



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: KWACH, LAKHA & KEIWUA, J.J.A.)

CIVIL APPEAL NO. 303 OF 2002

BETWEEN

WANGETHI MWANGI 1ST APPELLANT

NATION NEWSPAPERS LIMITED 2ND APPELLANT

AND

J. P. MACHIRA T/A MACHIRA & CO. ADVOCATES RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Mulwa, J) delivered on the 7th day of September, 2001

in

H.C.C.C. NO. 1709 OF 1996)

RULING OF THE COURT

This is an application brought by the successful plaintiff (applicant) under rule 80 of the Court of Appeal Rules to have Civil Appeal No. 303 of 2002 struck out because the notice of appeal is defective and incompetent and consequently the record of appeal is invalid as an essential step in the proceedings has not been taken by the defendants (respondents) within the prescribed time. The appeal is also being impugned on the ground that there is no correct certificate given by the Registrar of the superior court under rule 81 of the said Rules and the record of appeal does not comply with rule 85 of those Rules.

According to the affidavit filed in support of the application the judgment appealed from was delivered on September 14, 2001 while the notice of appeal together with the letter requesting for copies of proceedings thereto. The copies were ready for collection on August 5, 2002 and the respondents ought to have filed the appeal within 60 days of that date which was filed on November 19, 2002 being 46 days out of time and filed 106 days after the respondents' advocates were notified on August 5, 2002 that the proceedings were ready and in those circumstances we think it is rightly contended that the record of appeal is not properly before the court and the same should be struck out. It has also been submitted by the applicant that the certificate of delay is misleading as it does not represent the true and correct computation of time. It should not have been prepared by the advocates. Moreover a copy of the letter of August 5, 2002 has been omitted from the record of appeal which it is submitted explains why the respondents' advocates were able to prepare a misleading certificate of delay aforesaid. That omission in itself is submitted, contravenes rule 85 of the Court of Appeal Rules and has rendered the record of appeal incompetent.

The respondents have not been serious in prosecuting the appeal as evident from the fact that they only extracted the decree appealed from on October 7, 2002 whereas judgment was on September 7, 2001. It is also contended that the notice of appeal is incurably defective as it does not conform to rule 74 (3) and (6) respectively as to the part of the decision to be appealed from and as to requirements of Form D in the schedules to the Rules.

The respondent opposes the application but accepts that the judgment appealed from was delivered on September 7, 2001 and the notice of appeal giving rise thereto was filed in the superior court on September 14, 2001 when the respondent applied for copies of judgment and proceedings. It seems to us that confusion appeared to have set in with regard to copy of the judgment. There is no requirement whatsoever that a copy thereof required by rule 85 (1) (g) to be included in the record of appeal must be certified and the long wait referred to in the replying affidavit between August 5, 2002 to September 20, 2002 when a certified copy was availed cannot be discounted under the proviso to rule 81(1). Accordingly we see no basis for the submission that the respondents had 60 days from September 20, 2002 within which to lodge the appeal which regrettably was lodged out of time and without leave of the court to do on November 19, 2002.

These being our views of the matter the appeal is struck out with costs to the applicant. The applicant will also have costs of this motion.

Dated and delivered at Nairobi this 11th day of April, 2003.

R. O. KWACH

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR