



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: TUNOI, GITHINJI & WAKI, JJ.A)**

**Civil Application 337 of 2004**

**BETWEEN**

**D.T. DOBIE & CO (KENYA) LIMITED .....APPLICANT**

**AND**

**ALFRED MACHAYO.....RESPONDENT**

**(An appeal from the Ruling and Orders of the High Court  
of Kenya at Nairobi (Kuloba, J) dated 19th July, 2000**

**in**

**H.C.C.C. NO. 210 OF 1996)**

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**RULING OF THE COURT**

**Rule 81** of this Court’s rules provides in mandatory terms that an appeal shall be instituted within 60 days of the date when the notice of appeal was lodged. The proviso thereto, however, provides as follows:-

**“Provided that where an application for a copy of the proceedings in the superior court has been made 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 appellants of such copy.”**

That was the provision relied on by the appellant in the main appeal to file the record of appeal in C.A. NO. 254 of 2004 lodged in the registry of this Court on 19.11.04.

Before us now is an application by the respondent seeking to strike out the record of appeal on the ground that it was filed out of time and without leave of the court. The reasons given for that assertion are that although the decision against which it is desired to appeal was made on 19th July, 2000, and the notice of appeal was filed upon leave of the superior court being given on 3rd June, 2003, the filing of the appeal beyond 60 days of the lodging of that notice of appeal was in contravention of the rules. That is because the certificate of delay obtained and relied on by the respondent does not avail him for the simple reason that it tells a lie about itself and does not accord with the rules. The certificate of delay was drawn up by the respondent but was approved and issued by the Deputy Registrar on 6th October, 2004. It states:-

## **“AMENDED CERTIFICATE OF DELAY**

**(Under Rule 81(1) of the Court of Appeal Rules)**

1. *An application for certified copies of the proceedings and ruling in this suit was made by M/s S.K. RITHO & COMPANY ADVOCATES, Advocates for the plaintiff/intended appellant and was lodged in this Court on 13th June, 2003 which was within 30 days of the Ruling and Orders dated 3rd June, 2003 for leave to appeal out of time against the Ruling and Orders dated 19th July, 2000. 1(a) By a letter dated 14th September, 2004 M/S S.K. RITHO & COMPANY ADVOCATES requested for the in-complete proceedings from the year 2000 to year 2003 and on 4th October, 2004 they were ready for collection.*
2. *By a letter dated 9th August, 2004 and received on 18th August, 2004, the Deputy Registrar of the High Court of Kenya at Nairobi, informed M/S S.K. Ritho & Company Advocates that the copies of the proceedings and ruling will be supplied upon payment of Court requisite fees.*
3. *The necessary Court fees was paid on 18th August, 2004 and the certified copies of proceedings and ruling were collected by the Advocates for the plaintiff/intended appellant on 23rd August, 2004.*
4. *The time taken by this Court to prepare and supply certified copies of the proceedings was from 13th June, 2003 to 4th October, 2004 and that is a period of 479 days.*

This Certificate of Delay was prepared and ready for collection on- (sic) day of 2004.

Dated at Nairobi this 6th day of October, 2004.

**DEPUTY REGISTRAR**

**HIGH COURT OF KENYA**

**NAIROBI**

The fallacy in the certificate of delay as submitted by learned counsel for the applicant, Mr. Fraser, is the statement that the application for certified copies of the proceedings and ruling was lodged on 13th June, 2003, **“which was within 30 days of the ruling and orders dated 3rd June, 2003”**. The ruling and order of the superior court made on 3rd June, 2003 was not intended to be appealed against and it was therefore irrelevant in computation of time or in the issuance of the certificate of delay. For an intended appellant to take refuge under the proviso to **Rule 81(1)**, the application for copies of proceedings must be made **“within 30 days of the date of the decision against which it is desired to appeal”**. The decision intended to be appealed against in this matter was made on 19th July 2000. Learned counsel for the respondent Mr. Riitho concedes that there was no application made for any proceedings until 12th June, 2003. That is a period of about three years since the decision was made. He submits however that the delay in making a decision to appeal was explained to the superior court before it granted leave to appeal and therefore the reference point is not the date of the decision but the date when leave to appeal was granted.

With respect, we cannot accept that argument. The only power donated to the superior court under **section 7 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya** is for *“extension of time for giving notice of intention to appeal from a judgment of the High Court”*. All other procedures are governed by the Court of Appeal Rules. The Registrar certified the period taken to prepare and supply certified copies as 479 days, from 13<sup>th</sup> June, 2003 to 4<sup>th</sup> October, 2004. We may observe in passing that it was unnecessary to apply for and await *“certified copies”* as they are not necessary for purposes of rule 81 which merely refers to *“a copy of the proceedings”*. All other things being equal, the appeal would have been within time as it was filed on 19<sup>th</sup> November, 2004. But it is plain beyond peradventure that the period between the date of the decision intended to be impugned and 13<sup>th</sup> June 2003 when copies of the proceedings were applied for, has yet to be explained to a competent court, and that court is the appellate court. There are numerous decisions of this Court to the effect that it is only the period strictly covered by the proviso to Rule 81(1) that will be excluded from computation of time. The period taken, for example, in obtaining the certificate of delay; the period taken in certification of the proceedings; or the period taken in drafting the order appealed against, have all been held to be outside the provisions of the rule: See **Daniel Nganga Kanyi vs. Sosphinaf Company Ltd & Anor.** C.Appl. No. 315/2001 (NKU) (UR). So too, we find, the period taken by an intending appellant to consider whether he would appeal or not, as was pleaded in this application. The respondent’s saving grace would have been a letter bespeaking copies of proceedings, and copied to the applicant, within 30 days of the decision intended to be impugned. There is none.

In the result we allow the application and order that Civil Appeal No. 254 of 2004 filed in this Court on 19th November, 2004, be and is hereby struck out with costs to the respondent in that appeal. The applicant here shall have costs of the application.

Dated and delivered at Nairobi this 14th day of October, 2005.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**