



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 26 of 2009

**RODGERS ABISAI T/A ABISAI & COMPANY ADVOCATES..... APPLICANT**

**AND**

**WACHIRA WARURU**

**THE STANDARD LIMITED ..... RESPONDENTS**

*(Application to deem the Notice of Appeal dated 23<sup>rd</sup> May, 2007 filed in an intended appeal from the judgment of the High Court of Kenya at Kisii (Kaburu Bauni, J.) dated 18<sup>th</sup> May, 2007 as withdrawn*

**in**

**H.C.C.C. NO. 52 OF 2001)**

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**RULING OF THE COURT**

The applicant, **Rogers Abisai**, moves the Court to mark the notice of appeal dated 23<sup>rd</sup> May, 2007 albeit lodged in the Court on 25<sup>th</sup> May, 2007 as withdrawn on the ground that the respondents, *Wachira Waruru* and *The Standard Ltd.* have not taken essential steps to lodge the requisite record of appeal within the time stipulated by the Rules of the Court.

It is common ground that the original suit, to wit *Kisii HCCC No. 52 of 2001* was filed on 23<sup>rd</sup> April, 2001. It was thereafter heard on various dates upto and including the 16<sup>th</sup> October, 2002 when judgment was delivered by *Wambilyangah, J.* (as he then was) whereupon he dismissed the suit with no order as to costs. Being aggrieved by that decision, the applicant lodged an appeal which was subsequently heard and determined by this Court on 23<sup>rd</sup> June, 2006. The Court allowed the appeal, dismissed the cross appeal and directed that “*this matter be referred to the superior court for assessment of damages.*”

The superior court *Bauni, J.* proceeded to assess damages on the basis of the evidence and submissions hitherto on record. The learned judge delivered his judgment on 18<sup>th</sup> May, 2007. The respondents, like the applicants in the first judgment, were dissatisfied and filed a notice of appeal on 23<sup>rd</sup> May, 2007. It was lodged in the Court two days thereafter on 25<sup>th</sup> May, 2007. On 30<sup>th</sup> May, 2007 the respondents requested the Deputy Registrar of the superior court for “**typed certified copies of the proceedings and**

**judgment”** none of which, we are informed from the bar, have been received to date.

We would agree with Mr. Oguttu, learned counsel for the applicant, that certified copies of proceedings and judgment are not necessary documents for the purposes of an appeal. An intended appellant only requires uncertified copies of proceedings and judgment to facilitate the compiling of a record of appeal. These documents comparatively take a shorter time to obtain than certified ones. Thus, it is clear that the respondents had requested for wrong copies of proceedings and judgment.

Mr. Oguttu submits that this omission is contrary to **rule 81(1)** of the Court of Appeal Rules and that the respondents having failed to comply with the said rule, then they had failed to lodge the record of appeal within the statutory duration and the grace period conferred by the said rule is not available to them due to the breach of the mandatory proviso to **rule 81**.

We do not agree with that submission. The said rule is not breached by merely asking for certified copies of proceedings. It may be breached if the uncertified copies are available but the intending appellant does not use them insisting on being supplied with the certified ones. Again, it would appear that certified copies may be used to mount an appeal if they are supplied timeously.

In the case before us, the Deputy Registrar has not replied to the request of the respondents and has not indicated at all whether any of the documents, certified or not, are available. Further, Mr. Oguttu does not know whether those documents are available or not. He has none of them himself.

In the absence of any reply from the Deputy Registrar as to whether certified or uncertified copies of proceedings and judgment are available or not, it would be the height of injustice to condemn the respondents, who have been ably represented by Mr. Echessa, for failing to take an essential step to lodge the requisite record of appeal.

We think that this application is premature and ought not to have been lodged in the first place. However, the reason for bringing this motion can be gleaned from the subject matter of the dispute.

In the result, we dismiss the application with costs.

***Dated and delivered at Kisumu this 17<sup>th</sup> day of July, 2009.***

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***P.N. WAKI***

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***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**