



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET
CIVIL APPLI 230 OF 2006

ZACHARIA MOGENI APPLICANT

AND

STANDARD CHARTERED BANK (K) LTD RESPONDENT

(Application to strike out the Notice of Appeal dated 12th August, 2004 and lodged in the High Court of Kenya Eldoret (Dulu, J.) dated 29th July, 2004 in H.C.C.C. NO. 42 OF 1997)

RULING OF THE COURT

Before us is a Notice of Motion stated to have been filed under “Rule 80 and 81 of the Court of Appeal Rules” in which the applicant, *Zacharia Mogeni*, seeks an order that:-

1. *The Notice of Appeal dated and lodged in the High Court of Kenya at Eldoret on 12th August, 2004 by STANDARD CHARTERED BANK LTD. seeking to challenge the judgment of the High Court of Kenya at Eldoret in Civil Case No. 42 of 1997 be struck out.”*
2. *The costs of and incidental to this application be borne by the respondent.”*

The application which is supported by the affidavit of Ken M. Nyaundi is brought on the ground that an essential step in the proceedings has not been taken in that no appeal has been lodged since the Notice of Appeal was lodged and served and that the time for lodging such an appeal has lapsed.

When this application came up for hearing before us on 23rd February, 2007, Mr. Nyaundi, the learned counsel for the applicant, submitted that the notice of appeal was filed on 12th August, 2004 and relied on what he deponed in his own affidavit in support of the application.

Mr. Kuloba, the learned counsel for the respondent, submitted that in view of the replying affidavit by Mr. Obura and the certificate of delay issued by the Deputy Registrar of the High Court, this application should fail. Mr. Kuloba emphasized that the appeal being Civil Appeal No. 200 of 2006 had been lodged on 1st September, 2006 and was only awaiting a hearing date to be fixed.

When asked about the appeal in question, Mr. Nyaundi conceded that the appeal had, indeed, been filed.

We have considered the rival submissions in this matter and we are satisfied that the notice of appeal (*which is sought to be struck out*) was filed on 12th August, 2004. On that same day, a letter was sent to the Deputy Registrar High Court at Eldoret asking for typed copies of proceedings and the ruling of the superior court for purposes of appeal. As is usual with the typing process in the superior court, copies of proceedings were not ready until much later. To confirm that delay in supplying copies of proceedings there was a certificate of delay issued under *Rule 81* of the Court of Appeal Rules. That certificate of delay stated:-

“CERTIFICATE OF DELAY

(Under Rule 81 of the Court of Appeal Rules)

1. *An application for copies of the proceedings and the judgment in this suit was made by M/s Nyairo and Company Advocates for and on behalf of M/s Obura and Company Advocates for the Applicant and was lodged in this Court on 12th August, 2004 which was within 30 days of the ruling desired to be appealed against.*
2. *By a letter dated 10th May, 2005 the Deputy Registrar of the High Court of Kenya at ELDORET notified the applicants (sic) Advocates that copies of the proceedings and the judgment will be supplied upon payment of the requisite Court fees.*
3. *The Court fees was paid on 28th July, 2006 and the certified copies of the proceedings and judgment were collected by the applicants.*
4. *The time taken by this Court to prepare and supply the copies of the proceedings and ruling was from 12/8/2004 to 28th July, 2006.*
5. *This Certificate of Delay was prepared and was ready for collection this 28th day of July, 2006.*

ISSUED at ELDORET this 31st day of July, 2006.

Signed

DEPUTY REGISTRAR

HIGH COURT OF KENYA, ELDORET”.

From the foregoing, it is clear that time taken by the superior court to prepare and supply the copies of proceedings and ruling was from 12th August, 2004 to 28th July, 2006. It is to be observed that the court fees for the proceedings was paid on 28th July, 2006 when the said copies were collected by the respondent and/or its counsel. It has been confirmed to us that the appeal was lodged on 1st September, 2006. Can it be said that that appeal was filed out of time? We do not think so in view of the proviso to rule 81(1) of this Court’s Rules which provides:-

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) 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, we are satisfied that this application to strike out the notice of appeal is filed

without any merit. We accordingly order that the notice of motion dated 14th August, 2006 be and is hereby dismissed with costs to the respondent.

Dated and delivered at Eldoret this 30th day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR