



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 250 OF 2009

BETWEEN

PAUL WANYONYI APPLICANT/RESPONDENT

AND

SILVER STAR PARCELS SERVICES LIMITED RESPONDENT/APPELLANT

(Application to strike out the notice of appeal and the record of appeal in an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Khamoni, J.) dated 8th August, 2008

in

H.C.C.C. NO. 1003 OF 2006)

RULING OF THE COURT

This is an application by the respondent in the appeal under **Rules 80** and **81 (1)** of the *Court of Appeal Rules* (Rules) for an order that the appeal be struck out on the ground that it was instituted out of time without leave of the Court.

Rule 81 (1) of the Rules, stipulates that an appeal should be instituted within sixty days of the date when the notice of appeal is lodged:

“Provided that when application for a copy of proceedings in the superior court has been made in accordance with sub-rule (2) within 30 days of the date of the decision against which it is desired to appeal, there, shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the registrar of the superior court as having been necessary for the preparation and delivery to the appellant of such copy”. (Emphasis ours).

Sub-rule (2) of **Rule 81** disentitles an appellant reliance on the proviso unless the application for such copy was in writing and a copy of it sent to the respondent.

In this case, the judgment appealed from was delivered on 8th August, 2008 and it is conceded that the appellant made an application for the copy of proceedings on 19th August, 2008 though delivered to the Deputy Registrar of the superior court on 4th September, 2008 – all within the stipulated 30

days. There is no complaint by the applicant (Respondent) that a copy of the application was not sent to his advocates. The letter is indeed copied to them. There is a certificate of delay issued by the Deputy Registrar of the superior court stating, among other things, that by a letter dated 17th July, 2009, which appellant's advocates received on 6th August, 2009, the appellant's advocates were informed that proceedings were ready for collection on payment of requisite charges; that the copies were paid for on 13th August, 2009 and collected on 18th August, 2009 and that the time taken to prepare and supply the copies of proceedings was from 4th September, 2008 to 18th August, 2009. The appeal was filed on 16th October, 2009 which is within the stipulated 60 days, if time is computed from 19th August, 2009.

Mr. Kaluma, learned counsel for the applicant, raised issue about the authenticity of the certificate of delay and submitted that time started running from 6th August, 2009 when the appellant's advocates received a notice and the appeal should have been filed by 5th October, 2009. Mr. Kaluma, further contended that there is no explanation in the certificate for the period from 6th August, 2008 to 18th August, 2009 when the proceedings were collected from the registry.

Mr. Wamiti, learned counsel for the respondent, deposes in the replying affidavit, among other things, that the letter dated 17th July, 2009 was infact posted on 4th August, 2009 and received on 6th August, 2009; that on receipt of the letter he instructed his clerk to pay the requisite fees and collect the proceedings; that upon the file being traced at the registry the requisite fees was paid on 13th August, 2009 and that the proceedings were not released until 18th August, 2009 as the registry advised that there were some corrections to be effected before their release.

Mr. Wamiti has annexed a copy of the envelope enclosing the letter dated 17th July, 2009. The post-mark on the envelope verifies that the letter was posted on 4th August, 2009.

Mr. Kaluma submitted, that time started to run from 6th August, 2009 when the appellants advocates were notified that the proceedings were ready. He relied on **Richard Kanyago & two Others vs. David Mukii Mereka** – Civil Appeal (Application) No. 94 of 2001 (unreported) where the Court disagreed with the ruling of Platt, J.A. in **Nairobi Home Economic vs. African Heritage** [1982 – 88] 1 KAR 1024 that “*certificate of delay is binding prima facie*” on the Court and stated:

“time starts to run from the date of receipt of the notice from the court or such date when, in the usual course of postage, the notice should be expected to be received by the appellant”.

Mr. Wamiti on his part disputes that time starts to run when the advocate is notified and relied on **Patani vs. Crown Match Co. Ltd. & 2 Others** – Civil Appeal (Application) No. 174 of 2004 (unreported) where the Court said:

“The certificate of delay was issued by the Deputy Registrar of the superior court and it is not open to (counsel) to simply declare it wrong without telling us what was not right with it”.

In the **Nairobi Home Economics** (supra), Platt, J.A. said of the Certificate of Delay issued under provision **Rule 81 (1)**:

“This Court is bound to accept the certificate as prima facie correct, subject to amendment by the registrar and small corrections of obvious slips”.

On our part, we do not find anything wrong with that statement of the law. Indeed, Platt, J.A. did not say that the registrar's certificate is binding. The Rules give power to the registrar to certify the time to be excluded. The certificate should contain matters of fact which are within the knowledge of the registrar or which the registrar can verify. This Court is handicapped. It has no means of verifying the information although it cannot close its eyes to glaring errors on the face of a certificate. The passage, we have quoted in **Richard Kanyago** relating to when the time starts to run is too restrictive and is inconsistent with the test stated in the proviso – that is – the time as may be certified by the registrar as

required for preparation and delivery. That test is concerned with reality not speculation. The strict application of the test stated in **Richard Kanyago** (supra) could work injustice as it does not take into account systemic delays which may arise at the registry even after an appellant has received a notice that the copy of proceedings is ready.

In this case, the explanation by the appellant's counsel that the registry did not release the copy of the proceedings notwithstanding that he had received the letter and paid the requisite fees until 18th August, 2009 is supported by the certificate itself. It has not been shown that the information in the certificate is incorrect and we have to give effect to it.

In the result, we are satisfied that the appeal was filed within the time stipulated by **Rule 81 (1)** and dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 30th day of April, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR