

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 717 OF 2002

PHILIP J. WISHAMINYA

INSURANCE EXPERTS KENYA LTD.....APPELLANTS

VERSUS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

RULING

This is an application by way of Notice of Motion under Order 51 Rule 1 of the Civil Procedure rules and Sections 1A, 1B and 3A of the Civil Procedure Act for orders that, the court file herein be reconstituted in terms of the pleadings annexed to the application and that thereafter the file be locked in the strong room for safe custody.

The reasons set out on the face of the application and also the supporting affidavit, are that the original court file has been missing from the court registry since June, 2008. Efforts to trace the said file have borne no fruits.

The supporting affidavit has given a chronology of events and efforts that have been made by the parties in the prosecution of this appeal. What is not in dispute is that the appellants lost their case in the lower court and thereafter filed an appeal. This was followed by an application for stay of execution which apparently was granted.

The original file appears to have been transmitted from the lower court to the High Court sometime in October, 2006 going by the averments in the supporting affidavit, to facilitate the hearing of the appeal. There is also evidence that at some point the appeal was listed for hearing but the court could not proceed as there was no notification that the appeal had been admitted under relevant provisions. Correspondence on record annexed to the application points to the fact that the file has been missing since the year 2008.

The Deputy Registrar on the other hand has not been very helpful in addressing the issue and the latest correspondence resting with the letter dated 14th November, 2018 confirms that the applicant has had a frustrating time in trying to trace the record herein.

The application is opposed and there is a replying affidavit sworn by the 1st appellant herein. It is stated that counsel for the appellants who was handling the said file on their behalf passed on in July 2016 long after the court file went missing. The deponent cannot vouch or confirm that the documents sought to be used in the reconstruction of the file tally with the court record in the absence of his file from his then advocate. He also pleads that a delay of more than 10 years would be prejudicial to him in the absence of the file from his advocate and the court file.

I have considered the rival submissions by counsel on record. It is submitted that the record presented, and on which the reconstruction of the file is sought, may not be complete because not all exhibits are on the record and not all documents have been stamped. There is no objection to the appeal going on but on *viva voce* evidence.

On the other hand, counsel for the respondent counters that submission by stating that the record is a reflection of the appeal lodged by the appellants and that they took advantage of an order for stay, and any retrial after fifteen years may be prejudicial to the respondent. In any case, witnesses may not be available.

I have had a look at the record presented by the respondent/ applicant. It contains the plaint, the statement of defence, and the applications that have been made by the parties, the judgment of the lower court and the Memorandum of Appeal.

All these documents bear the court stamp which clearly shows that it is the authentic record of appeal.

Other than the absence of the lower court original record, I am satisfied that what has been presented and sought to be used as the record of appeal is sufficient to grant the order sought. I note, with respect, that the record of appeal that has been presented was filed by the then advocate for the appellants and served upon the advocates for the respondent. In effect it is their own record which they cannot now disown. In that regard there is no prejudice that can be said shall befall the appellants if the orders sought are granted.

In the interest of justice and with a view to determining this matter once and for all, I allow this application and order that this record shall be reconstructed as prayed and thereafter the file shall be placed in the strong room for safe custody. The costs of this application shall be on appeal.

Dated, signed and delivered at Nairobi this 23rd Day of May, 2019.

A. MBOGHOLI MSAGHA

JUDGE