



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: R. S. C. OMOLO, J. W. ONYANGO OTIENO, D. K. S. AGANYANYA

CIVIL APPEAL (APPLICATION) NO. 177 & 178 OF 2009

BETWEEN

**RATEMO OIRA T/A RATEMO OIRA & COMPANY  
ADVOCATES.....APPLICANT/RESPONDENT**

AND

**BLUE SHIELD INSURANCE CO. LTD  
.....RESPONDENT/APPELLANT**

*(Application to strike out the record of appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Khaminwa, J.) dated 9<sup>th</sup> February, 2009*

in

**H.C.C.C. NO. 243 OF 2008 (O.S)**

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**RULING OF THE COURT**

On 7<sup>th</sup> May 2008, the appellant in Civil Appeal No. 177 of 2009, **Blue Shield Insurance Limited**, which is the respondent in the two applications before us, filed in the superior court Originating Summons under **Orders 52 rules 4 and 5, 36 rules 1, 2, 3 and 8** of the Civil Procedure Rules, **sections 63 and 3A** of Civil Procedure Act and the Advocates Act Chapter 16 against **Ratemo Oira, t/a Ratemo Oira & Company Advocates**, the applicants in this application and the respondents in that appeal. The Originating Summons and other applications connected to the matter were set down for hearing before Khaminwa, J. who after full hearing, dismissed them in a ruling dated 9<sup>th</sup> February 2009. The respondent felt aggrieved and filed notice of appeal timeously on 10<sup>th</sup> February 2009 through its advocates at that time, Mbigi Njuguna & Company Advocates. On the same day a letter dated 10<sup>th</sup> February 2009, bespeaking the copies of the proceedings and certified copy of the ruling and order was addressed to the Deputy Registrar of the High Court and copied to Ratemo Oira & Company Advocates, the applicants herein. In a certificate of delay issued on 20<sup>th</sup> July 2009, the Deputy Registrar of the High Court stated, *inter alia*, as follows:-

**“2. By a letter dated 26<sup>th</sup> June 2009, the advocates for the appellant were notified that the copies of proceedings and judgment were ready for collection upon payment of the Court requisite charges.**

3. *That Court fees for certified copies of proceedings and ruling was paid on 13<sup>th</sup> July 2009.*
4. *That proceedings and ruling were collected on 14<sup>th</sup> July 2009.*
5. *That time required for preparation and delivery of certified copies of the proceedings and ruling was from 10<sup>th</sup> February 2009 to 14<sup>th</sup> July 2009 and that is 155 days.*
6. *This Certificate of Delay was prepared and ready for collection on 20<sup>th</sup> day of July 2009.”*

Armed with that certificate of delay, the respondent in this application filed the record of appeal on 10<sup>th</sup> August 2009.

In the meanwhile, and while waiting for the typed proceedings in respect of the superior court's ruling of 9<sup>th</sup> February 2009, Blue Shield Insurance Company Ltd, filed a notice of motion dated 18<sup>th</sup> February 2009 under **Order 41 rule 4** of the Civil Procedure Rules, seeking stay of recovery of costs awarded to the respondent. Khaminwa, J. heard that application and in a ruling dated 25<sup>th</sup> March 2009, granted it upon a condition that security in the sum of Ksh.15 million be made either in cash deposit or by banks guarantee within 21 days of the date of that ruling. That ruling did not satisfy the respondent in this application. It applied through its advocates, for copies of proceedings and ruling and apparently sent copy of the letter to the applicant in the application before us. A certificate of delay was prepared on 24<sup>th</sup> July 2009 and it was certified that the time that was required for preparation and delivery of the certified copies of the proceedings and ruling was from 1<sup>st</sup> April 2009, when the letter applying for the proceedings and ruling was made to 14<sup>th</sup> July 2009 when the proceedings and ruling were collected and that was 105 days. The respondent in this application filed Civil Appeal No. 178 of 2009 on 10<sup>th</sup> August 2009.

After the two appeals, namely Civil Appeal No. 177 and Civil Appeal No. 178, both of 2009 were filed on 10<sup>th</sup> August 2009, the applicants moved to this Court by way of applications seeking in each case to strike out the appeals. In respect of Civil Appeal No. 177 of 2009, he seeks to have it struck out on grounds that the appeal does not lie as in law the appellant Blue Shield Insurance Company Limited had no right of appeal and had not obtained leave to appeal. Secondly, the appeal was filed out of time as the certificate of delay cannot be relied upon because it did not tell the truth on the period of delay. Thirdly, Mr. Oira says the letter bespeaking the copies of the proceedings and ruling was not acknowledged by the Deputy Registrar to confirm that the appellant/respondent had applied for the proceedings and lastly that the certificate of delay erroneously referred to the advocates who applied for copies of proceedings as being the advocates of the defendant which was not the case as the advocates who applied for the copies of the proceedings and ruling were advocates for the applicants in the originating summons and not advocate for the defendants in that application.

In respect of Civil Appeal Number 178 of 2009, Mr. Oira's take was that the appeal was filed out of time and without leave of the Court as the certificate of delay was not proper and so could not be relied upon to explain the delay period. Further, Mr. Oira contended that there was no letter bespeaking the copies of proceedings and ruling as he was not served with a copy of the same letter if it existed.

Mr. Muthuri, the learned counsel for the appellant/respondent, on the other hand, submitted that the two appeals were lodged as of right pursuant to **section 66** of the Civil Procedure Act. He submitted further that under **rules 42 (1)** and **52 (4)** of the Civil Procedure Rules, the appeals did lie as of right as they are on matters concerning advocates. As to the allegations that the appeals were filed out of time, Mr. Muthuri's submissions were that as the provisions of **rule 81 (1)** of this Court's Rules and the proviso thereto and **rule 81 (2)** were complied with, the appeals were filed timeously, as the Court has always accepted and relied on the certificate of delay issued by the Deputy Registrar in such cases. As to the apparent mix-up in the description of the role of the firm of advocates who applied for copies of proceedings and ruling, Mr. Muthuri felt that was a minor mistake by the Court Registry for which the appellant should not be penalized.

As is clear from the above, the two applications, one seeking to strike out Civil Appeal No. 177 of 2009 and the other seeking to strike out Civil Appeal No. 178 of 2009, are basically between the same parties and basically on the same subject matter. We had them consolidated and heard together. We feel, however, that each must be considered on its own merits.

Civil Appeal No. 177 of 2009 emanated from a decision made on an originating summons. Whether such decision is termed judgment as happens in certain cases or ruling as was used in the decision of the superior court which gave rise to the Civil Appeal No. 177 of 2009, the effect is the same; such decisions finally determine all the issues and are in essence decrees. We are of the view as concerns this particular matter, that the provisions of **section 66** of the Civil Procedure Act covers them. We are not persuaded that leave is required to file appeals from the decisions on originating summons. We also note that the provisions of **Order 52 rule 4 (2)** allow for the commencement of disputes between advocate and clients by way of originating summons. Mr. Oira, did not refer us to any decisions on this particular aspect. We resist the temptation to discuss this aspect further as the parties may want to address the Court further when hearing the appeal. On the issue of the appeal being filed out of time and without leave of the Court, Mr. Oira is plainly wrong. The decision being challenged was delivered on 9<sup>th</sup> February 2009. The respondent/appellant filed notice of appeal on 10<sup>th</sup> February 2009. It also wrote a letter bespeaking the copies of the proceedings and ruling to the Deputy Registrar on 10<sup>th</sup> February 2009. Mr. Oira acknowledges that at paragraph 2 of his supporting affidavit. At paragraph 12 of the same affidavit, Mr. Oira admitted that the Deputy Registrar wrote to the appellant/respondent's advocate telling them that the required copies were ready for collection on payment. The respondent collected the copies of proceedings and ruling on 14<sup>th</sup> July 2009 and the certificate of delay, part of which we have reproduced above was issued on 20<sup>th</sup> July 2009 and stated that the period of delay was 155 days. The appeal was filed on 10<sup>th</sup> August 2009. This was well within time. However, Mr. Oira faults it on account that the proceedings and ruling together covered only 33 pages and did not require all that time to prepare. He therefore, felt the certificate of delay was not properly obtained. He reads some sinister motive. He nonetheless has not pointed out any fraud other than saying that proceedings took only eleven days to be typed. That argument presupposes that only the proceedings and ruling in that one case was being typed at the Registry. It does not consider that even if the typing of the proceedings could take only eleven days, there could have been other matters before it, such that it could have taken that period to reach the typist. When it comes to computation of time within which the appeal should have been filed, this Court has always relied on the certificate of delay, unless salient and cogent reasons are set out to challenge the certificate of delay. In the case of ***Daniel Ng'ang'a Kanyi vs. Sophinaf Company Ltd and James Gatiku Ndulo Civil Appeal (Application) No. 315 of 2001 (unreported)*** this Court dealt with a similar situation and it stated as follows:-

***“The certificate of delay confirms when delivery of the copies were made to the appellants. That is all that the rule requires of the Court to consider. We are satisfied as no evidence has been placed before us to confirm otherwise that any errors of omission or commission in this matter were made by the court.”***

Likewise, in this matter, as we have stated, all that Mr. Oira alleges is that as it took 11 days to type copies of proceedings and ruling, the days of delay stated in the certificate of delay cannot be correct. He has not placed any evidence before us as to how many other proceedings, judgments, rulings, etc. preceded the subject proceedings and why the Registry could not take all that time to prepare the subject proceedings. Without that evidence, we are bound to accept the period of delay stated in the certificate of delay. Under **rule 81** as read with the proviso to it, the computation of the period resulted into no delay in filing Civil Appeal No. 177 of 2009. The other issue raised by Mr. Oira was that as there was no acknowledgement of the receipt of the letter bespeaking the copies of the proceedings and ruling, there is no evidence that the appellant/respondent applied for proceedings. That submission does not advance the applicant/respondent's cause. In the certificate of delay, the Deputy Registrar started off by acknowledging the receipt of that letter and gave its date as 10<sup>th</sup> February 2009. Mr. Oira himself acknowledges the existence of that letter at paragraph 2 of his supporting affidavit as we have stated. In any case, there is no rule requiring the Registrar to acknowledge receipt of letter bespeaking the copies of proceedings and ruling. If there was, the acknowledgment in the certificate of delay would suffice.

The last point raised was that as Mbigi Njuguna & Company, Advocates, were referred to as the advocates for the defendant whereas they were not, the certificate of delay cannot be relied on. That reasoning forgets that the Court looks at the substance of the matter and cannot, under the Appellate Jurisdiction Act as amended recently vide **section 3A** and **3B**, take such a drastic action on flimsy grounds which in any case was a mistake by the court Registry and not the appellant.

The upshot of the above, is that we are far from being satisfied that a case warranting striking out of Civil Appeal No. 177 of 2009 has been made out. The application in respect of that appeal is dismissed with costs to the appellant/respondent, Blue Shield Insurance Company Limited.

In respect of Civil Appeal No. 178 of 2009, the same reasons were adopted by Mr. Oira. In that appeal the certificate of delay stated that 105 days were required for preparing the copies of proceedings and ruling. The decision appealed from was delivered on 25<sup>th</sup> March 2009. The letter bespeaking the copies of proceedings and ruling was dated 1<sup>st</sup> April. The appeal was filed on 10<sup>th</sup> August 2009. On the grounds stated in respect of Civil Appeal No. 177 of 2009, we see no delay whatsoever. Again we cannot say the appellant required leave to file the appeal. Mr. Oira said in his submissions before us that in this appeal, there was no letter requesting for copies of proceedings and ruling as no letter was copied to the respondent/applicant. We note on perusing the record of appeal availed with the application, that the Deputy Registrar of the superior court states in the certificate of delay that a letter was written bespeaking the copies of proceedings and ruling and was dated 1<sup>st</sup> April, 2009. That, in effect means that such a letter indeed existed. There is no such a letter in the record of appeal, but is there need for it to be in the record? The answer is No. In the case of ***Kenya Commercial Bank vs. Charles Otiso Oundo, Civil Appeal (Application) No. 198 of 2000***, this Court stated:-

***“There is no requirement for the inclusion of a copy of the letter bespeaking copies of proceedings and ruling in the record of appeal. The certificate of delay sets out that fact.”***

Mr. Oira cannot be right when he says that letter does not exist. It existed and the certificate of delay cited it as letter dated 1<sup>st</sup> April 2009. Further in his grounds in support of the application, he refers to a letter from the Deputy Registrar in response to such a letter. Mr. Oira goes on to say from the bar, that he did not receive a copy of that letter. In short, he says that the certificate of delay cannot be relied upon as the appellant/respondent failed to comply with the provisions of **rule 81 (2)**. That allegation was, as we have said, made from the bar. We have perused thoroughly the grounds upon which the application for striking out the appeal was made and the affidavit in support of the application. The affidavit sworn by Mr. Oira does not mention anywhere that the letter bespeaking the copies of the proceedings and ruling was not sent to him. At paragraph 2, he says the appellant/respondent failed to make an application for certified copies, on 1<sup>st</sup> April, 2009, when notice of appeal was filed but there is evidence that such a letter existed as we have shown above. The allegation that the letter bespeaking copies of proceedings and ruling was not sent to the respondent/applicant is sufficiently serious as it would end up in striking out the appeal. It needed be part of the grounds of the application and needed to be stated in the supporting affidavit to afford the appellant/respondent opportunity to respond to it. We cannot rely on the allegations at the bar. Nothing turns on that allegation.

Thus on the grounds advanced by Mr. Oira, we have no cause to strike out Civil Appeal No. 178 of 2009. However, before we dismiss the application we observe that the decision appealed from was dated and delivered on 25<sup>th</sup> March 2009. The only notice of appeal in support of Civil Appeal No. 178 of 2009 is the notice of appeal dated 10<sup>th</sup> February 2009 which is the notice of appeal in support of the appeal against the ruling of 9<sup>th</sup> February 2009. We have not been able to locate the notice of appeal in respect of the ruling dated and delivered on 25<sup>th</sup> March 2009. There is however, one filed by the applicants' advocates in the record for notice of motion before us but not in the record of appeal. As the two appeals are related and there exists a notice of appeal though not in the record, we will leave it at that.

The application seeking striking out of Civil Appeal No. 178 of 2009 is also dismissed with costs to the respondent.

*Dated and delivered at Nairobi this 11<sup>th</sup> day of June, 2010.*

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**