



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Civil Appeal 93 of 2010**

**BETWEEN**

**ELIUD MURAGE WAMBU ..... APPELLANT**

**AND**

**JOSEPH MURIITHI STANLEY**

**JOHN K. J. MWAI ..... RESPONDENTS**

**(Appeal from the judgment and order of the High Court of Kenya at Nyeri (Makhandia, J.) dated 23<sup>rd</sup> November, 2009**

**in**

**H.C.C.C. NO. 113 OF 2002)**

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

**RULING**

There is before me a motion dated 2<sup>nd</sup> August, 2010 filed by the appellant in the main appeal seeking an order allowing the filing of a supplementary record of appeal. According to the applicant, the only documents intended to be filed in that record are a letter bespeaking copies of proceedings and ruling dated 23<sup>rd</sup> November, 2009 which was filed in the court registry on 26<sup>th</sup> November, 2009, and a certificate of delay prepared by the Deputy Registrar of the superior court in Nyeri on 7<sup>th</sup> June, 2010. Those documents are important, according to the applicant, because without them, the appeal would be incompetent as it would be apparent that it was filed out of time. Indeed, the respondent had already filed a motion on 18<sup>th</sup> May, 2010 seeking to have the record of appeal struck out for that same reason, amongst others. The respondent's motion is still pending hearing before the full court.

The appellant is not represented by counsel. In his brief submissions before me he stated that he was advised by a friend that the two documents were necessary to confirm the validity of his appeal and he sought further advice from the court registry which furnished him with the certificate of delay.

The motion was opposed by the 1<sup>st</sup> respondent who was also unrepresented, because of the delay caused since the delivery of the judgment in his favour. The 2<sup>nd</sup> respondent also opposed the motion through learned counsel Mr. Muchira, who submitted that the application was tailor made to answer the challenge of striking out which is already before the court. He observed that after delivery of judgment on 26<sup>th</sup> November, 2007, the applicant applied for review two years later and withdrew the application thereafter. No appeal would therefore lie. He further submitted that he had not been served with a copy of the letter bespeaking copies of proceedings and ruling, and therefore the certificate of delay which is intended to be introduced would not assist the applicants' case as it is outside **Rule 81 (2)** of the Rules of this Court. The letter bespeaking copies in any case was not made part of the application and was dated 23<sup>rd</sup> November, 2009 while the certificate of delay says the letter was dated 26<sup>th</sup> November, 2009.

It is indeed correct, as stated by Mr. Muchira that the letter bespeaking copies of proceedings and ruling dated 23<sup>rd</sup> November, 2009 was not made part of the annexures in the application before me. In my discretion however, I allowed the applicant to produce the letter after confirming that it was served on the 2<sup>nd</sup> respondent's Advocate together with the notice of appeal on 3<sup>rd</sup> December, 2009. The letter is dated 23<sup>rd</sup> November, 2009 and the applicant states that it was filed in Court on 26<sup>th</sup> November, 2009. It was indeed stamped at the court registry in Nyeri but the date of receipt is not apparent. That omission cannot be blamed on the applicant but on the registry. Furthermore, there was no requirement that the letter be "served" on the

respondents. Rule 81 (2) makes no such provision. It is enough that a copy of the letter was “sent” to the respondent and on the face of it, the applicant complied with that requirement.

As for the certificate of delay, it ought to be issued by the registrar of the superior court at the time of supplying the copies applied for under the proviso to **Rule 81 (1)**. It is apparent that the certificate intended to be produced herein was not supplied to the applicant until 7<sup>th</sup> June, 2010. Perhaps the court registry ought to have explained why it took so long to issue the certificate of delay, particularly in view of the deposition by the applicant stating thus:

**“5. THAT the proceedings and Ruling were not supplied to me by the High Court until 23-2-2010 when the days of Lodging the Records of Appeal were already expired.**

**6. THAT on the same day 23<sup>rd</sup> February 2010 when I received the said Proceedings and Ruling the High Court Registry staff assured me that there was no problem or nothing wrong PROVIDED that I had to lodge the Records of Appeal within a period of sixty (60) days from 23-2-2010 when the Proceedings and Ruling were supplied to me.**

**7. THAT the registry did not tell me whether I was supposed to be supplied with also certificate of delay from the court signed by the Deputy Registrar to certify that it was the court that delayed in typing the proceedings, but not me.**

**8. THAT on 21<sup>st</sup> April 2010 I lodged the Records of Appeal which did not have certificate of DELAY included because the Registry told me that there was no need on condition that I could file the Records of Appeal within sixty days from the date of supplying of the said proceedings and certified Ruling”.**

I would give the benefit of doubt to the applicant in the circumstances he found himself in.

In the result, I allow the application as prayed with the result that the applicant shall within seven 7 days of the date hereof, file and serve a supplementary record of appeal containing the Letter bespeaking copies of proceedings and ruling and dated 23<sup>rd</sup> November, 2009 and the certificate of delay issued by the court on 7<sup>th</sup> June, 2010. The costs of this application shall be in the appeal.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of October, 2010.**

**P. N. WAKI**

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

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

DEPUTY REGISTRAR