



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, SHAH & OWUOR, J.J.A

CIVIL APPLICATION NO. NAI. 254 OF 2002

BETWEEN

WILFRED ODHIAMBO MUSINGO.....APPLICANT

AND

HABO AGENCIES LIMITED.....RESPONDENT

(An application to strike out the notice of appeal from the Ruling of High Court

of Kenya at Nairobi (Khamoni, J) delivered on 15th August, 2001

in

H.C.C.C. NO. 2047 OF 2000)

RULING OF THE COURT

The applicant, *Wilfred Odhiambo Musingo*, seeks an order to strike out a notice of appeal lodged by the respondent, *Habo Agencies Limited*, on the grounds that the respondent has failed to take any steps to lodge the appeal within the time stipulated in rule 81 of the Rules of this Court. The respondent's defence filed in the superior court was struck out as the same was not served upon the applicant's advocates within seven days as mandated in Order VIII rule 1(2) of the Civil Procedure Rules. This is what we were told by both counsel before us. The defence was struck out on 15th August, 2001.

The notice of appeal sought to be struck out was lodged in the superior court on 22nd day of August, 2001. That was within the stipulated time. Copies of proceedings and ruling were applied for on 16th August, 2001. That was also within time. The advocates on record for the respondent were and still are Messrs. Asige Keverenget & Anyanzwa. By a letter dated 16th May, 2002 the superior court notified them that the copies of proceedings and ruling were available for collection upon payment of Shs.990/=. Unfortunately the said letter is addressed as follows:

“Asige Keverenget & Anyanzwa,

Advocates,

P.O. Box 86870,

NAIROBI”

These advocates have no offices in Nairobi and Post Office Box Number 86870, is a Mombasa number. The address seems to have caused problems. The letter was not posted to the advocates until 4th September, 2002 as deponed to by Mr. Asige and as confirmed by the Deputy Registrar of the superior court in the Certificate of Delay dated 25th September, 2002.

Mr. Tiego who appeared for the applicant took issue with the statement under oath by Mr. Asige to the effect that the said letter was not posted until 4th September, 2002. He urged that it was unbelievable that a letter dated 16th May, 2002 could not be posted until 4th September, 2002. He suggested that the note made by Mr. Kenyonzo who appeared for the respondent on behalf of Mr. Asige as well as notes made by Mr. Keyonzo’s clerk, Mr. Mulindi, in respect of visits and inquires made at the court registry, were not genuine. He also urged that the Certificate of Delay issued by the Deputy Registrar of the superior court was not correct and that therefore the record of appeal was not lodged within the time frame as provided in Rule 81 of the Rules of this Court.

As we see it, the letter of 16th May, 2002 was, for one reason or another, not posted until 4th September, 2002 and we cannot lay the blame therefor at the door of the respondent’s advocates. According to both counsel the appeal itself was filed on 1st November, 2002. That is within 60 days of the date when the copies of the proceedings and ruling were delivered.

Despite Mr. Tiego’s spirited urgings that the appeal was lodged out of time we cannot see it that way. As we have already pointed out, the late posting of the letter in question was not because of any blame on the part of the advocates for the respondent. We were told that we had powers to look behind the correctness of a certificate of delay - See the case of *Kanyago & 2 others vs. Mereka (Civil Appeal No. 94 of 2001)* (unreported). We have those powers but in this instance we cannot detect any flaw in the certificate of delay to warrant our saying that it was incorrect.

This application is dismissed with costs.

Dated and delivered at Nairobi this 4 th day of April, 2003.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR