IN THE COURT OF APPEAL

AT NYERI

(CORAM: O,KUBASU, VISRAM & NAMBUYE, JJ.A.)

CIVIL APPEAL NO. 316 OF 2005

BETWEEN

MUCHOKI KANYONYO ……...……APPELLANT

AND

STEPHEN KUIYUKIA KANYONYO……...…..……RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Nyeri (Okwengu, J) dated 15th July, 2004

in

H.C.C.A. No. 106 of 2002)

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JUDGMENT OF THE COURT

Proceedings leading to this appeal were started in the lower court under ***Succession Cause No. 381 of 1986*** in which issues in controversy were referred to a panel of elders for arbitration with the consent of both parties. An award was subsequently filed in the lower court way back in the year 2000 and read to the parties on 15th January 2001. The appellant unsuccessfully applied to set that award aside. It is the refusal to set aside the elders award which aggrieved the appellant and prompted him to file ***Nyeri HCCCA No. 106 of 2002*** in which the order subject of this appeal arose from. We note from the record that the said appeal was admitted to hearing on 3rd October 2002 and directions given on 7th March 2003 for it to be heard for one day. It was indeed heard by *Okwengu, J (as she then was)* on 3rd May 2004 and it was in the course of writing a judgment to dispose off the entire appeal when the learned Judge discovered that the appeal was infact premature as the record was incomplete for not containing vital documents necessary for the disposal of the appeal. It transpired that both the appellant who was represented as well as the court were to blame for the state of affairs, the appellant for presenting an

incomplete record of appeal and the Deputy Registrar High Court for failing to exercise his/her discretion properly by wrongly admitting and setting down the appeal for hearing. For this reason the learned Judge in her wisdom under orders made on 22nd June 2004 found it prudent to exercise her judicial discretion not to strike out the appeal though incompetent, as it was, but to allow the appellant a period of 13 days within which to file a supplementary record of appeal to enable the Judge reopen the matter to receive representations on the introduced documents and then write a judgment to finalize the appeal.

It is not in dispute that the learned Judge gave the appellant up to 5th July 2004 to comply, with a mention before her on 8th July 2004 to confirm compliance and further directions.

When parties appeared before the learned Judge on 8th July 2004, it transpired that the appellant had not complied with the court orders of 22nd June 2004. No reasons were given to the court for non compliance. Neither was any plea made to the court for enlargement of time in order to comply. Instead, the appellant's counsel then appearing a *Mr. Macharia,* sought to have the matter, stood over generally in order to enable the appellant to comply with the order to file a supplementary record of appeal.

The respondent objected to have the matter stood over generally because it had taken long and had also become costly for him. The learned Judge after due consideration on the matter declined to have the matter stood over generally and instead dismissed the appeal.

The appellant was aggrieved with that dismissal order but did not apply for review of the said order to plead for extension of time within which to comply and give reasons for non compliance with not agreeing on 22nd June 2004 and instead filed an appeal to this Court vide the memo of appeal dated 17th day of September 2004 and lodged in this court on the 18th day of November 2005.

That appeal came up for hearing before us on this 6th day of February 2012 and in his oral address to the court, learned counsel

for the appellant *Mr. Gacheru* urged us to allow the appeal and interfere with the learned High Court Judge's order of dismissal firstly because 13 days given to them for preparation and filing of the record of appeal were not sufficient to enable the appellant have the record typed and certified before being presented to the court. Secondly, that the high court had power to extend time within which to comply instead of dismissing the appeal. Thirdly, that the learned Judge of the High Court could have invoked ***rule 4*** of the Court of Appeal Rules to extend time within which to comply with the filing of the supplementary record of appeal and have the appeal disposed off on its merits considering that it concerns brothers instead of having it dismissed.

The respondent ***Mr. Stephen Kuiyukia Kanyonyo*** on the other hand has urged this court to bring this protracted litigation to an end because it has not only become too costly but has also caused him a lot of problems.

We have given due consideration to rival competing interests in the light of the outlined background information set out above, and we proceed to draw out the following conclusions. Firstly, the learned Judge of the High Court *(as she then was)* was right in finding that the appeal before her was incompetent because the record was incomplete, a matter not disputed by the appellant's counsel. Secondly, we are satisfied that the learned Judge exercised her discretion judiciously in that upon faulting the appellant's counsel on the one hand for filing an incomplete record of appeal, and the court on the other hand for admitting and setting down an incompetent appeal for hearing, rightly found it prudent not to punish an innocent litigant by striking out an incompetent appeal, and instead in the interests of fairness and justice gave the appellant time within which to comply. Thirdly, it is not disputed that the appellant did not comply with the time line given within which to comply and instead came back to court to seek an order to have the matter adjourned generally. Granting such a blanket order would not have served the best interests of justice to both litigants who stood on equal footing before the seat of justice. Fourthly, the factual reasons for non compliance presented to us were not presented to the learned Judge. We feel that was the best forum to receive those factual limitations. Fifthly, no reason has been given as to why the

appellant did not apply for review and/or setting aside of those orders and give the factual reasons that he has presented to us.

For the reasons given above we are satisfied that the appeal before us is a proper candidate for dismissal. We hereby dismiss the same with costs to the respondent both here and in the High Court.

Dated and delivered at Nyeri this 10th day of February, 2012

E. O. O'KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR