



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, BOSIRE & OWUOR J.J.A)
CIVIL APPEAL NO. 94 OF 2001**

BETWEEN

**1. RICHARD KANYAGO
2. EXPRESS KENYA LIMITED
3. PETER KANYAGO APPELLANTS
AND
DAVID MUKII MEREKA RESPONDENT**

**(An appeal from the judgment and decree of the High Court
of Kenya at Nairobi (Hon. Mr. Justice Osiemo) dated
6th February 2001**

in

**H.C.C.C. NO.78 OF 2000)

RULING OF THE COURT

This is an application under rule 80 of the Court of Appeal Rules (the Rules), for an order striking out the Notice of Appeal and Record of Appeal in the present appeal.

The three appellants were defendants in High Court Civil Case No.78 of 2000, in which, David Mukii Mereka, the applicant, was the plaintiff. In that suit the applicant claimed special and general damages both under the Law Reform Act and the Fatal Accidents Act following fatal injuries which his son suffered in an accident involving motor vehicle registration No. KAD 211R then owned by Express Kenya Ltd jointly with Peter Kanyago, the 3rd appellant, but which was being driven by the 1st appellant with the consent of the third appellant.

The above suit came up for hearing on 18th September, 2000 before Osiemo J. But before the hearing commenced, the parties by consent recorded the following order:-

"By consent all the pleadings are amended by introducing PETER KANYAGO as the 3rd defendant as the owner of vehicle Registration No.KAD 211R. The 3rd Defendant adopts the defence of the 1st and 2nd Defendants. Secondly, special damages are agreed as follows:-

- (1)Police abstract report shs.1000
- (2)Medical expenses at shs.309,914.85
- (3)Funeral expenses at shs.200,000.00

(4) Costs of obtaining Letters of Administration agreed at shs.20,000/=.

The total sum of 430,014.85.

J.L. A. OSIEMO."

At the hearing only the applicant testified. In his judgment the trial Judge found for the applicant on liability and assessed general damages at Kshs.4,010,000. To that figure he added the agreed special damages of Kshs.430,014.85 to get a total figure of kshs.4,440,014.85 which he awarded as special and general damages.

The appellants were aggrieved and on 19th February, 2001, about thirteen days after judgment, they lodged a Notice of Appeal which, in pertinent part reads as follows:

"TAKE NOTICE that the Defendants being dissatisfied with the decision of Honourable Mr. Osiemo, J. given at NAIROBI on the 6th Day of February 2001 intends to appeal to the Court of Appeal against the whole of the said decision."

In the present application the applicant's case is that the parties having agreed on the quantum of special damages it was not open to the appellants to challenge on appeal the sum agreed upon. Mr. Ochieng Oduol for the applicant submitted before us that the provisions of rule 74(3) of the Rules requires a party appealing to specify the aspects of the decision appealed from which he is aggrieved of, and no more. In his view it was not open to the appellants to challenge damages which they themselves had consented to.

Mr. Majanja for the appellants urged the view that since the appellants had not admitted liability the agreed damages were conditional and any appeal against the decision on liability perforce also challenges the quantum of damages. With due respect to counsel that reasoning offends not only against common sense but also against the common law and Section 67(2) of the Civil Procedure Act. Section 67(2) above, provides as follows:

"67(2) No appeal shall lie from a decree passed by the Court with the consent of parties."

Of course we appreciate that the agreed special damages were conditional on the appellant's being found liable in damages. But was it open to the appellants to appeal against the amount of special damages which they had assisted in fixing? With due respect to the appellants by indicating in their Notice of Appeal that they were dissatisfied with the amount of special damages the superior court awarded with their consent, they were, in effect trying to revive an issue which the parties had agreed would not be the subjectmatter of adjudication by the trial court. The applicant did not call evidence on the matter during the trial. The defendants did not think that was necessary. Clearly the Notice of Appeal offends the provisions of rule 74(3), above. As material to this ruling that rule provides that:

"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision, and where it is intended to appeal against a part only of the decision, shall specify the part complained of,..."

Subject to a finding on liability, the appellants are not complaining about the quantum of special damages. And if their appeal were to be heard they would not properly present arguments against the sum which was awarded on the head of special damages. As the appellants' notice of appeal does not accord with rule 74(3), above, which is worded in mandatory terms, and in view of the fact that the Rules do not permit amendment of primary documents the notice of appeal is incurably defective and renders the present appeal incompetent.

Apart from that, the appeal was filed out of time without leave. The appellants cannot rely on a Certificate of Delay in the record of appeal as the same is on the face of it misleading. The proviso to rule 81 of the Rules, under which the certificate of delay was filed provides, in pertinent part, that:-

"... 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 [of proceedings]."

According to the certificate of delay, the appellants were, by a letter dated 8th March, 2001 notified by the superior court that copies of proceedings and judgment were ready for collection. In paragraph 3 of the certificate of delay, the appellants' counsel received that letter on 16th March 2001. Yet in paragraph 4 of the said certificate it is averred that the time required for the preparation of the proceedings and judgment was from 19th February 2001 to 27th March, 2001. It cannot be true that the time after 16th March 2001 was required for the preparation and delivery of the copies of proceedings and judgment. The certificate of delay is clearly misleading and was apparently worded in a slanted manner to conceal the fact that the record of appeal was lodged out of time. We note that in the recent past a practice has gained ground where advocates prepare certificates of delay for the Registrar's signature clearly tailored to circumvent the provisions of rule 81, above. The duty to prepare a certificate of delay is on the Registrar of the superior court. It is a duty he should not delegate to the litigants or their counsel. The ultimate responsibility for its accuracy lies with him. If as here, the Court is of the opinion that a certificate of delay is misleading it is entitled to ignore it. The position was made abundantly clear by this Court in *Republic v. The Ministries For Transport & Communications; The Minister For Finance; and KP&T Corp. (Interested Party) Ex parte Kenya Consumer Organisation & Another*. Civil Appeal No.276 of 1996 (unreported). The Court there said:

"But with the greatest respect to Platt JA (*In Nairobi Home Economic African Heritage* [1982-88] 1KAR, 1024), we are unable to agree that the certificate of delay is binding, prima facie, on this Court. If the certificate of delay is wrong then, on the basis of available evidence, the Court cannot simply ignore the same."

The question as to when the time starts running in terms of the proviso to rule 81(1) of the Rules, has been considered by this Court from time to time. In the case we have just cited above, it was held that time starts running on the date the superior court notifies the intending appellant that copies of proceedings and judgment are ready for collection. That presupposes that the time taken in postage, where the notice is sent by post, is excluded from computation. But suppose as here all there is in that regard is what the appellant gives as the date he was notified that copies of proceedings and judgment were ready for collection, how is the court supposed to behave? The words in the phrase "required for the preparation and delivery" in rule 81, above, must be given their ordinary meaning. In our view they mean that only the time the superior court says it required to make ready for delivery the copies of proceedings and judgment including such period as is necessary to transmit a notice to that effect to the intending appellant is to be considered. To rule otherwise in our view, will mean that this Court would be exercising discretionary jurisdiction under rule 81, with the result that reasonable cause would become a ground for excluding from computation periods outside the time actually necessary for the preparation and delivery of the copies of the proceedings and judgment. Rule 81, is in our view, worded in mandatory terms. Only the period "required for the preparation and delivery to the appellant" of the copies "shall, in computing the time within which the appeal is to be instituted..." be excluded by the Court.

It then follows that to give rule 81 reasonable construction, time starts to run from the date of receipt of the notice from the court or such date when, in the usual course of postage, the notice would be expected to be received by the appellant.

The letter advising the appellants' counsel that copies of proceedings and judgment were ready for collection is on record and bears the date 8th March, 2001. In absence of any evidence to the contrary, we presume that the letter was posted, and allowing the usual four days for postage for mail within Nairobi we can safely say that the time required for the preparation and delivery of copies of proceeding and judgment in the present appeal was from 9th February 2001, when the letter bespeaking the said copies was received by the superior court, to 13th March 2001. Even assuming that the appellants' counsel received the letter dated 8th March, 2001, on 16th March, 2001 as alleged in the certificate of delay, the record of appeal was lodged out of time.

In the result we allow the motion dated 8th May 2001 and strike out the notice of appeal and the record of appeal as prayed. The applicant shall have the costs of the motion and the appeal.

Dated and delivered at Nairobi this 30th day of November, 2001.

R.O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR