



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, AGANYANYA & VISRAM, JJA)**

**CIVIL APPEAL NO. 148 OF 2009**

**BETWEEN**

**C.Y.O. O.....APPELLANT**

**AND**

**R.O.O.....RESPONDENT**

***(An appeal from the judgment and decree of the High Court of Kenya at Nairobi  
(Rawal, J.) dated 18<sup>th</sup> September, 2008***

**In**

**NAIROBI H.C.C.A. NO. 33 OF 2001)**

**\*\*\*\*\***

**RULING OF THE COURT**

The matter before us is a notice of motion dated 10<sup>th</sup> August, 2009 and filed in court on 11<sup>th</sup> August, 2009. It seeks an order under **rule 80** of the Court of Appeal Rules (*“the rules”*) for striking out the notice of appeal filed on 3<sup>rd</sup> October, 2008, the Memorandum of Appeal filed on 2<sup>nd</sup> July, 2009 and the entire record of appeal. **Rule 80** of the rules, as it existed before amendment in September, 2010, provided as follows: -

**“80. A person affected by an appeal may, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:**

**Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the notice of appeal or record of appeal on the respondents as the case may be.”**

The proviso to that rule sets a time limit for invoking it. It would be apparent, therefore, that on the face of it the motion itself was filed out of time and is liable to striking out. Nevertheless, it was argued before us *inter partes* and we shall therefore consider it on its merits. What is the background to the application?

The applicant is **C.O** who is locked up in a matrimonial dispute with his second wife, **R.O.O**, the respondent herein. C filed a suit in the Chief Magistrates Court in Nairobi on 29<sup>th</sup> November, 2000, alleging various acts of cruelty and violence against R and sought judicial separation and an order that the two were no longer bound to cohabit as man and wife. R denied the acts of cruelty and/or violence and

alleged her own acts of cruelty against C. She sought dismissal of the suit and counterclaimed for maintenance. The Chief Magistrate (Mrs. G. Nzioka (as she then was) heard the dispute and on 15<sup>th</sup> August, 2001 granted the orders for judicial separation, and non-cohabitation. She also granted the order for maintenance, on terms that:

*“iii) The Plaintiff to pay Kshs.4,000/= each for the defendant’s house help, watchman and gardener and Kshs.40,000/= for her maintenance.*

*iv) The Plaintiff to settle the electricity, water and telephone bills.*

*v) The Plaintiff do transfer the motor vehicle which the defendant was using to her and to maintain the same.*

*vi) The Plaintiff do meet the costs of this suit.”*

C was aggrieved by the order for maintenance only and he appealed to the High Court (Rawal, J) which on 18<sup>th</sup> September, 2008 allowed the appeal and made the following orders:

*“(1) The appellant do pay Shs.30,000 per month for the respondent’s maintenance with effect from the date of judgment i.e 15<sup>th</sup> August, 2001.*

*(2) The appellant to pay electricity, water and workers of Homa Bay home.*

*(3) The appellant to pay telephone bills of the respondent not exceeding Kshs. 5,000 per month.*

*(4) No order as to costs.”*

Once again C was not satisfied with that order and so on 25<sup>th</sup> September, 2008, he timeously filed a Notice of Appeal in the High Court and lodged the same in the Court of Appeal Registry on 26<sup>th</sup> September, 2008. It is endorsed on the Notice of appeal that on 29<sup>th</sup> October, 2008, it was served on R, who was unrepresented at the time, and she accepted service but did not sign. If that was the case, the service appears to have been timeous also.

On 2<sup>nd</sup> October, 2008, the advocates on record for C, M/S. Amuga & Co. wrote to the Deputy Registrar for supply of proceedings and judgment for appeal purposes and the letter was copied to R. Eventually the Deputy Registrar responded on 10<sup>th</sup> June, 2009 stating that the copies were ready for collection. They were collected on 12<sup>th</sup> June, 2009 and a certificate of delay was issued by the Deputy Registrar on 22<sup>nd</sup> June, 2009. The appeal was thereafter filed on 9<sup>th</sup> July, 2009, which was within the time allowed under **rule 81** of the rules. From all indications on record therefore, it was a valid appeal. But R still complains that it ought to be struck out. Why?

According to the affidavit in support of the application and the submissions of learned counsel who appeared for her, Ms. V. Kimenyi, the notice of appeal was never served on R as endorsed thereon or at all, and the record of appeal was not served either. Furthermore, the letter bespeaking copies of proceedings, and judgment was merely copied to R but not served on or received by her and therefore Collins could not take advantage of the proviso to **rule 81**. Non-compliance with these essential procedural steps thus renders the main appeal incompetent.

In response to those depositions and submissions, the advocates on record for C, Mr. Amuga filed two affidavits, one by a court process server, the other by the advocate, deponing that the notice of appeal was personally served on R at their offices on 25<sup>th</sup> October, 2008 soon after it was lodged in the High Court, and on 29<sup>th</sup> October, 2008, or soon after it was lodged in the Court of Appeal Registry. It is also deponed that the letter bespeaking copies of the proceedings was personally served on Rodah on 6<sup>th</sup> October, 2008. As for the submission that the record of appeal was filed out of time, Mr. Amuga relied on

the Certificate of delay issued by the court, and submitted that on all counts the application to strike out was vexatious.

We have considered the application, the affidavits on record and the submissions of counsel. In the end we have come to the conclusion that the application is lacking in merit. There is basically one issue of fact and two issues of law raised by the applicant; whether the applicant was served with the notice of appeal, whether the letter bespeaking copies of proceedings required service on the applicant, and whether the proviso to rule 81 validates the filing of the appeal out of time.

The issue of service of the notice of appeal boils down to the applicant's word against that of the respondent's advocate and court process server. They are all stated on oath, but we think on a balance of probability, the respondent's account of events is preferable. That is because the affidavits in reply were filed and served in time for the applicant to refute any of the matters of fact stated therein but there was no response. All that there was, was a belated attempt to have the matter adjourned further but the attempt was rejected. We find as a fact that the notice of appeal was served on the applicant, R.

As to whether the letter bespeaking copies of proceedings was "served" on the applicant, we find no provision for "service" under the rules as they existed in October, 2008. The relevant rule provided as follows: -

*"8(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent."*

Emphasis added.

There is no dispute that the letter bespeaking copies of proceedings and judgment, which is exhibited, was written within thirty days of the decision appealed from. There is no dispute either, that the letter was copied to the applicant. In accordance with the rule, it would have been sufficient if it was "sent" to the applicant as there was no requirement for personal "service". The rule was only amended in the new rules to require that it shall be "served". See **Rule 82 (2)** of the Court of Appeal Rules 2010. At all events, there is affidavit evidence that the letter was personally served on the applicant and we believe that evidence.

Finally, in view of our finding on the letter bespeaking copies of proceedings and judgment, we find and hold that the proviso to **rule 81** was complied with and therefore the Certificate of delay issued by the Deputy Registrar of the High Court entitled the respondent to file the memorandum and record of appeal when it did. It was filed timeously.

For those reasons, the application is dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of November, 2011.***

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**