IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: TUNOI, BOSIRE & VISRAM JJ.A)

CIVIL APPEAL (APPLICATION) NO.225 OF 2010

BETWEEN

SAFE RENTALS LIMITED …… APPLICANTS/ RESPONDENTS

AND

AFRICAN SAFARI CLUB LTD ……. RESPONDENT/ APPELLANT

(Being an application to strike out record of appeal from the judgment and decree of the High Court of Kenya at Mombasa (Sergon J.) dated 23rd July, 2009 and delivered on 24th July 2009 in

H.C.C.C. NO. 130 OF 2006)

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RULING OF THE COURT

Two applications were argued before us simultaneously, the first one being an application for an order striking out Civil Appeal No. 225 of 2010, as incompetent, and is expressed to be brought under **Rules 42(1)** and **80** of the Court of Appeal Rules. It was filed on *26th August 2010*. The second one was filed on *17th November, 2010,* and was filed by the appellant in the aforesaid appeal, African Safari Club Limited, which application is expressed to be brought under **rules 44(1), 47** and **64(1)** of the Court of Appeal Rules, The Appellate Jurisdiction Act and Article 159 (2) (b) and (d) of the Constitution of Kenya. In that application the appellant seeks, firstly, an order expunging from the record a certificate of delay dated *31st May 2010*; secondly, an order granting it leave to file and presumably serve a supplementary record of appeal to bring on record some undisclosed documents. However, we presume the appellant wants to incorporate in the record of appeal the documents which **Safe Rental Limited**, the respondent in the appeal, says are omitted from the record of appeal.

In both applications the court has been invited to exercise judicial discretion in favour of the respective applicants. It is however, trite that to succeed an applicant must show it is deserving of the exercise of that discretion in its favour. The applicant has to disclose all material facts, demonstrate good faith, and offer reasonable and full explanation, where necessary, as to the reason for its failure to take the essential step for which the court's discretion is invited to sanction, within the time stipulated in the rules for doing so.

The facts upon which both applications are based are straightforward. African Safari Club Limited, hereafter referred to as the appellant, was the unsuccessful party in a suit which was commenced in the superior court by plaint, by Safe Rentals Limited which we shall hereafter refer to as the respondent for,

among other things, liquidated 'sums' of money allegedly being rental for metal safety deposit boxes which the respondent says it installed in the appellant's hotels. Judgment thereof was delivered on *24th July 2009* and on *27th July 2009* the appellant filed a notice of appeal against that judgment. By its letter dated *7th August 2009,* which was copied to the opposite side, the respondent's then advocates, Moses Mwakisha, requested for typed certified copies of proceedings and judgment. By dint of the provisions of **rule 81** of the Court of Appeal Rules the request was made within time and as a result the appellant was entitled to take advantage of the proviso to that rule.

The appellant did not file a record of appeal until *30th July 2010,* which was way outside the 60 days stipulated in the Court of Appeal Rules for doing so. Ordinarily the appellant's appeal would be incompetent. However, it would appear the appellant appreciated this, and therefore incorporated in the record of appeal certificates of delay to enable it take advantage of the proviso to rule 81 aforesaid. This Court has held time and again that a certificate of delay is not absolute. The court can, if necessary, inquire into its validity. Two certificates of delay are on record. The first certificate in time is dated *31st May 2010*. In that certificate it is shown that the requested copies of proceedings and judgment were ready for collection on *17th May 2010* and the period *7th August 2009* when the request for the same was made and *17th May 2010,* was certified as having been necessary for the preparation and delivery to the appellant of the copies of proceedings.

Curiously, however, there is another certificate of delay on record dated *23rd July 2010* which certifies that copies of proceedings were ready for collection on *14th June 2010,* and that the period between *7th August 2009* and *14th June, 2010* was necessary for the preparation of the said proceedings. Obviously if the earlier certificates were to be relied upon this appeal will certainly be incompetent as having been filed out of time. It is mainly because of that fact that the respondent has sought an order striking out the record of appeal.

The appellant, however, contends, and it was its counsel's submission that it was not aware of the existence of the first certificate of delay. It received a bundle of documents from the court through the appellants former advocates, and therefore, the presence of the two certificates can only be explained by the court. Its counsel, Judith Sijeny, has deponed in her affidavit in support of the appellant's application thus:-

"8. That the proceedings and the certificate of delay dated *23rd July 2010* were brought to us in a bundle one week before the *30th July 2010* and I proceeded to prepare the records of appeal accordingly.

9. That I realized later after settling and binding my pleadings that there were two certificates of delay one dated *31st May 2010* and the other *23rd July 2010…*

10. That as at the time of filing the records, I had relied on the certificate of delay dated *23rd July 2010* and therefore filed the records therein on time.

11. That I am not responsible for the certificate of delay dated *31st May 2010* and verily believe that it is an incorrect document."

In a later paragraph the deponent avers that she checked the court record and found only one copy of the certificate of delay, namely the one dated *23rd July 2010*.

Judith Sijeny did not receive the bundle of documents she talks about in her affidavit direct from the court. She received them from the firm of Moses Mwakisha & Co. advocates, who previously were acting for the appellant. That firm has not explained how it came to be in possession of two certificates of delay. It would have been more prudent for somebody from that firm to swear an affidavit to explain that aspect of this matter. That notwithstanding it is curious that it was not Moses Mwakisha & Company Advocates, who requested the court to furnish the appellant with a certificate of delay, but Sijeny &

Company. By that firm's letter dated *22nd April 2010*, the Deputy Registrar of the High Court at Mombasa was requested to supply a certified copy of the decree and certificate of delay "confirming that the period *7th August 2009* (when proceedings were applied for) to date has been necessary for the preparation of the proceedings." The letter was signed by Judith Sijeny, from whose affidavit, we reproduced excerpts, above. It is instructive that the first certificate of delay dated 31st May 2010 is dated soon after that letter. It is also instructive that the two certificates of delay in issue here, appear to have been signed by the same Deputy Registrar.

In view of the foregoing facts and circumstances how should the court exercise its discretion in both applications? Clearly, the appellant is not being particularly candid in this matter. These are civil proceedings. Only the appellant may explain how it came to be in possession of two certificates of delay. The law places the burden on it to offer a reasonable explanation as to how it came by the two certificates. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, deals with that issue. It provides as follows:

"In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

Miss Sijeny for the appellant implied that the certificate of delay dated *31st May 2010*, is an incorrect one. There is no basis for that conclusion. The appellant is the one which will benefit if that certificate of delay were to be expunged from the record. Doing so is not a difficult thing to do. However a careful consideration of the matter reveals that the certificate of *23rd July 2010* was meant to mislead the court. Its presence casts aspersions on the **ubarrima fides** of the appellant and its legal advisers. This or any other court will not properly allow its process to be abused. While the court has power under both Article 159 of the Constitution and **Sections 3A** and **3B** of the Appellate Jurisdiction Act to bear in mind the overriding objective of civil litigation, namely to facilitate the just, expeditious, proportionate and affordable resolution of matters before it and to obviate over reliance on technicalities of procedure, it should not assist a party who seeks to mislead it, as in this case.

In view of the conclusion we have come to we are disinclined to allow the appellant's aforesaid application. It is dismissed with costs to the respondent. In the event the appellant's aforesaid application must succeed with the result that we hold that the certificate of delay dated *23rd July 2010* is invalid which therefore means, that **Civil Appeal No. 225 of 2010** was filed out of time without leave of the court and is therefore incompetent. Consequently it is struck out with costs both of the motion dated *25th August 2010* and of the appeal to the respondent in the appeal.

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

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR