



IN THE COURT OF APPEAL

AT MOMBASA

[CORAM: SICHALE, J. MOHAMMED & KANTAL, J.J.A]

CIVIL APPLICATION NO. 53 OF 2020

BETWEEN

SAMUEL KITI LEWA.....APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA (HFCK).....1ST RESPONDENT

JAMES K. KAGETE.....2ND RESPONDENT

SAVINGS & LOAN KENYA LTD.....3RD RESPONDENT

(An application for the review of the judgment of this Court

(Ouko, Asike-Makhandia & M’Inoti, J.J.A) dated 26th September, 2019

in

Mombasa HCCA NO. 110 OF 2018

Consolidated with Civil Appeal No. 111 of 2018)

RULING OF THE COURT

The applicant’s Notice of Motion dated **27th July, 2020** said to be brought under Section 3(2), 3A and 3B of the Appellate Jurisdiction Act, Rules 1(2), 41 and 42 of the Court of Appeal Rules seeks the following orders:

“

1. ...(spent)

2. That this Honourable Court grants stay of execution of its judgment delivered on 26th September, 2019 in Civil Appeal Number 110 of 2018 (Consolidated with Civil Appeal No. 111 of 2018) – Housing Finance Company of Kenya and 2 Others vs Samuel Kiti Lewa pending the hearing and determination of the application herein.

3. That this Honourable Court be pleased to recall, reopen, review and set aside the judgment and consequential orders delivered by this Honourable Court at Mombasa on 26th September, 2019 in Civil Appeal No. 110 of 2018 (Consolidated with Civil Appeal No. 111 of 2018) – Housing Finance Company of Kenya and 2 Others vs Samuel Kiti Lewa and subsequently dismiss and or strike out the appeal with costs.

4. That Costs of the application herein be awarded to the Applicant”.

The application is supported by the affidavit of **Samuel Kiti Lewa** (the applicant herein) sworn on **27th July, 2020**, wherein he deponed that on or about 1996 he purchased the suit premises being house on land parcel No. 9763/I/MN title number 30028 through a mortgage facility with the 1st respondent (Housing Finance Company of Kenya) (HFCK), took over vacant possession of the suit premises in 1997 and he has

been in occupation to date; that in the year 2007, he learnt that the 2nd respondent (**James K. Kagete**) had purchased the suit premises from the 1st respondent by a private treaty after he had fallen into arrears in servicing the mortgage; that the applicant successfully filed a suit against the 1st and the 2nd respondents at the High Court of Kenya at Mombasa in which **Njoki Mwangi, J.** in a judgment dated **28th July, 2017** nullified the sale of the suit premises to the 2nd respondent; that the 2nd applicant was aggrieved by the decision of the High Court and together with the 3rd applicant (**Savings & Loan Kenya Ltd**), they successfully filed an appeal to this Court against the decision of **Njoki Mwangi, J.**; that in a judgment delivered on **26th September, 2019**, this Court (**Ouko, Asike-Makhandia & K. M' Inoti, JJ.A**) allowed the 2nd and 3rd respondents' appeal against the applicant. It is that decision which gave rise to the current application wherein the applicant is seeking a review of this Court's judgment dated **26th September, 2019** on grounds that the 3rd respondent was not a party to the proceedings at the High Court; that this Court lacked jurisdiction to entertain the appeal on the basis that the judgment of **26th September, 2019** was delivered in his absence and that the record of appeal was incomplete as it did not contain the testimonies of all his witnesses.

In the impugned judgment, this Court held as follows:

“We have said enough to show that this appeal must be allowed because the learned judge determined issues that were neither pleaded nor addressed by the parties and also delivered a judgment that divested a party of its property rights without an opportunity to be heard. We allow the appeal, set aside the judgment dated 28th July, 2017 and substitute therefor an order dismissing Lewa’s suit and allowing HFCK and Kagete’s counterclaim with costs. HFCK and Kagete will have the costs of this appeal”

In the replying affidavit of the 1st respondent's Legal Officer, **Joseph Lule** sworn on **6th January, 2020** in opposition to the motion, it was deponed that the applicant ought to have invoked Rule 84(1) of this Court's Rules to strike out the appeal in the event that the record of appeal was incomplete and that failure to include primary documents in a record of appeal is not a ground for striking out such an appeal.

In the supplementary affidavit sworn by the applicant on **8th November, 2020**, he maintained that the onus to ensure that the record was complete lay on the respondents and that the omission of the evidence of some of the witnesses occasioned a miscarriage of justice.

In the applicant's submissions dated **8th November, 2020**, he contended that the omission of the testimonies of the witnesses which omission was admitted by the 1st respondent is a violation of Rule 87(1) of this Court's Rules which Rule is couched in mandatory terms and that the appeal having been incompetent, this court lacked jurisdiction to hear and determine the appeal.

In the 1st respondent's submissions dated **6th November, 2020** and while citing this Court's decision of **Daniel Lega Okome vs. Safari Park Hotel Ltd and another [2018] eKLR**, it was submitted that no injustice has been occasioned to the applicant to warrant a review and that the instant matter does not meet the criteria of exceptional circumstances warranting a review and that in any event, the applicant was entitled under Rule 84(1) of the Rules of this Court to apply to strike out the record of appeal within 30 days of service on the basis alleged by the applicant that the record of appeal omitted the testimonies of some of the witnesses.

On **10th November, 2020**, this application came up before us for consideration *“on written submissions with no appearance of counsel”*.

We have considered the record, the rival submissions, the authorities cited and the law.

We are in agreement with the 1st respondent's submission that if the applicant felt that the appeal ought to have been struck out, then he ought to have applied to have it struck out under Rule 84 of the Rules which provides that:

“84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”.

The applicant did not do so.

On the other hand, Rule 92 of the Rules provides:

“92. (1) If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal.

(2) The respondent shall as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and on each other respondent who has complied with the requirements of rule 79.

(3) An appellant may at any time lodge in the appropriate registry four copies of a supplementary record of appeal and shall as soon as practicable thereafter serve copies of it on every respondent who has complied with requirements of rule 79.

(4) A supplementary record of appeal shall be prepared as nearly as may be in the same manner as a record of appeal”.

Suffice to state that the law also places an obligation on a respondent to file a supplementary record of appeal in the event that the record is incomplete. The applicant herein ought to have taken advantage of Rule 92 (1) of this Court's Rules to perfect the record of appeal. The appellant did not do so. In our view, due to the failure on the part of the applicant to take advantage of Rule 92(1) of this Court's Rules, he cannot now be heard to be saying that the appeal proceeded to his disadvantage on the basis that the record of appeal was incomplete.

We also hasten to add that the review sought by the applicant, even in cases deserving of review call for great circumspection. In ***Daniel Lago Okomo vs. Safari Park Hotel Ltd & another [2018] eKLR***, this Court stated:

“The exceptionality of the circumstances under which this Court will review its judgments and even so with great caution and circumspection, are matters of such critical importance, raising the bar so high that seldom will review applications be successful.”

Further, the applicant's argument that the Court lacked jurisdiction for the incompleteness of the record does not hold sway. An omission on the contents of a record of appeal does not divest a court of its jurisdiction.

It is in view of the above that we find that the motion herein has no merit.

Accordingly, it is dismissed with costs.

Dated and Delivered at Nairobi this 29th Day of January, 2021.

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR