



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

**CORAM: OMOLO, TUNOI & O’KUBASU, JJ.A.**  
**CIVIL APPEAL APPLI 46 OF 2005**

**BETWEEN**

**BOYA RURAL NURSING HOME LTD .....APPLICANT /RESPONDENT**

**AND**

**NATIONAL HOSPITAL INSURANCE FUND BOARD**

**OF MANAGEMENT.....RESPONDENT/APPELLANT**

*(Application to strike out the record of appeal in an appeal*

*from the ruling and order of the High Court of Kenya at  
Kisumu (Mr. Justice B. K. Tanui) dated 5th October, 2004  
in*

**H.C. MISC. CIVIL APPLICATION NO. 250 OF 2003)**

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**RULING OF THE COURT**

By this application expressed to be brought under *rules 80 and 81* of the Rules of this Court, the respondent in Civil Appeal No. 46 of 2005, Boya Rural Nursing Home Limited, seeks orders to strike out the record of appeal thereof on the ground that the appeal has been lodged out of the prescribed time without the requisite leave; that no leave to appeal had been obtained from the superior court or this Court before the appeal was filed or at all and that the form of the proceedings and the headings of the appeal were not correctly instituted.

The decision the subject matter of the appeal was delivered on 5th October, 2004. The appellant being aggrieved by it lodged a notice of appeal in the superior court on the same day and dispatched a letter bespeaking of copies of the proceedings and ruling to the Deputy Registrar. The letter is copied to Messrs. Wasuna & Co. Advocates. On 2nd December, 2004, the Deputy Registrar informed Messrs. Otieno, Ragot & Co. Advocates that the proceedings they had applied and paid for vide receipt No.[particulars withheld] dated 13th October, 2004 were ready for collection. Pertinent parts of the Certificate of Delay are as follows: -

***“2. Copies of the proceedings and ruling aforesaid were prepared and ready for collection by the respondent on 2nd December, 2004 and the respondent notified by letter of the same day.***

**3. The period that was necessary for the preparation and delivery to the respondent of copies of the proceedings and ruling aforesaid was from 5th October, 2004 to 2nd December, 2004 and that was 59 days.”**

It is Mr. Wasuna’s contention that by 14th October, 2004 the appellant had obtained from the Deputy Registrar typed copies of the proceedings and the ruling and that the certificate of delay is false and misleading and cannot be relied upon to justify filing the record of appeal outside the 60 days from the date the notice of appeal was lodged. Mr. Wasuna avers that the appeal should have been lodged not later than 14th December, 2004.

It is plain that the notice of appeal was filed timeously and so was the letter bespeaking of the proceedings. The Deputy Registrar then issued the certificate of delay after carrying out the computation as is mandated by **rule 81 (1)** which instructs him to exclude any time certified as having been required to prepare and deliver to the appellant the proceedings in the superior court. In this respect the material and effective date according to the certificate of delay is 2nd December, 2004.

Mr. Wasuna relies on a paragraph in the affidavit by the respondent’s director to contend that the proceedings were received by 14th December, 2004. This assertion is not supported by any document and moreover, it is contradicted by the Deputy Registrar ‘s certificate of delay.

With due respect to Mr. Wasuna there is no basis for us to impugn the certificate of delay. Moreover, there is not justification, as no proof whatsoever has been adduced, to support the allegation that it is patently and manifestly false. This assertion is grossly misconceived and is dismissed.

We are satisfied that the appeal so lodged by the appellant was properly and validly filed within the period prescribed by the rules.

Did the appellant require leave to appeal?

The record shows that the respondent had commenced proceedings before the superior court under **Order L111 rule 1** of the Civil Procedure Rules, seeking inter alia, leave to apply for orders of Judicial Review i.e. mandamus and prohibition, to compel the appellant to pay the respondent certain claims made by it under the National Hospital Insurance Fund Act. Under this Order the appellant was entitled to appeal as of right and did not have to seek the leave of the superior court or of this Court. This limb of contention by Mr. Wasuna is equally dismissed.

It is also argued by the Mr. Wasuna that the recital of the forms of heading is incorrect and the appeal should be struck out. Though the form of the proceedings and the heading of the application before the superior court and the appeal lodged do not exactly follow the format prescribed in **Farmers Bus Service & Others v Transport Licensing Appeal Tribunal** [1959] EA 779, we do not think that the omission can be a ground to strike out the appeal, the objection having been belatedly raised. Moreover, the objection goes only on the want of form rather than on the substance.

In the result this motion fails and we order that it be and is hereby dismissed with costs to the appellant.

***Dated and delivered at Kisumu 2nd day of December, 2005.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

.....

**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**