



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NUMBER 571 OF 2012

EQUITY BANK LIMITED. 1ST APPELLANT

LUCY NDURURI. 2ND APPELLANT

VERSUS

REOBERT CHESANG.RESPONDENT

RULING ON DIRECTIONS

1. On 30th April, 2014, Onyancha J made certain orders in this matter including an order that the appeal herein be prosecuted within six (6) months in default the appeal to stand dismissed. Pursuant thereto, the Appellant prepared the Record of Appeal and filed the same on 29th August, 2014. The same was admitted on 13th October, 2014 and directions given on 16th October, 2014 that the appeal be heard before me on 29th October, 2014.

2. When the matter came up for hearing on that day, the Respondent pointed out that the Record of appeal was not complete. The proceedings had typographical errors that changed the meaning of the case in the lower court and that the exhibits produced before the trial court had not been included in the record. For those reasons, the court ordered that the Appellant do file a Supplementary Record of Appeal to include properly typed and certified proceedings of the trial court and the missing exhibits. The six (6) months period fixed by the court for the prosecution of the Appeal was extended for another six (6) months.

3. On 4th February, 2015 when the matter came up for mention to confirm compliance and to fix a hearing date, Ms Ndirangu Learned Counsel for the Appellant informed the court that the Appellant had complied with the directions made on 29th October, 2014 save for three exhibits that were missing. She indicated that the Respondent had indicated that he had copies of the said exhibits. The court granted the Appellant 30 days to file a Further Supplementary Record of Appeal to include the said exhibits. When the matter came up again on 11th March, 2015 to confirm compliance and to fix a date for trial, both Ms Ndirangu and Mr. Chesang the Respondent, appearing in person, told the court that the said three (3) exhibits, produced as P Exhibit 6, 7 and 19 in the trial court were still missing. This prompted the court to summon the Executive Officer of the trial court to appear and explain the whereabouts of the said three (3) exhibits.

4. On 23rd March, 2015, Stanley Githire Thumbi, the Executive Officer Milimani Commercial Courts attended court and stated that he and his staff had looked for the said exhibits but could not trace them.

He was unable to establish at what stage the said exhibits went missing. He requested for more time to try and trace the same. Even after being granted more time, the Executive Officer told the court on oath on 27th March, 2015 that before he reported to his present station, there was no exhibit register. As a result, movement of exhibits produced in court could not be traced. That he and his staff were unable to tell when and how the subject exhibits disappeared from the court file. Indeed the Executive officer informed the court that he has since reported the loss of the said exhibits to Capital Hill Police Station on 25th March, 2015 in OB No. 20/25/03/2015.

5. I invited the parties to address the court on the proper cause to take as it would seem that the said exhibits may have been completely misplaced. I have carefully considered the submission of the parties before arriving at this decision.

6. I have considered the contention by the Respondent that his entire original file for this case together with other documents and diary disappeared in or about June, 2011. He reported the loss to the Kilimani Police Station on 10th June, 2011 under OB No. 36/10/06/11. He produced the police records to that effect. He told the court that the proceedings for 6th, 8th, 9th, 13th and 23rd June, 2011 in which his complaint about the said loss were recorded had been omitted in both the Record and the Supplementary Record of Appeal.

7. I have perused the record. The Supplementary Record of Appeal at pages 13 and 14 contain the testimony of the Respondent before the trial court. He testified on 10th March, 2011 and produced all his exhibits numbered 1 – 18 and 19. In view thereof, it might well be that by the time his personal file went missing, the said Exhibit No's 6, 7 and 19 were already on the court record. He might have remained with none.

8. I have also considered the contestation by the Appellants Counsel that the said exhibits are crucial and that the Appellant had not had a chance to see and challenge those exhibits before the trial court.

9. When I asked the parties as to the nature of the missing exhibits, they concurred that these were:

- a) P Exhibit 6 – A Nakumatt Supermarket Loyalty Card.
- b) P Exhibit 7 – A publication from Equity Bank, the Appellant
- c) P Exhibit 8 – An audited Report from Equity Bank Managing Director indicating the profit made in the year 2010.

Looking at the nature of the exhibits, one would wonder whether copies or counterparts of the same could not be had by either of the parties.

10. My view is that, the unavailability of the aforesaid exhibits cannot hamper the hearing, just and effective determination of the appeal.

11. Accordingly, I give directions as follows: -

a) Any party who has a copy or counterpart of the said exhibits is granted leave to file and serve the same within 30 days of the date hereof.

b) The Appellant is to file and serve a Further Supplementary Record of Appeal within 30 days of today to include the missing proceedings and any other relevant documents.

c) The Appellant to file and serve written submissions on the appeal within 45 days of today (i.e. 15 days after the filing and service of the Further Supplementary Record of Appeal).

d) The Respondent to file and serve his written submissions within 30 days of service of the written submissions by the Appellant.

e) The written submissions to be in New Times Roman Font 14 not exceeding 5 pages double spacing.

f) Hi-lighting of the submissions to be made on a date to be given by the court.

g) The deadline for the hearing of the Appeal as contained in the Orders of 29th October, 2014 is hereby varied accordingly to extend to 18th of June, 2015.

It is so directed.

DATED and DELIVERED at **NAIROBI** this 10th day of April, 2015.

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A MABEYA

JUDGE