



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal (Appli) 69 of 2008

SAMUEL SANG.....1ST APPLICANT/RESPONDENT

HEMA INVESTMENT LTD.....2ND APPLICANT/RESPONDENT

AND

KENYA INDUSTRIAL ESTATE LIMITED.....RESPONDENT/APPELLANT

(An application to strike out record of appeal lodged on 25th April, 2008 from the judgment and decree of the High Court of Kenya at Nairobi (Visram, J.) dated 21st January, 2004 in

H.C.C.C. NO. 994 OF 1998)

RULING OF THE COURT

The notice of motion dated 29th May, 2008 and filed on 3rd June, 2008 seeks four orders but only one is relevant for purposes of our ruling. The order sought is that the record of appeal lodged on 25th April, 2008 be struck out for several reasons. Once again, some of those reasons are not relevant for purposes of our ruling and we make no reference to them. What is relevant, and is conceded by the appellant in the main appeal, is that an exhibit [Exhibit I(c)] was produced during the hearing of the suit in the superior court but that exhibit is not included in the record of appeal. The submission made by learned counsel for the applicant Mr. Omotii, and conceded by Mr. Ngii, Learned counsel or the respondent, is that the exhibit is a primary document without which the appeal is rendered incurably defective. We agree. In the circumstances we are bound to grant the application on that ground alone and we now do so. We order that the record of appeal be and is hereby struck out.

As for costs, the applicant did concede that some prayers made were unnecessary and the record of appeal confirms so. Mr. Omotii apologized for seeking orders on the basis of those assertions. We think it would be fair therefore to deprive him of the costs of this application. The applicant shall nevertheless have costs of the struck out appeal. It is so ordered.

Dated and delivered at Nairobi this 13th day of March, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR