



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 232 of 2003

PANALPINA (E.A) LTD APPELLANT

AND

JOSEPH NJUGUNA NGA'E RESPONDENT

(An application to strike out an appeal from a judgment and decree of the High Court of Kenya at Nairobi (Central)(Mr. Justice Philip Waki) dated 3rd June 2002

in

H.C.C.A. NO. 297 OF 1999)

RULING OF THE COURT

The respondent/appellant in this Notice of Motion *Joseph Njuguna Nga'e* sued the applicant/respondent *Panalpina East Africa Limited* by way of plaint dated 11th December, 1997 in which he sought judgment against applicant/respondent for Ksh.250,000, interest at Court rates, and costs of the suit on the alleged grounds that the applicant/respondent was in breach of the tenancy agreement entered into between the respondent/applicant and the applicant/respondent. The applicant/respondent denied the allegations in its defence dated 23rd September 1998. That suit was in the Chief Magistrates Court at Nairobi. The respondent/appellant made an application before the same court which was partly allowed and partly refused and the applicant/respondent appealed against the same decision in the superior court. Waki J. (as he then was) allowed the appeal and ordered that the orders made by the subordinate court be set aside and defence be accepted on record. The respondent/appellant felt aggrieved by that decision and filed Notice of Appeal in this Court. The record of appeal was filed after the period allowed by the rules of the Court had expired but the respondent/appellant relied on his belief that he had complied with the requirements of *rule 81* and particularly that he had complied with the proviso to *rule 81(1)* of this Court's Rules as he had taken steps as are required by *rule 81(2)* of the Rules.

The record of Appeal (Civil Appeal No. 232 of 2003) was filed on 23rd September 2003, and was served upon the applicant/respondent on 25th September 2003. On 24th October 2003, the applicant/respondent filed this Notice of Motion before us seeking only two orders namely:-

- “1. That the appeal be struck out with costs to the applicant.**
- 2. That the costs of this application be provided for.”**

The grounds advanced in support of the application are that no appeal lies and that some essential steps in the proceeding has not been taken or has not been taken within the prescribed time. The Notice of Motion is brought under *rules 42 and 80* of the Court of Appeal Rules. In the affidavit in support of the application sworn by the legal officer with the applicant/respondent, Mr. Eric Bengi, the respondent states what in a summary is that the Deputy Registrar had confirmed in a letter to both parties dated 25th October, 2002 that the copies of proceedings and judgment in respect of HCCA No. 297 of 1999 against which appeal was being lodged were ready. Thus, according to the applicant/respondent the record of appeal should have been filed within sixty days from the date of the Deputy Registrar's letter dated 25th October, 2002 whereas the record of appeal was filed on 22nd September, 2003 and that was out of the period allowed even after considering the delay at the Registry in preparation of the copies of proceedings and judgment. Further, the affidavit states that vide a letter dated 10th July, 2003, and entitled "*reminder*", the Deputy Registrar again reminded the respondent/applicant to collect the copies of the proceedings and judgment but notwithstanding all that the Record of Appeal was still filed out of the period prescribed and without the leave of the Court. It is thus incompetent.

The respondent/appellant opposed this application and filed a replying affidavit sworn on 13th November 2003. In summary form, the respondent/applicant states that judgment appealed from was delivered on 3rd June 2002; notice of appeal was filed and request for proceedings was made on 17th June 2002, a copy of the same request for proceedings was sent to the respondents on the same day. He admits that on 25th October 2002, a letter was written to his advocates by the Court informing them that the proceedings were ready for collection. They received the same letter on 8th November 2002 but upon going to the registry to collect the same, they discovered that the same proceedings had only been typed but had not yet been proof-read and approved for certification and the same were not ready for collection despite efforts to collect the same. They however, paid for the same proceedings on 18th December 2002 notwithstanding that the same were not yet ready for collection. On 3rd February 2003 they wrote a letter to the Court confirming that their letter of 25th October 2002 stating that the proceedings were ready was issued in error. Eventually the Court wrote another letter on 10th July 2003 confirming that the proceedings were ready. That letter was received by the respondent/appellant on 18th July 2003, which was on a Friday and on Monday 21st July 2003, the Court's file was with the Judge for an application and remained with the judge till 31st July 2003 for ruling. The proceedings were finally obtained on 7th August 2003. He ended up that affidavit by stating that the Deputy Registrar was aware of the same circumstances and that was why the certificate of delay covered the entire period upto 7th August 2003.

We have considered the rival positions of the parties. We have considered the able submissions by the learned Counsel who appeared before us as well as the annexed exhibits and the law applicable. It is apparent that the Deputy Registrar did write to the respondents/appellants a letter dated 25th October 2002 stating that the copies of the proceedings and judgment were ready for collection. There is also a reminder dated 10th July 2003 to the same effect. We do note however that in their letter of 3rd February 2003, the respondent/appellant wrote to the Deputy Registrar and stated as follows: -

"Please refer to the above matter and your letter dated 25th October 2002 indicating that the proceedings herein are ready for collection.

We did pay for the proceedings on 18th December 2002 but it transpired that the same were not ready as what had been prepared was the draft copies which had not been proof-read.

We have subsequently been following up the proof reading and certification but the final certified copy is yet to be availed to us by the court.

Since we require the proceedings for appeal purposes, please expedite the process and let us know immediately the proceedings are ready for our collection to enable us proceed to prepare the record of appeal. Do also confirm that the earlier letter to collect the proceedings was issued in error and is not applicable while issuing the certificate of delay.”(underlining supplied)

Whereas we observe that the above letter also mentions certification, which in law is not necessary for the purposes of compiling the record of appeal as Mr. Mugambi, the learned Counsel for the applicant/respondent rightly points out, the main thrust of the letter is that the copies of proceedings and judgment whether certified or uncertified requested for earlier in the letter of 17th June 2002 had not been proof-read and handed over to the respondent/appellant. Further we note that the allegation by the respondent/appellant that the same copies had not been proof-read and were therefore not ready for collection as alleged in the Deputy Registrar’s letter of 25th October 2002 was not refuted by the Deputy Registrar and was in fact and in effect supported by the Deputy Registrar, for the same Deputy Registrar in his certificate of delay issued on 14th August, 2003 gave the entire history of the efforts to have the copies of proceedings and judgment available in a narrative form and at the end of it stated as follows:-

“7. The time taken by this Court to prepare and supply the copies of the proceedings and judgment was from 17th June, 2002 to 7th August, 2003, that is 398 days.”

That certificate of delay was given after the respondent/appellant’s letter of 3rd February 2003 which we have reproduced hereinabove and which asked the Deputy Registrar to confirm that the earlier letter of 25th October 2002 was written in error while issuing the certificate of delay. That is apparently what the Deputy Registrar did in effect even though he did not literally acknowledge that the letter of 25th October 2002 was issued in error. The Deputy Registrar’s certificate of delay has not been challenged. In fact at paragraph 3 of the same certificate of delay the Deputy Registrar says: -

“The Court fees were paid on 18th December, 2002 but the proceedings and judgment could not be supplied immediately as the same were not ready.”

In our view, the certificate of delay in all these matters is an important document for it is the official document as provided under the proviso to *rule 81(1)* of the Court of Appeal Rules that would guide the Court whenever there is delay in filing record of appeal, in computing the period of delay and validating the same period of delay. It cannot be taken lightly by the Court. Here it was not challenged by the applicant/respondent and thus its contents stand. It accepts that the delay between 17th June 2002 and 7th August 2003, i.e. delay of 398 days was in respect of time taken by the Court to prepare and supply the copies of the proceedings and this confirms in effect that the letter dated 25th October 2002 from the Deputy Registrar to the Counsel for the respondent/appellant and the reminder on which the applicant/respondent relies for his application were written in error. It would have been different if the respondent/appellant had been given uncertified copies but returned them for certification. Here they were not given even uncertified copies. Striking out an appeal is a serious matter and no court will do so without proper and weighty reasons before it. We too cannot do so without being satisfied that it is the only decision open to us.

This application cannot succeed. It is dismissed with costs to the respondent/appellant. Orders accordingly.

Dated and delivered at Nairobi this 5th day of May, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR