



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO.139 OF 2011

NAVINCHANDRA BHARMAL SHAH APPLICANT

AND

MUKESH MANUBHAI PATEL1ST RESPONDENT

VIJAY PARSOARMA PATEL2ND RESPONDENT

PRAFULCHANDRAW CHANDUBYAI PATEL3RD RESPONDENT

*(Application to strike out Notice of Appeal from a Judgment of the
High Court of Kenya at Nairobi (Nambuye, J) dated 22nd March, 2010*

in

H.C.C.C. NO. 165 OF 2007)

RULING OF THE COURT

Before us is an application by way of Notice of Motion expressed as being brought pursuant to “**Appellant (sic) Jurisdiction Act** (Cap 9 Laws of Kenya) and under **Rule 83 Court of Appeal Rules.**” In this application, the applicant **Navinchandra Bharmal Shah** seeks an order “*that the Intended Applicant/Respondent is deemed to have withdrawn Notice of Appeal dated 15th day of March, 2010 and filed in Court on 22nd March, 2010 in this Court.*” The application is brought on the following grounds:-

- “1. The intended Appellant/Respondent has not taken further steps after filing Notice of Appeal dated 15th March, 2010 and filed in this Court on the 22nd March, 2010 to lodge an appeal till to date after one year.**
- 2. The delay in lodging Appeal and prosecution thereof in time after a period of one year has prejudiced the position of the Applicant/Respondent since he is unable to enjoy the fruits of the Decree awarded in his favour by the Superior Court.**
- 3. That this Honourable Court do hold that the intended Appellant is deemed to have withdrawn the Notice of Appeal dated 15th March, 2010 and filed in this Court on 22nd March, 2010.**
- 4. The costs of this Application be awarded to the Plaintiff/Applicant.”**

The applicant swore an affidavit in support of this application and the pertinent paragraphs of that affidavit are as follows:-

“2. THAT Honourable Lady Justice R.N. Nambuye delivered her judgment on the 12th March, 2010 allowing the prayers in the plaint filed in the Superior Court on 19th day of February, 2007. Now produced and shown to me and marked as Exhibit “A” is a photostat copy of the said judgment.

3. THAT the Defendant/Respondent filed a Notice of appeal dated 15th March, 2010 and filed in Court on 22nd March 2010. Now produced and shown to me and marked as Exhibit “B” is the photostat copy of the said Notice of Appeal.

4. THAT the Defendant/Respondent applied for the certified copies of the proceedings and Judgment on 17th March, 2010. Now produced and shown to me and marked as Exhibit “C” is the photostat copy of the letter dated 16th day of March, 2010 written by the Advocates of the Defendant/Respondent.

5. THAT it is now over one year since the delivery of the Judgment by Honourable Lady Justice Nambuye yet the Appeal has not been lodged in the Court.

6. THAT on perusal of the Court file by clerk of my Advocate, it appears that the Defendant/Respondent has not made any attempt to obtain certified copies of the proceedings and Judgment from the Registry of the Superior Court.”

When the application came up for hearing before us on 28th February, 2012, Mr. Anil Joshi appeared for the applicant, while Mr. Samuel O. Makori appeared for the respondents. In his submissions, Mr. Joshi relied on the grounds upon which this application was brought and what the applicant depones to in his supporting affidavit.

On his part, Mr. Makori relied on the replying affidavit of Pravin T. Parmar who deponed inter alia:-

“2. THAT I am the administrator of the Premier Academy and am duly authorized by the Trustees of the Premier Academy Charitable Trust as well as all the Respondents herein to depone this affidavit for and on their behalf.

3. THAT I am seized of material and pertinent information relating to the matter in question and I am thus duly authorized and competent to depone this affidavit.

4. THAT I have had opportunity to read the Notice of Motion application dated the 27th of June, 2011 and wish to respond to the same as follows:-

5. THAT the Respondents herein were the Defendants in Civil Suite No. 165 of 2007.

6. THAT the Superior Court (Nambuye, J.) delivered a judgment in the aforesaid suit on the 12th of March, 2010.

Attached and marked “A” is a copy of the judgment.

7. THAT being dissatisfied with the aforesaid decision we instructed our advocates on record Messrs Oraro and Company Advocates on the 15th of March, 2010 to lodge an appeal.

Attached and marked “B” is a copy of the instructions letter by Premier Academy dated 15th March, 2010.

8. THAT I am advised by the said advocates which advise I verily believe to be true that they did

lodge a notice of Appeal on the 17th of March, 2010 with the Registrar of the Superior Court in compliance with rules 75(1) and (2) of the Court of Appeal Rules.

Attached and marked “C” is a copy of the Notice of appeal.

9. **THAT** in addition with lodging the Notice of Appeal the said advocates did lodge a letter bespeaking proceedings in compliance with Rule 82(2) of the Court of appeal Rules.

Attached and marked “C1” is a copy of the letter dated 17th March 2010.

10. **THAT** I am advised by SAMUEL MAKORI ADVOCATE of Oraro and Company Advocates, our advocates on record, and which advise I believe to be true that they have to date not received the proceedings.

11. **THAT** I am further informed by the said Advocates that they have on numerous occasions since the date of lodging the Notice of Appeal, visited the Court Registry to determine the progress of the typing and certification of the proceedings and have been advised that the typing process is ongoing.

12. **THAT** the said advocates have in addition to the physical visits to the Registry also written to the Deputy Registrar inquiring on the progress though this letters have not elicited a response.

Attached and marked “D” are copies of letters dated 2nd February 2011, 7th June 2011 and 27th January 2012 as evidence of the foregoing.

13. **THAT** I am further advised by the said advocates which advise I verily believe to be true that they have been advised by the staff at the Court Registry that the said proceedings are now being proof-read which is an indicator that the complete Superior Court record may shortly be available.

14. **THAT** I am advised by our advocates on record which advise I verily believe to be true that Rule 82 of the Court of Appeal Rules require an Appellant to lodge in the appropriate Registry the Record of Appeal among other documents in Quaduplicate.

15. **THAT** the failure to complete the Record and Institute the Appeal is thus not one of the Respondents making but is for reasons that the Respondents have been unable to obtain the proceedings which form an integral part of the Appeal.

16. **THAT** the delay in filing the record of Appeal can only be due to administrative delay attributable to the Superior Court and therefore a matter beyond the control of the Respondents.

17. **THAT** the Respondent have therefore under the circumstances and for the reasons stated been unable to comply with Rule 82 of the Court of Appeal Rules.”

Mr. Makori further submitted that there are annexed copies of the letters and numerous visits to the court registry in a bid to obtain the proceedings for the purposes of lodging an appeal. He urged us to exercise our discretion under **sections 3A** and **3B** of the *Appellate Jurisdiction Act*. For all these reasons, he asked us to disallow this application.

Having considered the entire application and the rival submissions by both counsel, it would appear that the applicant’s main complaint, is that although the judgment of the High Court was delivered on 12th March, 2010, and a notice of appeal filed on 22nd March, 2010, the respondents herein have not filed the appeal. In response to that complaint, the respondents, through the replying affidavit of Pravin T. Parmar, have indicated that they have not been indolent as they have been making efforts to obtain the copies of proceedings for the purposes of mounting an appeal. From the affidavit of Mr. Parmar, it cannot be denied that efforts have been made to obtain the copies of proceedings. Indeed, the delay in providing copies of proceedings is on the administration of the courts. The respondents are not to blame for this

delay.

In view of the foregoing, we are of the view that to allow this application would cause injustice to the parties and that in the spirit of **Sections 3A** and **3B** of the Appellate Jurisdiction Act, the parties are urged to expedite the lodging and final determination of the intended appeal. To that end, the Deputy Registrar is directed to assist in compiling and lodging of the record of appeal.

For the foregoing reasons, we disallow this application but with no orders for costs.

Dated and delivered at NAIROBI this 28th day of March, 2012.

E.O. O’KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR