiction Act (the Act), which state as follows:

“3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

“3B. (1) for the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;**
- (b) the efficient use of the available judicial and administrative resources;**
- (c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- (d) the use of suitable technology.”**

We are of the view that to allow the application before us would be to act contrary to the aforesaid overriding objectives. Accordingly, the notice of motion dated 8th October, 2010 is hereby dismissed. The notice of appeal is deemed as properly served upon the respondent. As regards costs of the application, the same shall be paid by the respondent (appellant in the appeal). It is so ordered.

Dated and delivered at Mombasa this 4th day of March, 2011.

S. E. O. BOSIRE
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JUDGE OF APPEAL

E. M. GITHINJI
.....

JUDGE OF APPEAL

ALNASHIR VISRAM
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR