



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appli 45 of 2008

DALY & COMPANY LIMITED APPLICANT

AND

MOBIL OIL KENYA LIMITED RESPONDENT

(Application to strike out the Notice of Appeal from the judgment of the High Court of Kenya at Mombasa (Khaminwa, J.) dated 19th October, 2006

in

H.C.C.C. NO. 448 OF 2001)

RULING OF THE COURT

Daly & Company Limited, the applicant herein, brings this notice of motion pursuant to *Rules 80, 81(1) & (2) and 82(a)* of the Court of Appeal Rules seeking the following orders:-

- “1. *The notice of Appeal filed by the Appellant/Respondent herein on 23rd October, 2006 be struck out.*
2. *The costs of the application be borne by the Respondent.*
3. *There be such further order as may seem fair and just in the circumstances.”*

The application is brought on the following grounds:-

“(i) *The Honourable Lady Justice Khaminwa delivered judgment in favour of the applicant herein on 19th October, 2006 and the Respondent herein filed a Notice of Appeal on 23rd October, 2006.*

(ii) *That since then the Respondent has never filed the Appeal.*

(iii) *That the applicant was awarded Kshs.8,056,485.90 together with costs and interest including costs of the Respondent’s counter-claim of Kshs.20,985,825/= which was dismissed.*

(iv) *That the applicant has been denied enjoyment of the fruits of a successful litigation.*

(v) *That the time prescribed by the rules for filing the appeal has long expired.*”

In addition to the foregoing, there is a supporting affidavit sworn by one, *Emma Suleman*, a director of the applicant company in which the said *Suleman* depones:-

- “1. *That I am a director of the Applicant company and as such I have authority to swear this affidavit.*
2. *That I am conversant with all the facts of the case giving rise to this application.*
3. *That the applicant filed H.C.C.C. NO. 448 of 2001 against the respondent herein and the case was fully heard and decided by Hon. Lady Justice J. Khaminwa.*
4. *That the applicant was successful and the Hon. Judge awarded the applicant a sum of Kshs.8,056,485.90 together with costs and interest and also costs on Respondent’s counter-claim of Kshs.20,952,825/= which was dismissed by the court with costs.*
5. *That I am aware that the said judgment was delivered on 19th October, 2006.*
6. *That thereafter I was informed by Mr. Wachira the applicants advocate on record which information I verily believe to be true that the Respondent herein filed a notice of appeal against the judgment aforesaid.*
7. *That I was informed by the advocate aforesaid that the said notice of appeal was filed on 23rd October, 2006. Annexed hereto and marked “A” is a copy of the said notice.*
8. *That I am also informed by the said advocate which information I also belief (sic) to be true that the Respondent has never filed the intended appeal against the judgment neither has any appeal been served upon the applicant or its advocate.*
9. *That I am advised by the said advocate which advise I verily believe to be true that there has never been a certificate of delay applied for and obtained by the respondent.*
10. *That the applicant is a successful litigant, who is now denied the fruits of a successful litigation from 19th October, 2006.*
11. *That I now make this affidavit in support of the applicant’s prayer that the notice of appeal aforesaid be struck out.*”

The application came up for hearing before us in Mombasa on 23rd January, 2009 when *Mr. D.K. Wachira*, appeared for the applicant and *Mr. W.O. Wameyo*, appeared for the respondent.

In urging us to strike out the notice of appeal filed by the respondent, *Mr. Wachira* submitted that the respondent had done nothing to pursue the appeal and that he has not even applied for or obtained a certificate of delay. For that reason, so argued *Mr. Wachira*, there was no intention on the part of the respondent to file the appeal. We were reminded that the judgment of the superior court was delivered on 19th October, 2006 and up to the time of filing this application no appeal had been filed.

In reply to the foregoing *Mr. Wameyo* sought to rely on the proviso to rule 81 of the Court of Appeal Rules and on his own replying affidavit in which he deponed:-

- “1. *That I am an advocate of the High Court of Kenya practicing as such in the firm of Musinga Munyithya & Co. Advocates.*
2. *That I have read and understood the contents of the application dated 19th February, 2008.*

3. *That upon being served with the said application, we prepared affidavit in reply thereto which affidavit was forwarded to our client the appellant for execution.*
4. *That in spite of reminders the appellant has to date failed to return duly executed copies of the affidavit and consequently we have not been able to file the same within the time prescribed in law.*
5. *That in response to the said application and specifically elaborated in the said affidavit, the appellant sought to show the steps they have taken upon the filing of the Notice of Appeal.*
6. *That more particularly, the appellant sought to show that:-*
 - (a) *On the 25th of October, 2006, 6 days after the delivery of the judgment in the superior court, the appellant's advocates issued a letter to the deputy registrar requesting for typed proceedings and judgment. A copy of the said letter is hereto annexed and marked as "WOW 1".*
 - (b) *The said letter marked "WOW 1" was copied and served upon the respondent's advocates.*
 - (c) *Thereafter we wrote another letter on 27th April, 2007 to the deputy registrar requesting for the said proceedings. Annexed hereto are our file copies of the letters marked as "WOW 2".*
 - (d) *The deputy registrar responded requesting for Kshs.2,000/= for typing of proceedings which we duly paid vide receipt no. 080682880. Annexed hereto is a copy of the reply from the deputy registrar and the receipt for Kshs.2,000/= marked as "WOW 3" and "WOW 4" respectively.*
 - (e) *After waiting for a while we decided to photocopy the proceedings and type them and we forwarded both a hard copy and a soft copy to the deputy registrar for certification under cover of our letter dated 26th October, 2007 which we duly copied to the applicant's advocates herein. Annexed hereto are our file copies of the said letters marked as "WOW 5".*
 - (f) *The registrar has never returned the certified copies to date. I confirm that we sent another reminder on 28th November, 2008 a copy of which I annex hereto and mark as "WOW 6".*
7. *That it is within my knowledge that to date the deputy registrar has not supplied us with typed proceedings.*
8. *That it is also within my knowledge that a Record of Appeal cannot be filed without typed proceedings and judgment.*
9. *That from the foregoing, it is quite clear that we have exercised due diligence and the delay in preparing and lodging of the Record of Appeal has been necessitated by circumstances that are not attributable to the appellant.*
10. *That further in view of the foregoing, it is only fair and just that the application be dismissed with costs.*
11. *That what is deponed to herein is true to the best of my knowledge, information and belief save for sources which are expressly stated."*

In urging us to dismiss this application, Mr. Wameyo submitted that on his part he has been diligent to the extent of typing the proceedings in a bid to expedite the process. He informed us that the superior court's record was voluminous hence the delay in its preparation. As a parting shot, Mr. Wameyo told us that they had done all that could be done in the circumstances of this case.

We have set out the rival submissions in this application and it would appear that the matter is fairly straightforward. Why do we say so? It is because there is no dispute that the judgment of the superior

court was delivered on 19th October, 2006 and a notice of appeal filed on 23rd October, 2006. That notice of appeal was filed within fourteen days as provided by rule 74(2) of this Court's Rules. The applicant's complaint is that the respondent has done nothing to pursue the intended appeal. We have reproduced the replying affidavit of Mr. Wameyo and in that affidavit together with its annexures, Mr. Wameyo explains the efforts made in pursuing the filing of the appeal pursuant to the notice of appeal. In their letter dated 25th October, 2006, the respondent's advocates wrote to the Deputy Registrar of the High Court of Kenya at Mombasa asking for typed copies of proceedings and judgment delivered by Hon. Lady Justice Joyce Khaminwa for purposes of an appeal against that judgment. It would appear that there was no response from the Deputy Registrar and hence on 27th April, 2007 the respondent's advocates wrote yet another letter to the Deputy Registrar requesting for certified copies of proceedings and judgment. The Deputy Registrar responded to the letter of 27th April by his letter of 10th May, 2007 in which he, (*Deputy Registrar*) stated inter alia:-

"Please deposit K.Shs.2,000/= for typing of proceedings and note that the taxation will be held on 18th May, 2007."

The said deposit was paid as can be seen from a copy of a receipt No. 0682880 dated 19th June, 2007. It would appear that the respondent's advocates having waited for a considerable period decided to have the proceedings typed. In their letter dated 26th October, 2007, the respondent's advocates wrote to the Deputy Registrar stating inter alia:-

"We have managed to have the proceedings typed.

We enclose herewith both a hard copy and a soft copy to enable you approve the typed draft and certify it accordingly. By a copy of this letter a draft is also given to the plaintiff's advocates."

It would appear that the Deputy Registrar did not respond hence prompting the respondent's advocates to write again on 28th November, 2008 stating inter alia:-

"Kindly but urgently certify the proceedings in this matter.

We undertake to pay you charges."

In view of the foregoing, can it be seriously argued that the respondent and its advocate did nothing after filing of the notice of appeal?

We do not think so. From the replying affidavit (*and the annexures*), it is evident that there were efforts to obtain copies of the proceedings and judgment but these efforts have not been rewarded so far. In the circumstances we are unable to say that the respondent has been indolent.

Rule 81 of this Court's Rules provides in mandatory terms that an appeal shall be instituted within sixty days of the date when the notice of appeal was lodged. The proviso thereto, however, provides as follows:-

"Provided that where an application for a copy of the proceedings in the superior court has been made within thirty 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 required for the preparation and delivery to the appellant of such copy."

In view of the foregoing, and the efforts made by the respondent's advocates to obtain copies of proceedings and judgment, we are satisfied that the respondent and its advocates have done all they could in the circumstances of this case. What else were they expected to do in pursuing the issue of proceedings and judgment?

For the foregoing reasons, we find no merit in this application to strike out the notice of appeal. Accordingly, the notice of motion dated 19th February, 2008 is hereby dismissed but with no orders as to the costs of the said motion.

Dated and delivered at NAIROBI this 13th day of February, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR