



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 110 OF 2009

BETWEEN

ATTORNEY GENERAL.....APPELLANT/RESPONDENT

AND

SMALL WONDER LIMITED.....RESPONDENT/APPLICANT

(Application to strike out Record of Appeal filed on 5th June, 2009 against the decree and judgment of the High Court of Kenya at Nairobi (Kihara Kariuki, J.) dated 3rd February, 2009

in

H.C.C.C. NO. 918 OF 2002)

RULING OF THE COURT

This is an application under **Rule 80** (now rule 82) of this Court's Rules in which the applicant, **SMALL WONDER LTD.**, seeks an order that the record of appeal filed on 15th June, 2009 be struck out. The applicant is also asking for the costs of the application.

The application is brought on the following grounds:-

- “1. That the appellant failed to lodge its notice of appeal within the time prescribed by the rules and hence the appeal is incompetent.**
- 2. That judgment against the Appellant was passed on 3rd February, 2009.**
- 3. That the time for lodging the notice of appeal elapsed on 17th February, 2009.**
- 4. That appellant lodged the notice of appeal on 18th February, 2009.**
- 5. That the notice of appeal was therefore lodged one day late without the leave of the court.”**

The application is supported by the sworn affidavit of **Renato Pieia**. In that affidavit, the said **Renato Pieia** states inter alia:-

- “3. THAT the Appellant lodged its notice of appeal on 18th February, 2009, one day late from the**

stipulated time.

4. THAT the notice of appeal was supposed to be lodged by 17th February, 2009.

5. THAT I am advised by my advocates on record which advise I verily believe to be true that the appellants notice of appeal falls within the purview of rule 80 of the Court of Appeal rules and therefore ought to be struck off.”

When the application came up for hearing on 5th July, 2011, Mr. P. Mwangi, the learned Counsel for the applicant more or less repeated what we have set out above. Mr. Mwangi confirmed that the main complaint in the application is that there was a delay of one day.

In his reply Mr. Waigi Kamau submitted that the notice of appeal was filed on 16th February, 2009 and hence within the 14 days as stipulated by **Rule 75(1)** of this Court’s Rules.

From the record before us the judgment of the superior court was delivered on 3rd February, 2009. The rubber stamp on the Notice of Appeal which was affixed by the High Court Registry (at p. 113 of this record) shows that the notice of appeal was filed on 16th February, 2009, while another rubber stamp affixed by the Court of Appeal Registry shows 18th February, 2009. The notice of appeal was therefore filed within 14 days as stipulated by **Rule 75(1)** of this Court’s Rules, the Court of Appeal stamp notwithstanding. The distinction drawn by Mr. Mwangi between “**filing**” and “**lodging**” of the notice of appeal is without a difference and we do not agree that the notice of appeal was filed or lodged out of time.

For the foregoing reasons, we find no merit in this application and we order that the same be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 15th day of JULY, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR