

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 408 OF 2018

TSHUSHO CAPITAL KENYA LIMITED.....APPLICANT

VERSUS

FOAM MATTRESS LIMITED.....1ST RESPONDENT

OBADIAH OMWENGA ORURU.....2ND RESPONDENT

RULING

1. The application dated 5th February, 2021 seeks orders that **this honourable court do strike out the Memorandum of Appeal herein filed on 30th January, 2018 for want of prosecution.**
2. It is stated in the affidavit in support that no step has been taken herein since the filing of the Appeal on 13th August, 2018. That the Deputy Registrar issued a Notice to file Record of Appeal to the Appellant's counsel on 26th July, 2019 but the Record of Appeal was not filed.
3. The application is opposed. It is deponed in the replying affidavit that the Appellant's counsel took over the conduct of this matter on 6th December, 2019 from the previous counsel who has since left the employment of the law firm on record. That upon perusing the file, on record there was a letter dated 28th March, 2019 requesting for certified copies of the proceedings and the impugned ruling. That upon following up on the court file with the court registry the same could not be traced. That following the outbreak of the Covid 19 pandemic more challenges were encountered with the e-filing system.
4. The court was urged not to visit the mistakes of the counsel on the litigant. It is further stated that the trial court dismissed the primary suit at a preliminary stage. That the Appellants' case is in respect of a liquidated claim for recovery of material damages arising from a road traffic accident and has a fair chance of success.
5. The Appellant further filed a supplementary affidavit sworn by the court clerk and the court process server from the Appellants' Advocates law firm and reiterated the contents of the replying affidavit. The two affidavits reflect that if the notice to file Record of Appeal dated 12th July, 2019 was duly served the same was inadvertently placed in the wrong file or was not brought to the attention of the counsel formerly handling the matter.
6. I have considered the application and the response thereof. A perusal of the court file clearly reflects that no step has been taken by the Appellants herein since the filing of the Appeal. It seems the Appellants were woken up after a period of over two years later by the filing of the instant application. The Record of the lower court was received by this court and Notice to file Record of Appeal sent to the Appellant's advocate and copied to the Respondent's advocates. Indeed, the Respondents have annexed their copy of the said notice which is stamped as received on by them on 20th July, 2019. The copy of the notice in the court file is stamped as received by the Appellants Advocates on 17th July, 2019. The Notice was therefore duly served.
7. On the previous counsel having left employment, the Appellants also ought to have followed up on the progress of their case. The Appellants and their advocates ought to have been more vigilant especially taking into account that the Appeal is on a suit that was dismissed by the trial court for want of prosecution.
8. In the upshot, I find merit the application. The Memorandum of Appeal is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

B. THURANIRA JADEN

JUDGE