



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 18 of 2003

ALI AHMED NAJIAPPELLANT/RESPONDENT

AND

LUTHERAN WORLD FEDERATION.....RESPONDENT/APPLICANT

(An appeal from the judgment of the High Court of Kenya

At Nairobi (Ang’awa, J.) dated 23rd January, 2002

in

H.C.C.C. SUIT NO. 1754 OF 2000)

RULING OF THE COURT

The application before us brings into focus the construction of *rule 81 (2)* of the rules of this Court (“the rules”) which states:-

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent.”

The proviso referred to is not contentious here and is in these words:-

“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.”

The application was filed by the respondent in the main appeal under **rule 80** of the rules seeking an order that the appeal be struck out for the reason that it was filed out of time and without the leave of court, and was therefore incompetent. The judgment of the superior court which is being challenged was delivered on 23rd January, 2002. No issue arises as to the filing and service of the notice of appeal. It is also evident that a letter bespeaking copies of the proceedings and judgment dated 24th January, 2002 was dispatched to the deputy registrar of the superior court. The letter is exhibited in the record and has a stamp of acknowledgment from the civil court registry and the deputy registrar referred to it on 8th

August, 2002 when he called upon the appellant, who is the respondent in this application to pay for and collect the documents. According to the certificate of delay issued by the deputy registrar on 11th February, 2003, the respondent's advocates paid for the copies and they were issued to them on 14th January, 2003. The period of delay certified by the deputy registrar was 356 days. It would follow therefore that time did not run under the proviso to **rule 81(1)** and the respondent was confident enough that the appeal was filed within time when he submitted the documents and fees required under that rule on 14th February, 2003. But the applicant here does not think so, hence the application now before us which was filed on 17th March, 2003.

The contention by the applicant, as far as we can understand it from learned counsel Mr. A.T. Njoroge, is basically this: -

The letter addressed to the deputy registrar bespeaking copies of proceedings and judgment ought to have been copied and served on the applicant's advocates but it was not. In that event the respondent was not at liberty to take refuge under the proviso to **rule 81(1)** since **sub-rule 2** thereof was breached. The certificate of delay was therefore of no consequence and could only be useful in an application for leave to appeal out of time. As no such leave was sought, the appeal was incompetent.

Mr. E.J. Mutemi, learned counsel for the respondents however, vehemently refutes the application both on facts and in law. He submitted, firstly, that the letter bespeaking copies of proceedings and judgment dated 24th January, 2002 was sent to the applicant's advocates and it was exhibited with the affidavit in reply. The letter is indeed exhibited and is copied to the firm of advocates on record for the applicants (the respondents in the main appeal). He submitted however that there was no substance in the submission that the letter ought to have been served on the respondents and a return or affidavit of service made to confirm it as contended by Mr. Njoroge. **Rule 81 (2)**, he submitted, says nothing about service of the letter and simply says a copy shall be sent. Mr. Mutemi referred to the sworn assertion made in the replying affidavit that the copy was sent to the advocates for the applicants and also referred to further correspondence which would lend credence to that assertion. The correspondence is a series of some thirteen letters exhibited with the supplementary affidavit filed by the applicant which were exchanged between 3rd April, 2002 to 7th August, 2002. Apart from keeping alive the issue of copies of proceedings and judgment which both parties were still awaiting from the court registry, they also discussed issues of costs, decree, stay of execution and propriety of the notice of appeal which was allegedly defective. Mr. Mutemi submits that in view of all those letters, the applicant's advocates cannot be heard to deny that they were aware that the copies of proceedings and judgment had been applied for and the first source of that knowledge was the letter dated 24th January, 2002 which was copied to them.

In response, Mr. Njoroge asserted that the first time the issue of copies of proceedings and judgment was raised was in the respondent's advocate's letter dated 3rd April, 2002 and there was no record of the letter dated 24th January, 2002 in their offices. The only way the respondent's advocates could prove service, he submitted, was by production of a delivery book, certificate of posting or other evidence to confirm delivery. In the absence of such proof the advocates must be taken to be misleading the court.

We have anxiously considered the application, the affidavits on record, and the rival submissions of both counsel. As stated earlier, the issue before us is whether under **rule 81 (2)** of the rules an appellant must "serve" the letter applying for copies on the other side, as contended by the applicant, or simply "send" the copy to them, as contended by the respondent; and whether there is a distinction between the two terms. Curiously none of the advocates cited any authority for their submissions or referred us to **rule 17** of the rules of this Court which is relevant to the issue. The rule provides, as far as is relevant, as follows: -

"17. (1) Where by these Rules any document is required to be served on any person, service may be effected in such way as the court may in any case direct,and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule 22 to appear on his behalf....."

(2) Where any document is required to be served on the appellant or on the respondent and two or more appellants or respondents, as the case may be, are represented by one advocate, it shall be sufficient if one copy of that document is served on that advocate.

(3) For the purpose of this rule, service on a partner or a clerk of an advocate at the office of the advocate shall be deemed to be service on the advocate.

(4) Proof of service may be given where necessary by affidavit, unless in any case the Court shall require proof by oral evidence:.....

(5) Where any document is required to be sent to any person, the document may be sent by hand or by registered post to that person or to any person entitled under rule 22 to appear on his behalf and notice of the date fixed for the hearing of an application or appeal or for the delivery of judgment or the reasons for any decision may be given by telephone or telegram.”

(Emphasis is added.)

The side note to the rule is “*service and transmission of documents*”. As clearly discernible from the above provisions, there are separate provisions relating to “*service*” and “*sent*” and a distinction is drawn on the applicability of the two terms. Why the rules provide for that distinction is not clear to us since it would accord with good sense, transparency and accountability, that a party should be able to prove that a document has been delivered to the other party in litigation before relying on such document to his benefit or to that party’s detriment. But the requirement for proof appears to apply only where “*service*” of a document is directed under the rules. No similar express requirement is made in the rule where the document is required to be “*sent*”. Possibilities for abuse of the latter provision cannot be ruled out and perhaps this is an anomaly which the Rules Committee may wish to re-examine.

For purposes of the application before us, we have seen that the application for copies was timeously made and a copy was made for the applicant’s advocates. The respondent’s advocate on record, Nzamba Kitonga, then swears as follows: -

“3. *THAT the applicant seems to be saying that the appellant cannot rely on Rule 81 (1) of the Court of Appeal Rules in filing this appeal outside the prescribed 60 days period (without seeking an extension of time) because the appellant did not copy and send to the respondent his application made to the Superior Court for copies of the proceedings and judgment of that court.*

4. *THAT such an assertion is patently incorrect because on 24/1/2002 I made the said application and forwarded a copy thereof to the advocates for the respondent. I annex hereto my file copy of the said letter marked “NK-1” which is also reproduced in the Record of appeal as page 20. There is no requirement under the rule that said copy be served. The word used in the rule is sent.*

5. *THAT my firm normally makes three letter-headed copies of all correspondence to the Court to enable us to retain a copy thereof for our formal records.*

6. *THAT the said application is clearly shown at the bottom thereof as copied to the advocates for the respondent.*

7. *THAT in subsequent correspondence vide their letters to us dated 15/4/2002, 25/5/2002 and 10/6/2002 hereto annexed and marked “NK-II (a), (b) and (c)” the advocates for the respondent variously and repeatedly admitted receipt of the said copy and acknowledged that they were aware that the proceedings were being prepared at the Superior Court Registry.”*

The response to those assertions, similarly under oath, is that the copy letter was not received in the offices of the applicant’s advocates. In view of the absence of any provision in the rules that proof be provided for a document that was “*sent*” as opposed to one that was “*served*”, we are reluctant to form a definite view of those opposing sworn averments, but will give the benefit of doubt to the respondent.

We will similarly not condemn the applicant for taking the view that the document required “service” and proof of it, and therefore making the application before us.

For those reasons we dismiss the application and order that the costs thereof be in the main appeal.

Dated and delivered at Nairobi this 8th day of June, 2007.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR