



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal (Appli) 174 of 2004**

**SHOBNABEN PANKAJ PATANI ..... APPLICANT/1<sup>ST</sup> RESPONDENT**

**AND**

**CROWN MATCH COMPANY LTD.....1<sup>ST</sup> RESPONDENT/2<sup>ND</sup> RESPONDENT**

**PRADEEP PATANI ..... 2<sup>ND</sup> RESPONDENT/1<sup>ST</sup> APPELLANT**

**MAHENDRA PATANI .....3<sup>RD</sup> RESPONDENT/2<sup>ND</sup> APPELLANT**

*(Application to strike out notice of appeal lodged on 12<sup>th</sup> May, 2003 and the appeal lodged on 10<sup>th</sup> August, 2004 in an appeal from a Judgment & Decree of the High Court of Kenya at Milimani Commercial Court (Justice Osiemo) dated 30<sup>th</sup> April, 2003*

**in**

**H.C.C.C. NO. 1663 OF 2001)**

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**RULING OF THE COURT**

Before us is an application by way of a notice of motion stated to have been brought under “**Rules 42(1), 52(2)(c), 74(1), 80 and 81(1)** of the Court of Appeal Rules”. In this application the applicant **Shobnaben Pankaj Patani** is seeking:-

***“an order that the Notice of Appeal lodged on 12<sup>th</sup> May, 2003 and the Appeal lodged on 10<sup>th</sup> August, be struck out on the grounds that the Notice of Appeal is incurably defective, in that it does not comply with the provisions of Rule 74(1) of the Court of Appeal Rules and that the Appeal has not been instituted within the stipulated period of sixty (60) days of the date of the lodgment of the Notice of Appeal.”***

The applicant also asked for costs of and incidental to this application and the appeal.

There were two parts to this application, in that, the first part related to the notice of appeal not being in conformity with **rule 74(1)** of and **rule 79(1)** of this Court’s Rules (the Rules) and the second part related to the appeal itself having been lodged out of time in contravention of **rule 80(1)** of the Rules.

When the application came up for hearing before us on 4<sup>th</sup> July, 2006, Ms. Malik for the applicant, submitted that the notice of appeal filed by the two appellants (the original 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the

suit in the superior court) did not conform with **rule 74(1)** of the Rules. It was her submission that each party ought to have filed its own notice of appeal. This was a novel and gallant submission by the learned counsel but, unfortunately, it has no basis. We say so in view of **rule 79(1)** of the Rules which provides:-

***“Where two or more parties have given notice of appeal from the same decision, the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 78 and the party or parties giving those notices shall be respondents in the appeal.***

There is no prohibition to the filing a joint notice of appeal where as here, it is appropriate. Hence, the notice of appeal filed herein by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the suit in the superior court was a proper notice of appeal. Even Ms Malik appeared to agree that her first part of this application was, indeed, without merit.

Turning now to the second part of the application, Ms Malik submitted that the record of appeal was not lodged within the time prescribed by **rule 80(1)** of the Rules. She stated that the parties were informed that the proceedings were ready for collection on 10<sup>th</sup> May, 2004 and the respondents/appellants made no payment for the same until 18<sup>th</sup> May, 2004. It was therefore Ms Malik’s submission that the appeal ought to have been filed by 24<sup>th</sup> June, 2004 and hence the appeal that was filed on 10<sup>th</sup> August, 2004 was in her view out of time.

To counter the foregoing submission, Mr. Sheth for the respondents in the application, stated that he would rely on the replying affidavit of Milton Okello, the court clerk employed by the firm of Messrs Chaudhri & Associates Advocates in which Mr. Okello sets out what transpired in this matter. Mr. Sheth then placed reliance on the certificate of delay signed by the Deputy Registrar of the superior court. Relying on that certificate of delay which stated, inter-alia, that certified copies of proceedings were collected on 11<sup>th</sup> June, 2004 it was Mr. Sheth’s submission that the appeal which was filed on 10<sup>th</sup> August, 2004 was within time.

In our view, this second part of this application is essentially on computation of time within which an appeal should be filed in this Court. It was Ms Malik’s submission that the appeal which was lodged on 10<sup>th</sup> August, 2004 was not within 60 days as prescribed by **rule 81(1)** of the Rules. But **rule 81(1)** has a proviso which states in relevant part:-

***“..... 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”*** (emphasis supplied).

In this application, Mr. Sheth sought to rely on the replying affidavit of Milton Okello in which an explanation is given as to what transpired. The relevant paragraphs of that affidavit were as follows:-

***“5. THAT upon receipt of the said letter Mr. Rana instructed me to pay the amount stated therein and collect the said proceedings.***

***6. THAT I made payments on 18<sup>th</sup> May, 2004 but was informed by the Registry officials that the proceedings had not been fully typed.***

***7. THAT despite numerous visits to the Registry I was informed that the proceedings were not ready for collection.***

***8. THAT as a result of the above I complained to the Executive Officer Mr. Ombedo who instructed one of the clerks at the Registry to locate the file and hand over the proceedings to me.***

***9. THAT the proceedings were arranged in my presence by one of the clerks at the Registry and given to me on the 11<sup>th</sup> June, 2004.***

10. *THAT I swear this affidavit to state that even though the letter stating that proceedings were ready for collection is dated 29<sup>th</sup> April, 2004 the proceedings were only handed over to me on 11<sup>th</sup> June, 2004.*

11. *THAT the above information is correctly mirrored in the Certificate of Delay in the record of appeal.”*

A certificate of delay was issued by the Deputy Registrar of the High Court and as that certificate of delay is crucial in this matter, we set it out fully:-

**“CERTIFICATE OF DELAY**

**(Rule 81 of the Court of Appeal for Kenya Rules)**

1. *An application for Certified copies of Proceedings, Judgment of 30<sup>th</sup> April, 2003 in this case was made by Chaudhri & Associates, Advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants above named and was lodged on 12<sup>th</sup> May, 2003 which was within thirty (30) days of the judgment intended to be appealed against.*

2. *By a letter dated 29<sup>th</sup> April, 2004 the Deputy Registrar at Milimani Commercial Court informed the Advocates for the Applicant that the copies will be supplied upon payment of Court requisite fees.*

3. *The Court fees was paid on 18<sup>th</sup> May, 2004 and the certified copies of proceedings were collected on 11<sup>th</sup> June, 2004.*

4. *The time taken by this Court to prepare and supply certified copies of proceedings, was from 12<sup>th</sup> May, 2003 to 11<sup>th</sup> June, 2004 this being Three Hundred and Ninety six (396) days.*

This Certificate of Delay was prepared and made ready for collection on the 7<sup>th</sup> day of July, 2004.

Issued at Nairobi this 7<sup>th</sup> day of July, 2004.

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That certificate of delay states, among other things, that time taken by the superior court to prepare and supply certified copies of proceedings was from 12<sup>th</sup> May, 2003 to 11<sup>th</sup> June, 2004, and that the certificate of delay was prepared and made ready for collection on the 7<sup>th</sup> July, 2004. That means that in computing the time within which to file the appeal that time stated in the certificate of delay must be excluded in computation. Ms Malik appears to have had problems with that certificate of delay as, in her view, the copies of proceedings ought to have been collected earlier than the date specified in the certificate of delay.

We appreciate that there is no prescribed form for a Certificate of Delay but the proviso to **rule 81** is very clear as we have endeavoured to show by setting out the relevant part thereof. The certificate of delay was issued by the Deputy Registrar of the superior court and it is not open to Ms Malik to simply declare it to be wrong without telling us what was not right with it. In **DANIEL NG'ANG'A KANYI V. SOSPHINAF COMPANY LTD AND JAMES GATIKU NDULO** – Civil Appeal (Application) No. 315 of 2001 (unreported) this Court dealt with the issue of certificate of delay under **rule 81** of this Court's Rules and stated, inter alia:-

***“The certificate of delay confirms when delivery of the copies was made to the appellants. That is all that the rule requires of the Court to consider. We are satisfied as no evidence has been placed before us to confirm otherwise that any errors of omission or commission in this matter were made by the Court.”***

The same issue of certificate of delay was the subject of this Court’s recent ruling in **KOBIL PETROLEUM COMPANY LTD. V. STEPHEN KININI WANG’ONDU T/A EMMANUEL MWEIGA SERVICE STATION** – Civil Application No. Nai. 3 of 2005 (unreported).

Similarly in the present application, we are satisfied with what is stated in the Certificate of Delay, which is to the effect that the copies of proceedings were collected on 11<sup>th</sup> June, 2004. Since the appeal was lodged on 10<sup>th</sup> August, 2004 this was clearly within the prescribed period of sixty days.

For the foregoing reasons we are satisfied that this application to strike out both the notice of appeal and the record of appeal was brought without merit and we order that it be and is hereby dismissed with costs to the respondents.

***Dated and delivered at Nairobi this 14<sup>th</sup> day of July, 2006.***

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

***I certify that this is***

***a true copy of the original.***

**DEPUTY REGISTRAR**