**LZ Engineering Construction Ltd v Deposit Protection Fund Board**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 22 December 2000

**Case Number:** 244/00

**Before:** Tunoi, Shah and Owuor JJA

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**Summarised by:** W Amoko

*[1] Practice and procedure – Court of Appeal – Notice of appeal – Time of appeal –Suspension of time*

*by an application for copies of proceedings – Whether the letter requesting proceedings should be filed*

*and copied to all Respondents – Whether the notice of appeal Court of Appeal Rules – Proviso to Rule*

*85(1).*

*[2] Practice and procedure – Court of appeal – Notice of appeal – Service of documents – How service*

*is to be effected – Rule 17(1) – Court of Appeal Rules.*

**RULING**

**TUNOI, SHAH AND OWUOR JJA:** We have before us an application brought under Rules 42(1) and

80 of the Rules of this Court (“the Rules”) whereby the Applicant, LZ Engineering Construction Ltd, seeks an order for striking out of the notice of appeal lodged by the First Respondent, Deposit Protection Fund Board, on the ground that the First Respondent has failed to file its intended appeal within the time limited by Rule 81 of the Rules. The facts leading to the application are that the judgment of the superior court (Ole Keiwua JA as he now is but sitting as a judge of the superior court at the material time) was delivered on 31 May 2000. The First Respondent lodged a notice of appeal to challenge that judgment. That notice of appeal lodged on the 13 June 2000 was in time. In the body thereof the First Respondent stated that it intended to serve copies of the said notice of appeal upon:

“1 Esmail and Esmail Advocates

Corner House

Kimathi Street

P O Box 11021

NAIROBI

2 Ramesh Manek Esquire Advocate

Agip House

Haile Selassie Avenue

P O Box 14635

NAIROBI

3 Okwach and Company

Pioneer House

Moi Avenue

P O Box 52831

NAIROBI”.

It is common ground that a copy of the said notice of appeal was not served on Ramesh Manek, Esquire, Advocate for the Second Respondent, Yaya Towers Ltd For the purposes of this application it is immaterial whether or not a copy thereof was served on M/s Okwach and Company advocates. Although the application before us was originally a two-pronged one, Mr *Esmail*, who appears for the Appellant, has abandoned one of those prongs namely that although the First Respondent was in possession of copies of proceedings and judgment by 9 June 2000 it failed to lodge the appeal by 9 August 2000. As this ground stands abandoned we will not delve into it. The main prong of Mr *Esmail*’s application is that the First Respondent did not send a copy of the letter bespeaking a copy of the proceedings to Mr Ramesh Manek or to M/s Okwach and Company and further that there was no indication that the letter requesting a copy of the proceedings was ever filed in the superior court registry. Mr *Esmail*, in the affidavit sworn in support of the application, in regard to the lodgment of the said letter with the registry of the superior court says: “Further, there is no indication on the copy of this letter (that is the letter requesting copy of the proceedings, dated 22 June 2000) when, if at all, the letter was filed in court”. In the replying affidavit sworn on behalf of the First Respondent by Mr *Peter Le Pelley*, Advocate, there is no denial of the above-stated averment. Nor did Mr *Le Pelley* respond to Mr *Esmail*’s argument in this Court on that issue during the course of the hearing before us. We can therefore only assume that the said letter was not on the file of the superior court. Mr *Le Pelley*’s affidavit in response to this application has annexed to it an affidavit by Mr *Esmail* sworn on 1 December 2000 wherein Mr *Esmail* deposed to the same fact as follows: “2. I have on more than one occasion searched the file in the Superior Court relating to High Court civil case number 3791 of 1993 in order to find out: when, if at all, the First Respondent’s advocates’ letter of 22 June 2000 addressed to the Registrar of the Superior Court seeking a copy of all proceedings therein was filed in the Superior Court; however despite these efforts I have not been able to find this letter on the Court files relating to the said case”. Faced with these depositions and in the absence of anything having been said in regard thereto by Mr *Le Pelley*, we called for the file of the superior court. We were also unable to trace that letter in the superior court file of HCCC number 3791 of 1993. Therefore, the proviso to Rule 81(1) of the Rules does not enure to the benefit of the First Respondent and the intended appeal, hence, ought to have been lodged by or about 13 August 2000. Such appeal not having been filed by that date the notice of appeal becomes a dead letter and is deemed to be withdrawnThere is yet another issue. Mr *Le Pelley* argued that the firm of M/s Esmail and Esmail, advocates, having been served with a copy of the letter requesting a copy of the proceedings, and Mr *Esmail* being a director of Yaya Towers Ltd, there is a good enough service of that letter on Yaya Towers Ltd by way of informal notification. In support of this argument Mr *Le Pelley* relied on Rule 81(2) of the Rules which reads: “(2) An appellant shall not be entitled to rely on the proviso to subrule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent”. What Mr *Le Pelley* urged was that service on M/s Esmail and Esmail, advocates, in which firm Mr *Esmail* is a partner, is good enough service on the Second Respondent, Yaya Towers Ltd, whose director Mr *Esmail* is, as Rule 81(2) caters for service on the respondent and not its advocate. When service of a document is to be effected it cannot be argued that an informal notification could amount to good service. Rule 17(1) of the Rules expressly provides that in the absence of any special direction the service shall be made personally on the person to be served or any person entitled under Rule 22 to appear on his behalf. Rule 17(2) of the Rules provides that if an advocate is on record it shall be sufficient if one copy of that document is served on that advocate. There is nothing in the Rules to suggest, even remotely, that informal notification is good service. Quite clearly Mr *Manek* had to be served with a copy of that letter. He was not served so that yet again the proviso to Rule 81(1) of the Rules does not enure to the benefit of the First Respondent. The appeal not having been filed on or by 13

August 2000 the notice of appeal is a dead letter.

On those two limbs only we order that the notice of appeal lodged in the superior court by the First

Respondent on 13 June 2000 be struck out. The Applicant will have the costs of this application.

For the Appellant:

*Mr Esmail*

For the Respondent:

*Mr Le Pelley*