



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 228 OF 2007**

**MOHAMED HASHAM ALI**

**MOHAMED T/A KITALE AUTOSPARES.....APPELLANT**

**AND**

**1. CENTRAL BANK OF KENYA )**

**2. CHARTERHOUSE BANK LTD )**

**3. RATILAL AUTOMOBILES LTD).....RESPONDENTS**

***(Being an appeal from the ruling and order from the High Court of Kenya at***

***Nairobi (Warsame, J) dated 22<sup>nd</sup> June 2007***

**in**

**H.C. Misc. Civil Application No. 960 of 2007)**

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**RULING OF THE COURT**

In an application dated and filed in the court registry on 29<sup>th</sup> November 2007, the applicant, **Central Bank of Kenya**, seeks the striking out of the Record of Appeal lodged in this Court on 24<sup>th</sup> day of October 2007 and that the costs attendant thereto be awarded to the applicant. It is supported by the affidavit deposed to by counsel for the applicant which has only one ground, namely that though the Record of Appeal was lodged in court as aforesaid, it was not until 19<sup>th</sup> November 2007 that the same was served upon his firm. He referred the Court to an annexure **marked A** on the affidavit which has the endorsement of the date of service on page 209 of the record of appeals dated 19<sup>th</sup> November, 2007. The same affidavit then states that the record of appeal should be struck out because it was not served upon the appellant (1<sup>st</sup> respondent) within the period prescribed by the Rules of this Court. There were no affidavits in reply to the application probably because the respondents were of the view that issues involved therein were purely of law.

Counsel for the parties appeared before us on 16<sup>th</sup> September 2008 to present their respective submissions. Mr. Ougo representing the applicant repeated what was contained in the application and the

supporting affidavit, namely that although the record of appeal was lodged in court on 24<sup>th</sup> October 2007, it was not until 19<sup>th</sup> November 2007 when it was served upon his firm. According to counsel this was beyond the period allowed by the rules; therefore the record of appeal was incompetent and should be struck out with costs.

Mr. Kiarie, Counsel for the first respondent submitted that he could only have served the record of appeal to the applicant within the requisite period if notice of address for service had been supplied as required by **rule 78(a)** and **(b)** of the Court of Appeal Rules but since there was no evidence of compliance with that rule, then the application was incompetent and ought to be struck out with costs.

Mr. Odera, counsel for the 2<sup>nd</sup> respondent opposed the application and stated that it did not show when the record of appeal was served except to show when the certificate of delay was received. He adopted the submissions of counsel for the 1<sup>st</sup> respondent and prayed that the application be struck out with costs. Mr. Nyairo counsel for the 3<sup>rd</sup> respondent adopted submissions of counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and had nothing more to add.

In reply Mr. Ougo submitted that if the record of appeal was served upon the applicant at the counsel's present address, then the presumption was that the address for service was known.

**Rule 87** of the Court of Appeal Rules provides that:-

**(1) "The appellant shall before or within 7 days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirement of rule 78.**

**(2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the court may at any time on application or of its own motion direct and within such time as the court may appoint."**

On the other hand **rule 78** of the Rules provides:

**(1) "Every person on whom Notice of Appeal is served shall:-**

**(a) within 14 days after service on him of a notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address of service; and**

**(b) within a further fourteen days serve such notice of address for service on every other person named in the notice of appeal as a person intended to be served."**

**Rule 80** of the Rules affords any person affected by an appeal a right to apply for its dismissal on the grounds that either no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The application before us was made under this rule

The record of appeal at page 205 is the Notice of Appeal which provides the address for service for counsel for the applicant herein, as:-

**Messrs Oraro & Co. Advocates,**

**3<sup>rd</sup> Floor,**

**ACK Garden House,**

**1<sup>st</sup> Ngong Avenue,**

**P.O. Box 51236,**

**NAIROBI.**

The Memorandum of Appeal lodged in the Court of Appeal registry on 24<sup>th</sup> October 2007 also bears the same address of service of same counsel for the applicant. Counsel for the first respondent similarly provides this address of service for the applicant on page 1 of the record of appeal.

With this kind of information regarding the applicant's address of service, there was no burden placed upon the applicant to show that he had given notice of address of service to enable the 1<sup>st</sup> respondent serve the record of appeal upon him within the prescribed period of 7 days and to try to refer to the provision of **rule 78** as a reason for serving the applicant with this record outside the prescribed period is merely an attempt to mislead this court. We are convinced that the submissions of the first respondent in this application do not provide any sufficient reason as to why the record of appeal was served upon the applicant almost 12 days after the period allowed by **rule 80** of the Rules of this Court. The arguments advanced by counsel for the respondents would only be available to them if the applicant had instructed new counsel in this matter for the purpose of this appeal. Otherwise we are of the view that the record of appeal lodged on 24<sup>th</sup> October, 2007 is incompetent and should be and is hereby struck out with costs.

***Dated and delivered at NAIROBI this 9<sup>th</sup> day of October, 2008.***

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**D. K. S AGANYANYA**

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**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**