



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: BOSIRE J.A (IN CHAMBERS))

**Billings in his affidavit deposes that the original record of the case went missing for sometime and despite several visits to the court registry and several written reminders to the registry to furnish those documents they were not supplied until 12th November, 1999, and 10 days later he filed this application. He also deposes that payment of the requisite fees for the documents was made on 2nd September, 1999, which then means that as at that date the documents were ready for collection. He did not collect the documents soon thereafter because, according to him, the court file again went missing.**

**In his submissions before me, Mr Weda, who says he now appears for the applicant in place of Mr. Billings, said, in answer to a question I put to him as to why this application was necessary if indeed the delay was caused by the High Court Registry, that it was on the mistaken belief that the application was necessary. He was, however, quick to add that presently, the applicant cannot possibly rely on the proviso to rule 81 of the Court of Appeal Rules in view of the long lapse of time since copies of proceedings and ruling were supplied to it. He also pleaded with me to exercise my unfettered judicial discretion under rule 4 aforesaid and grant Mr Billing's application. I do not think the applicant is deserving of the court's discretion in its favour. In his view the application is a delaying tactic intended to deny the respondent the immediate realization of the fruits of the judgment in its favour. He also submitted that the Notice of Appeal dated 18th March, 1999, and court stamped 8th March, 1999, is by reason of rule 82 of the Court of Appeal Rules, deemed to have been withdrawn the applicant having failed to take the next essential step timeously. The respondent has not applied to have it struck out as required by rule 80 of the Rules, and that being so his submission does not avail him of anything. It is now settled that an order of the court is necessary to give effect to the deeming provision.**

**The jurisdiction of the court under rule 4 aforesaid, being discretionary the applicant was obliged to place before me evidence to show that it is deserving of the orders sought. I note that the ruling appealed against is wrongly dated, 26th February 1999, because as earlier on pointed out the record of proceedings shows that the ruling was delivered on 3rd March, 1999. The ruling should properly have borne the same date in view of the provisions of O.XX rule 3(1) of the Civil Procedure Rules. However, that is not a point which is material in this application. For purposes of this ruling I will proceed on the basis that the ruling was delivered on 3rd of March, 1999.**

**The applicant acted promptly in respectively filing the Notice of Appeal and applying for copies of proceedings and ruling. The record of proceedings is not a long one but for some reason it took almost six months before the copies thereof were made ready, and when the applicant was advised that the same were ready and the requisite payment for them was made, it took a further two or so months before they were supplied. Although that is so, on 12th July 1999, Mr Billing was alive to the fact that where as here there is delay by the Court Registry to furnish copies of proceedings and ruling an intended appellant can invoke the provisions of rule 81, aforesaid, to exclude from computation the period the superior court certifies as having been necessary for the preparation of the copies. In his submissions before the trial Judge, on 12th July 1999, in an application for stay of execution of decree in the suit he said:**

**"The time (60 days) run from the time the certificate of delay is issued. It is not our fault that we do not have the proceedings."**

**If I accept what the applicant says in this application regarding when the court below was able to furnish its advocates with copies of the proceedings and ruling, it will mean that as at the 12th November, 1999, the time for filing a record of appeal had not expired in view of the proviso to rule 81 of the Court Rules. However, the applicant having excluded from the record of the application a copy of the certificate of delay, it is not possible to know the actual period the court took to prepare for supply to the applicant, the copies of proceedings and ruling. It is Mr Billing's firm of advocates which prepared the record of this application. In view of his above quoted submission one can only conclude that the omission of the certificate of delay from the record was not inadvertent. Besides, notwithstanding that copies of the proceedings and ruling were supplied, as he says, on 12th November, 1999, this application was not filed until 22nd November, 1999. That delay is not**

explained.

Besides, the record of proceedings is clear that the lower court's original file was not missing as alleged by the applicant. On 30th April, 1999, 23rd June 1999; 28th June, 1999, 7th July 1999; 12th July 1999; and 19th July, 1999, respectively the matter was listed for various orders. On none of those dates did the applicant's counsel then on record complain about the file not being available. He knew where the file was, and the reason for the delay in furnishing copies of proceedings. A certificate of delay would have explained the delay in doing so and the length of the delay.

I do not lose sight of the fact that the respondent did not file a replying affidavit to contradict what the applicant's counsel has deponed to in his affidavit in support of the application. It would have been prudent to do so. However, in view of what I have stated above, their failure to do so is inconsequential.

The record shows that the ruling against which an appeal is intended was certified on 29th September, 1999. The proceedings have a certificate bearing the date 10th November, 1999. Both were checked on 2nd September, 1999. It is not clear why documents checked on the same day would bear certificates of different dates. Certain events must have occurred which gave rise to that and which the applicant has not explained. It is also interesting that the applicant in most of its letters was not directly asking for copies of proceedings and ruling but for the court file.

The application appears to me to be presented in a slanted manner as gives a distinct impression that all the facts the court would need to know are not before it. I decline to exercise my discretion under rule 4, above, in favour of the applicant and dismiss its application with costs.

Dated and delivered this 19th day of May, 2000.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR