



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appli 49 of 2008

ZAINABU ALI RUWA..... APPLICANT

AND

A.P.A. INSURANCE COMPANY LTD..... RESPONDENT

(application for the notice of appeal dated 26th July 2007 and filed on 26th July 2007 to be withdrawn in an intended appeal from the High Court of Kenya at Mombasa (Sergon J.)

in

H.C.C.C.NO. 216 OF 2006)

RULING OF THE COURT

The notice of motion dated 26th March, 2008 and lodged in the Court on 28th March 2008 is stated to have been brought pursuant to the provisions of section 3(2) of the Appellate Jurisdiction Act and Rules 42, 45 (1) and 82 (a) of the Court's Rules. In the motion, the applicant, Zainabu Ali Ruwa, seeks one basic order namely that:-

“... the Notice of Appeal dated 26th day of July 2007 and filed in the superior court at Mombasa on 26th day of July 2007 by Messrs. A.P.A. Insurance Co. Ltd against the entire ruling and consequential Orders of the Honourable Sergon, J. in Mombasa HCCS (sic) NO. 216 OF 2006 ZAINABU ALI RUWA VS. A.P.A. INSURANCE CO. LTD , be and is hereby deemed to have been withdrawn with costs to the Applicant.”

Rule 82(1)(a) of the Court's rules provides that:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time –

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

On 26th July 2007, Sergon, J. by a ruling delivered on that day, ordered the striking out of a defence which A.P.A. Insurance Co. Ltd, the respondent herein, had filed in response to a claim made against it

by the applicant. On the very same day the respondent lodged a notice of appeal declaring its intention to appeal against the order made by the learned Judge. It also appears that at the time the order was delivered the advocates for the respondent verbally asked the learned Judge for copies of his ruling and the proceedings and the Judge ordered that the documents asked for were to be supplied to the respondent on the payment of the requisite charges.

Mr. Muthama, learned counsel for the applicant, appeared to us to attach some importance to the oral application made before the Judge apparently on the basis that time to appeal started to run from the time the oral application was made and granted. That is not correct; the proviso to **rule 81** and **rule 82(2)** of the rules only recognise written applications which must be made within thirty days from the date on which the ruling is made and a copy of which is sent to the opposite party. It is clear from the record before us that on the same day of the ruling, i.e. 26th July, 2007, the respondent wrote to the Deputy Registrar of the High Court at Mombasa asking for

“certified copies of the ruling given by the Court this morning and the proceedings in the above case to enable us to prepare the Record of Appeal”

The letter was copied to the then advocates for the applicant Messrs. Mutua & Company Advocates. Mr. Muthama did not claim before us that a copy of the letter did not reach those advocates. That being so, the respondent had done all that was required of it under the Court’s rules. The respondent has annexed to its replying affidavit a certificate of delay dated 16th April, 2008 and the certificate shows that the proceedings and ruling were delivered to the respondent on 16th April, 2008. We were informed that the appeal was in fact lodged on 17th April, 2008.

Mr. Muthama, for his part, says that the proceedings were available much earlier than the 16th April 2008 and Mr. Muthama in fact attached to their supporting affidavit a different certificate of delay dated 26th November, 2007. We think this is being mischievous. The applicant was satisfied with the order made by Serгон J. and had no intention whatsoever of appealing against that order. The applicant in fact filed no notice of appeal. In the circumstances, we are unable to appreciate why the applicant would require from the Deputy Registrar a certificate of delay.

We remind ourselves that we are not dealing with an application to strike out the record of appeal or the notice of appeal; different considerations would have applied if that was what we were asked to do. But instead we are asked to deem the notice of appeal as having been withdrawn. We cannot do that, taking into account all the relevant circumstances, particularly the fact that an appeal has already been filed, that the proceedings and ruling were applied for as required by the rules and that the Deputy Registrar of the High Court has issued to the respondent, who is the only person who required it, a certificate of delay which, prima facie, shows that the appeal might well have been lodged in time.

We are satisfied that there is no merit in the motion before us and that being the view we take we order that the said motion be and is hereby dismissed. We however, order that the costs of the dismissed motion shall be in the appeal already lodged.

Dated and delivered at Mombasa this 24th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O.O’KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR