



**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLICATION NO. NAI. 157 OF 2001

BETWEEN

ATTA (KENYA) LIMITED APPLICANT

AND

1. SULTAN HASHAM LALJI

2. BAHADURALI HASHAM LALJI

3. ESMAIL HASHAM LALJI

4. AHMED HASHAM LALJI

5. DIAMOND HASHAM LALJI

6. DIAMOND JAMAL

7. AZIM VIRJEE

8. ATTA (1974) LIMITED..... RESPONDENTS

(An application to strike out a notice of appeal in an intended appeal from the ruling of the High Court of Kenya at Nairobi (O'Kubasu, J) dated 21/7/2000

RULING OF THE COURT

On 21st day of July, 2000, the superior court, (O'Kubasu, JA sitting as a Judge of the High Court) delivered a ruling against which the first three respondents **Sultan H. Lalji, Bahadurali H. Lalji and Esmail H. Lalji** wanted to appeal. In furtherance of that desire the said respondents lodged a notice of appeal in the superior court on 2nd August, 2000. That was within time. By a letter dated 3rd August, 2000 the intending appellants' advocates M/s Kembi - Gitura & Company requested for certified copies of proceedings and ruling as well as proceedings in all interlocutory applications to enable them to lodge the appeal. That letter was copied to all parties affected by the intended appeal. As yet no appeal has been lodged.

By an application lodged in this Court on 24th May, 2001 the applicant (who was the third defendant in the superior court) seeks orders to strike out the said notice of appeal on the grounds that the three intending appellants have failed to file an appeal within the time limited by Rule 81 of the Rules of this Court.

When Mr. Esmail opened his arguments on behalf of the applicant he began by urging that Atta (1974) Limited (the eighth respondent here) was not properly served with a copy of the letter bespeaking copies of proceedings and ruling, in that the service thereof was by post as opposed to personal service as mandated by rule 17(1) of the Rules of this Court. However, rule 85(2) provides for "sending" as opposed to service of such a copy. Rule 17(5) provides that if a document is sent to any person it may be sent by hand or registered post to that person. There is no evidence as to whether a copy of the said letter was not posted to the eighth respondent and the eighth respondent itself has not stated its position thereon, nor has it objected to the service or non-service of the said copy. Mr. Esmail, quite properly, did not press the point.

Mr. Esmail's main argument centred on the request for certified copies (as opposed to uncertified copies) of the proceedings and ruling. He argued that there being no requirement for inclusion of certified copies of those documents in the record of appeal the three intending appellants do not have the benefit of the proviso to rule 81(1) so that the appeal ought to have been lodged by 2nd October, 2000. The said proviso reads:

"Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub -rule(2) within 30 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 appellant of such copy"

This proviso does not talk of certified or uncertified copies. It is correct to state that such certified copies are not required to mount an appeal. This was clearly held by this Court in the case of L.Z. Engineering Construction Limited v. Trade Bank Limited (in Liquidation), Civil Application No. NAI. 196 of 2000 (unreported). The Court said:

"Mr. Okwach went on to argue further that the time for lodgment of the record of appeal had not run out as he had repeatedly reminded the registry to prepare and deliver to him the said certified copies without response from the registry. We are unable to agree with that contention. Repeated reminders for preparation of documents not required to lodge an appeal cannot assist a party applying for the same. Time required to lodge an appeal cannot be extended, in other words, by requests for wrong documents".

Mr. Oraro who appeared with Mr. Kembi - Gitura for the respondents, numbered 1,2,3, & 8, had no quarrel with what was held in the L.Z. Engineering & Construction Company case (supra). His argument is that although certified copies were requested for, as yet it was not possible to say whether time taken to prepare certified copies was such as to deprive the respondents of the benefit of the proviso to rule 81(1). In the L.Z. Engineering case there was clear evidence to the effect that uncertified copies of the documents in question were available by 12th May, 2000 so as to enable the intending appellant to lodge an appeal within 60 days thereafter. In this application there is no such evidence. Mr. Esmail correctly stated that he was in no position to say if the uncertified copies were available as he was indeed able to say in the L.Z. Engineering case. That is the point of distinction between this application and the L.Z. Engineering application.

Mr. Oraro did concede that if the time required for certification takes the lodgment of appeal out of the 60 day period allowed, the appeal would be out of time, but in this matter, as yet, there is no evidence that even uncertified copies of the proceedings are ready and it would be wrong to strike out a notice of appeal which is still sustainable.

This Court said in the case of Joreth Limited vs. Kigano & Associates, Civil Appeal No. 66 of 1999 (unreported)

"Seeking certified copies of proceedings and ruling, per se, does not disqualify the appellant from relying on the proviso to rule 81(1) of the Rules as that proviso does not talk of certified copies. It talks merely of "copies". What is important is to bear in mind that in this case uncertified copies were

available by 26th March, 1999. It is at this stage that we would want to recall what this Court said in the case of *Republic vs. the Minister for Transport & Communications ex -parte Kenya Consumers Organization & another (Civil Appeal No. 276 of 1996) (unreported)*. The Court said:

"Only such time as may be required for preparation and delivery to the appellant of copies in question is to be excluded in computing the 60 day period for lodging an appeal. Time which may be taken by obtaining a certificate of delay is not to be excluded. Time needed for certifying copies of proceedings and judgments or rulings is not to be excluded in computing such time for the simple reason that the record of appeal does not need certified copies of proceedings, judgments or rulings"

The saving grace, in this appeal, for the appellant, is that it was informed of the fact of uncerified copies of the proceedings and ruling being ready on 26th March, 1999 and as these are the copies required to mount an appeal, this appeal was filed within the time it could have been filed. The simple mistake of seeking certified copies does not invalidate an appeal which was otherwise filed within time."

So the ratio decidendi of the two cases, *L.Z. Engineering* and *Joreth Limited* is that if as a result of bespeaking certified copies of proceedings the appellant runs out of time he would be out of time in lodging the appeal by the number of extra days it took to certify the copies of proceedings and the judgment or ruling, if the appeal is lodged within 60 days of the delivery of such certified copies.

In these circumstances the application before us is premature and is dismissed. We find, however, that the respondents to this application have not deponed to the fact that they have still not received even the uncertified copies of the proceedings and ruling. We make, therefore, no order as to costs.

Dated and delivered at Nairobi this 26th day of April, 2002.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR