



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLI.) NO. 258 OF 2007

EMBAKASI YOUTH DEVELOPMENT PROJECT APPLICANT/RESPONDENT

AND

HOUSING FINANCE COMPANY OF KENYA LTD..... APPELLANT/RESPONDENT

(Application to strike out the record of appeal from the ruling of the High Court of Kenya at Nairobi (Ojwang J) dated 12th November, 2004

in

H.C.C.C. NO. 1086 OF 2001)

RULING OF THE COURT

This is an application under **Rule 80** and **81** of the Court of Appeal Rules for an order that the record of appeal lodged in this Court on 7th December, 2007 be struck out on the grounds that:

- “1. The record of appeal was lodged out of time.**
- 2. The appellants’ advocates letter dated 12th November, 2004 bespeaking certified copies of the proceedings and ruling did not entitle the appellant to the benefit of the proviso to Rule 81 of the Court of Appeal Rules.**
- 3. The certificate of delay found at page 188 of the record is self contradicting and unreliable and cannot be the basis for lodging the appeal on 7th December, 2007.**
- 4. The appeal is thus incompetent”.**

On 28th June, 2001 **Housing Finance Company of Kenya Ltd.** (HFCK), the appellant, filed *High Court Civil Case No. 1068 of 2001* in the superior court against the respondent claiming that the defendant, its agents and servants had trespassed on the appellants’ land title No. Nairobi/Block 121/ 243, Komarock Estate.

The relief sought in the plaint was an order of injunction, an eviction order and general damages for trespass. The respondent through M/s. Amuga & Co. Advocates filed a defence denying the appellant’s

claim. In the statement of defence, the respondent averred that it would raise a preliminary objection as to the competence of the suit and contended that the defendant had no capacity to be sued.

On 12th October, 2001, the appellant filed a Notice of Discontinuance of the suit and on 4th January, 2002, the Deputy Registrar entered judgment for costs against the appellant. On 5th February, 2002 the respondent filed a bill of costs in respect of the discontinued suit. On 11th March, 2002 the appellant filed a notice of preliminary objection to the taxation of costs on the ground that the purported defendant (respondent) is not a legal entity capable of taxing a bill of costs and that the advocates purportedly on record for the defendant had no legal instructions from a juristic entity to prosecute the taxation. The preliminary objection was overruled by the Deputy Registrar on or about 11th November, 2003 who proceeded to tax the bill of costs on 7th August, 2004 at a total of Shs.314,160/= including Shs.300,000/= as instructions fees. The appellant filed a reference against the taxation under **Rule 11** of the *Advocates Remunerations Order* in the High Court praying that the Ruling of the Taxing Master be vacated. One of the main legal issues raised at the hearing of the reference is that the respondent as a non-legal person is not entitled to costs in any proceedings. The superior court (Ojwang J) dismissed the reference on 12th November, 2004.

The appellant filed a notice of appeal on 16th November, 2004 and by a letter dated 12th November, 2004 applied to the Deputy Registrar for the *certified copies of the proceedings and ruling*. That letter was copied to the respondents' advocates.

By a letter dated 7th September, 2007, the Deputy Registrar informed the appellants' advocates that copies of the proceedings and ruling were ready for collection on payment of Shs.2,040/= being the requisite court charges.

There is a note at the end of the letter which states, thus:

“NB: The said copies will be certified soon after the payment of the said amount”.

The appellant however, paid the copying charges on 2nd November, 2007 and the present appeal – *Civil Appeal No. 258 of 2007* was lodged on 7th December, 2007.

By **Rule 81 (1)** of the Court of Appeal Rules, an appeal should be lodged within 60 days of the date when the notice of appeal was lodged. However, by proviso to **Rule 81 (1)** as read with **Rule 81 (2)**, if an application for a copy of the proceedings in the superior court is made within 30 days of the date of the decision and in addition a copy of the application (letter) requesting for a copy of the proceedings is sent to the respondent, then the time certified by the Registrar of the superior court as having been required for the preparation and delivery of the copy of the proceedings to the appellant is excluded in computing time within which the appeal is to be instituted.

In this case, the appellant's counsel applied for certified copies of the proceedings and the ruling on the same day the ruling was delivered and sent the copy of the application to the respondent's counsel. We would readily agree with the contention of Mr. Ahmednasir, learned counsel for the respondent that merely because an application requests for certified copies does not *ipso facto* take the case outside the purview of the proviso to **Rule 81 (1)**, if the time taken to supply certified copies is the same time it would have taken the Registrar to provide uncertified copies. Indeed, the law is that it is the time needed for certifying copies of the proceedings which is to be excluded in computing time. The letter of the Deputy Registrar dated 7th September, 2007 informed the appellants' counsel that the proceedings/ruling were ready for collection on payment of Shs.2040/= and that the copies would be certified soon after the payment. It is implicit from that letter that the uncertified copy of the proceedings were ready for collection from the date of that letter. Thus, the fact that the appellants' counsel had applied for certified copies did not cause any delay for the period up to 7th September, 2007.

The appellants' counsel concedes that he was notified by the Deputy Registrar that the copies of the

proceedings were ready by a letter dated 7th September, 2007. The Deputy Registrar certified the period from 12th November, 2004 to 7th November, 2007 as required for the preparation and delivery of the *certified copies* of the proceedings and judgment.

The appellant required only uncertified copies of proceedings and not certified copies to file a competent appeal. Since the uncertified copies of the proceedings were ready for collection by 7th September, 2007 and the appellant's counsel was notified so by the Deputy Registrar, we think that the time started to run from the day following the receipt of the letter dated 7th September, 2007. The appellants' counsel does not explain the delay of about one month and three weeks from 8th September, 2007 to 2nd November, 2007 when the proceedings were paid for. It is a reasonable inference that that was the time needed for certifying the copy of the proceedings which time is not to be excluded in computing time. The appeal was lodged on 7th December, 2007. Again the delay from 3rd November, 2007 to 6th December, 2007 has not been explained

In the result, we are satisfied that *Civil Appeal No. 258 of 2007* was lodged out of time and without leave of the court.

Accordingly, we allow the application with costs and strike out Civil Appeal No. 258 of 2007 with costs to the respondent.

Dated and delivered at Nairobi this 11th day of July, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR