



**IN THE COURT OF APPEAL  
AT NAIROBI  
CIVIL APPLICATION NO. NAI. 359 OF 2000  
CORAM: GICHERU, SHAH & OWUOR, J.J.A**

**BETWEEN**

**DAIMA BANK LTD**

**WHITESTONE AUCTIONEERS.....APPLICANTS**

**AND**

**K.H. OSMOND.....RESPONDENT**

**(An application to strike out a notice of appeal in an  
intended appeal from the judgment, decree of the  
High Court of Kenya at Nairobi (Gacheche,  
Commissioner of Assize) dated 12th July, 2000**

**in**

**H.C.C.C. 3052 OF 1997)**

**\*\*\*\*\***

**RULING OF THE COURT**

We have, before us, an application by which the applicants Daima bank Limited and Whitestone Auctioneers seek orders to strike out the notice of appeal lodged in the superior court by the respondent K.H. Osmond Esq., on 17th day of July, 2000. The application is stated to be brought under rules 42, 43, 80 and 81 of the Rules of this Court ("the Rules") the application is based on the following grounds:

- "1. That the respondent herein has failed to take essential steps to institute the appeal herein.***
- 2. That the time for lodging of the appeal herein has expired.***
- 3. That the uncertified copies of the proceedings and judgment were available to the respondent on 24/8/2000 when they (sic) lodged an application for stay of execution in this honourable court under rule 5(2)(b) of the rules of this Court.***
- 4. That there is in existence an unconditional order of stay granted by this Honourable court on 8/9/2000 based on the said Notice of Appeal and the respondent has since then not taken any steps towards prosecution of the main appeal."***

The notice of appeal now sought to be struck out was lodged by the respondent as he was dissatisfied with the decision of Commissioner of Assize Ms. Gacheche delivered on 12th day of July, 2000.

The respondent's advocate Miss. B.M. Quadros by her letter of 14th July, 2000 sought a signed copy of the judgment delivered by Commissioner Gacheche on 12th July, 2000 together with certified copies of all the pleadings and proceedings in the suit in the superior court. At the same time she requested that she be supplied with photocopies of the learned Commissioner's notes (proceedings).

The only certified document that is necessary to enable an intended appellant to lodge an appeal is the decree or order appealed against as mandated by rule 85(1)(h) of the Rules. The following documents, amongst others, need not be certified:

***"1.The pleadings - See Rule 85(1)(c) of the Rules.***

***2.The trial Judge's notes of the hearing - See rule 85(1)(d) of the Rules.***

***3.The judgment or Order - See Rule 85(1)(g) of the Rules."***

Yet counsel for the respondent proceeded to apply for certified copies of documents mentioned in 1 above as well as a signed copy of the judgment. Miss Quadros who appeared for the respondent with Ms. S. Sheikh argued that it was not possible for her to sign the certificate required by Rule 85(5) of the Rules unless she had in her possession a certified copy of the proceedings and a signed copy of the judgment. A similar argument was advanced on behalf of the respondent in the case **L.Z. Engineering Construction Limited vs. Trade Bank Limited (in Liquidation)** (Civil Application No. Nai. 196 of 2000) (unreported) and this Court had this to say.

***"Mr. Okwach steadfastly insisted that h e could only have applied for certified copies to mount the appeal as otherwise he could not have signed the certificate as provided for in rule 85(5) of the Rules, which rule mandates the appellant to certify that the record of appeal is correct as per do cuments supplied to him by the superior court. The normal format thereof is as follows:***

***"Certified correct and prepared to accord with copies as supplied by the High Court".***

***It is quite clear that rule 85(5) of the Rules gives leeway to the appellant to cover any typographical or inadvertent mistakes that may creep in when the registry of the superior court types out the requisite copies. It does not suggest that such certificate can only be issued when the requisite copies are certified, as opposed to uncertified."***

This was pointed out equally positively in the case of **Mawji vs. Lalji & 2 others** (Civil Application No. Nai. 236 of 1992) (unreported) as follows:

***"It is quite probable that M/s A.R. Kapila & Company Advocates were not aware of the 1985 amendments (to the Rules) until the time they were served with the record of appeal filed by Mr. Hira on 4th October, 1990. On that date or soon thereafter M/s A.R. Kapila & Company Advocates could easily have seen that the record of appeal did not requir e a certified copy of the proceedings or even the judgment or ruling. The only requirement for a certified copy left was that of the decree or order appealed against and we would venture to state that the difficulties created by legal notice No. 14 of 198 4 (which brought the requirement of certified copies of almost all documents needed for a record of appeal) were well known to counsel regularly appearing before this Court and complaints in that regard led to amendment of Rule 85(1) by legal notice No. 10 1 of 1985."***

As regards a signed copy of the judgment appealed against this Court pointed out in the case **L.Z. Engineering Construction Limited** (supra) as follows:

***"It must be pointed out at this stage that there is no requirement for including a signed copy of any ruling sought to be appealed against. Judges sign the original, only generally."***

So that the argument by Miss Quadros that she needed certified copy of the proceedings and a signed

copy of the judgment does not hold water. It is clear that uncertified copies of proceedings and judgment were available at the time the respondent lodged Civil Application No. Nai. 251 of 2000 against the applicant on 24th August, 2000. The time to lodge the Record of appeal expired on or about 23rd October, 2000, so that the appeal lodged on 13th February, 2001 has been lodged out of time. That is Civil Appeal No. 23 of 2001.

The appeal not having been lodged in time the fate of the notice of appeal in question is clear. It is spent. It is ordered struck out. The applicants will have costs of this application. These are our orders.

**Dated and delivered at Nairobi this 16th day of March, 2001.**

**J.E. GICHERU**

.....

**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 of original.

**DEPUTY REGISTRAR.**