



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: CHUNGA C.J., TUNOI & SHAH, J.J.A

CIVIL APPLICATION NO. NAI. 196 OF 2000

BETWEEN

L.Z. ENGINEERING CONSTRUCTION LIMITED.....APPLICANT

AND

TRADE BANK LIMITED (IN LIQUIDATION).....RESPONDENT

(An application to strike out a Notice of Appeal in an intended appeal from a Judgment of the High Court of Kenya at Nairobi (Mbaluto J) dated 2nd March, 2000

in

H.C.C.C. NO. 19 OF 1998)

RULING OF THE COURT

On 2nd day of March, 2000, the superior court (Mbaluto, J) struck out a suit filed by the respondent, Trade Bank Limited (in Liquidation), against the applicant L.Z. Engineering Construction Limited. The respondent lodged, in time, a notice of appeal against the decision of the learned Judge. The respondent's advocates, by their letter of 3rd March, 2000 requested the registry of the superior court to supply to them, certified copies of the proceedings and the ruling presumably to enable them to lodge an appeal against the said decision. The letter beseeching certified copies of the proceedings and ruling was copied to the advocates for the applicant.

The present application was lodged on 18th July, 2000. The applicant seeks an order to strike out the said notice of appeal and also seeks incidental orders for costs. The application is based on the grounds in the affidavit of Mr. A.A.K. Esmail, Advocate for the applicant. The said grounds as stated and as argued before us can be briefly summarized as follows:

"1.The respondent was wrong in applying for certified copies of the proceedings and judgment when a record of appeal need not contain such certified copies.

2.Uncertified copies of the proceedings and ruling were available to the respondent by 12th May, 2000 to enable it to lodge an appeal within 60 days of 12th May, 2000.

3.As wrong copies (certified as opposed to uncertified) were applied by the time to lodge the appeal expired on 15th May, 2000.

4.There was no order in the superior court file authorizing the liquidator of the respondent to

appoint Messrs. Okwach & Company as advocates to commence the process of mounting the intended appeal."

Rule 81(1) of the Rules of this Court (the Rules) reads:

"81.(1) Subject to provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within 60 days of the date when the notice of appeal was lodged -

(a)A memorandum of appeal, in quadruplicate;

(b)the record of appeal, in quadruplicate; (

c)the prescribed fee; and

(d)Security for the costs of the appeal;

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 thirty days of the date of the decision against which it is desired to app eal, 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 appelland of such copy.

Rule 85(1) of the Rules in material parts provides that a record of appeal shall, amongst other documents, contain the following:-

(i)The trial Judge's notes of the hearing.

(ii)The judgment or the order. and

(iii)A certified copy of the decree or order.

The above quoted two Rules show what documents, among others, are necessary to prepare and lodge a record of appeal and a simple reading of them shows that certified copies of the proceedings and the ruling are not necessary to prepare a record of appeal.

Mr. Esmail was aware of the requirements of the type of documents necessary to mount an appeal and it appears that, Ex abundanti cautela, he applied for uncertified copies of the proceedings and the ruling by his letter of 8th March, 2000 addressed to the registry of the superior court. He managed to obtain those documents on 10th May, 2000 and forwarded copies of the same to M/S Okwach & Company Advocates who confirmed to the registry of the superior court that they had received copies of the proceedings and ruling but that they had not received either a certified copy of the proceedings or a copy of the ruling signed by the learned Judge himself. 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.

M/S Esmail & Esmail Advocates, wrote to M/S Okwach & Company, on 5th June, 2000 pointing out that the time for lodging the intended appeal had expired. Even at that stage M/S Okwach & Company insisted that the registry had to supply to them certified copies of the proceedings and ruling. This was by their letter of 9th June, 2000 addressed to the registry of the superior court. M/s Esmail & Esmail, under cover of their letter of 9th June, 2000 sent to M/s Okwach & Company a signed copy of the decree. It is to be noted that by then M/s Okwach & Company had all that they needed to lodge the appeal.

Mr. Esmail's argument before this Court is that time for lodging the record of appeal has expired and that therefore the notice of appeal ought to be struck out as the respondent has not taken the essential step of lodging the record of appeal in time. Mr. Okwach submitted that he could not have lodged the record of appeal without certified copies of the proceedings as well as the ruling, as he could not, in the absence thereof, obtain a certificate of delay for inclusion in the record of appeal. He pointed out to this Court the

words used in the proviso to rule 81(1) of the Rules which words are "preparation and delivery". The said proviso has been earlier set out by us in full. As we understood him, Mr. Okwach's argument is that only the registrar of the superior court can certify the period taken for such "preparation and delivery".

Ordinarily that is so. But in this instance the registrar could, eventually, have certified the period of "preparation and delivery" of certified copies as indeed requested for by M/S Okwach & Company, Advocates. Mr. Okwach took issue with Mr. Esmail's actions geared towards obtaining of the uncertified copies. It behoves upon a party wishing to bring an end to litigation to try and expedite the process of an appeal. There is nothing wrong in that as it is a matter of public policy that litigation ought to end as soon as practically possible. We therefore find nothing unusual or improper in what Mr. Esmail did. Mr. Okwach steadfastly insisted that he 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 documents 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.

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. Okwach also propounded an argument to the effect that as an advocate applying for such copies is to bear the costs of copying and certifying he can only rely on a document supplied by the court itself. This argument cannot stand. If necessary documents are available and the advocate becomes aware of such availability then the advocate becomes duty bound to obtain those documents to start process of mounting the appeal. A similar issue arose in the case of Mawji vs. Lalji & 2 others (Civil Application No. Nai. 236 of 1992) (unreported). In that case - a decision of full bench, confirming the decision of a single Judge, - the intended appellant's advocates insisted on being supplied with certified copies of proceedings and ruling despite having known that uncertified copies of proceedings and ruling were available. This fact they knew of, as another advocate (Mr. Hira) using uncertified copies had already filed and served on those advocates, a record of appeal, in connection with the same subject-matter. Yet they took no action towards mounting the intended appeal. This Court said:

"It is quite probable that M/s A.R. Kapila & Company Advocates were not aware of the 1985 amendments 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 require 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 1984 (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. 101 of 1985."

It was also decided by this Court in the case of Republic vs. The Minister of Transport & Communications & 2 others, Exparte - Kenya Consumers Organization & another (Civil Appeal No. 276

of 1996) (unreported) that, "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 orders."

In the case of Mau West Limited v. Kenya Co-operative Creameries Limited Civil Application No. Nai. 232 of 1998 (unreported) a single Judge of this Court (Omolo, JA) held in no uncertain terms as follows:

"I only need to add that no party needs a certified copy of the judgment to enable it mount a competent appeal; all that is required to be certified is the decree or order extracted from the judgment or the ruling."

A similar view was expressed by a full bench of this Court in the case of Kamau & another v. Caroline Njeru Muichigi (Civil Application No. Nai. 126 of 1999) (unreported)

Mr. Okwach referred to the case of Equatorial Commercial Bank Limited & another vs. Ibis Aviation Limited (Civil Application NO. Nai. 99 of 2000) (unreported) in which case this Court held that if the registry of the superior court selectively (emphasis supplied) delivers copies to advocates on the other side (and not of the intended appellant) the blame for delay cannot lie at the door of the intended appellant. In that case although fees for copies of proceedings and ruling were paid for on 16th February, 2000 the registry of the superior court did not deliver the same to the advocates for the intended appellant until 3rd July, 2000 and that too was done after several reminders and visits to the registry. ;That case is clearly distinguishable. In this case, Mr. Esmail took the trouble to send copies of court supplied proceedings and ruling to Mr. Okwach's office.

According to our reckoning the time to lodge the record of appeal has already expired. The notice of appeal has therefore become a dead-letter. It is ordered struck out. The applicant will have costs of this application. Having come to this decision we need not go into Mr. Esmail's second point, that is, whether or not Mr. Okwach properly or at all obtained leave under section 241 of the Companies Act to file and prosecute the intended appeal.

Dated and delivered at Nairobi this 17th day of October, 2000.

B.

CHUNGA

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CHIEF JUSTICE

P.K.

TUNOI

.....

JUDGE OF APPEAL

A.B.

SHAH

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.