

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 8 of 2002

HENRY LUKHANYUAPPELLANT

~VRS~

PIONEER GENERAL ASSURANCE SOCIETY LTD...RESPONDENT

RULING

This is a ruling on an application an application brought under section 3A and 80 of the Civil Procedure Act and Order XLIV rule 1 of the Civil Procedure Rules dated 15th March, 2006 seeking for the following prayers:

1. *That this Hon. Court be pleased to review its order made on 9.2.2006 striking out this appeal.*
2. *That upon such review this appeal be reinstated and the same set down for hearing on merits.*
3. *Costs of the application be provided for.*

The grounds supporting this application are that the appeal was struck out on the 9/2/2006 on the ground that the record of appeal did not contain the Respondent's written submissions. This was done as a result of a preliminary objection raised by the Respondent's counsel when the appeal came for hearing. After the striking out, the Applicant's counsel depones that he perused the lower court record and found out that the there were no written submissions filed by the Respondent. The decision of the court to strike out the appeal was based on the erroneous assumption of fact and has resulted into a failure of justice. The Applicant's counsel Mr. J. S. Khakula further states that there was no omission of the Respondent's written submissions from the record of appeal as no such submissions had been filed. The Applicant appeals to this court to reinstate the appeal in order to facilitate justice between the parties.

The application was opposed relying on the replying affidavit of one Timothy Mutua, the Life Manager and Principle Officer of the Respondent. He deponed that, the appeal was struck out on grounds that it was incompetent as both the record of appeal and supplementary record of appeal did not contain the Respondent's written submissions. It is within the deponent's knowledge that the written submissions were filed on 23/11/2001 and a court receipt was issued on the same date which is annexed on the affidavit. The omission on the part of the Applicant to include the said submissions was deliberate and can not be construed as an error apparent on the face of the record. The grounds relied on, are not merited and do not justify the reinstatement of the appeal.

The court has perused the court file and noted that on 11/5/2004, the Applicant was allowed to file a supplementary record of appeal in order to include the Respondent's submission. The supplementary record was filed in court on 11/3/2005 and contained several documents save the Respondent's submissions. It therefore appears that the Applicant omitted in the supplementary record the very document that made the court allow him to file the supplementary record. The reason for the omission was that the lower court record contained no written submissions of the Respondent. I have personally perused the lower court record and found that it does not contain the said submissions. For these reason, I agree with the Applicant's counsel that the said submissions were not available on record. I have no doubt that the Respondent filed his submissions in court because he has annexed a copy of the court

receipt. The only possibility is that the said submissions were misplaced in the court registry and the Respondent did not adduce any evidence to show that he served the Applicant's counsel with the said submissions. It is my considered opinion that if the said submissions were served, an affidavit of service should have been annexed to the replying affidavit. It is evident that the said submissions were not in the custody of the applicant's counsel and neither were they available in the lower court record.

For the foregoing reasons, I find that the striking out of the appeal was based on an error apparent on the face of the record for which the Applicant was not to blame. It is a cardinal principle that, the court should do what is reasonably possible to ensure that both parties are heard. It will not be in the interest of justice to shut out the appellant from being heard. I therefore allow the application as prayed. I hereby direct that a further supplementary record of appeal consisting of the said Respondent's written submissions be filed and served within 14 days. Costs in the cause.

Dated, Delivered and Signed at Bungoma

This 10th Day of June 2009.

F. N. MUCHEMI

JUDGE