



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 232 of 2008

DR GITHAIGA MUHIU.....1ST APPLICANT

MRS DAMARIS MUMBI MUHIU.....2ND APPLICANT

AND

SAVINGS & LOAN (K) LIMITED.....RESPONDENT

*(Application to strike out Notice of Appeal from the judgment of the High Court of Kenya
at Nairobi (Waweru, J) dated 24th day of November, 2004*

in

H.C.C.C. NO. 594 OF 2001)

RULING OF THE COURT

This is an application dated 12th August, 2008 and brought under Rule 80 of this Court's Rules. The applicant seeks to strike out a Notice of Appeal dated 6th December 2004 and lodged on 14th December, 2004 by the respondent.

The judgment which is the subject matter of the intended appeal was delivered on 24th November 2004 by *H.P.G. Waweru, J.* The applicants through their advocates depone that the respondent has failed to take any steps to file and serve a Record of Appeal within the 60 days prescribed by the Rules, and the respondent has on many occasions been reminded to take the necessary steps to lodge its appeal. In this regard the applicants have exhibited in the affidavit in support, letters written to the respondent in 2006, 2007 and 2008 inquiring on what the respondents had done to expedite the lodging of a Record of Appeal.

The respondent through its advocate *Mr Elijah Mwangi Njeru* filed an affidavit in reply. The affidavit contains only two exhibits namely a copy of the Notice of Appeal and a copy of the letter dated 6th December, 2004 to the Deputy Registrar requesting for typed copies of proceedings and judgment.

The respondent claims that its efforts to procure the exhibits in order to file the Record of Appeal have been unsuccessful. According to the respondent's counsel, inquiries made in the superior court, have revealed that the main cause of the delay is a misplacement of the judge's handwritten proceedings

apparently filed in *Milimani H.C.C.C.No.181 of 1999*, and which was produced as defence exhibit D2 at the trial in the superior court. The advocate for the respondent further claims to have regularly followed up the matter. The respondents advocate has also stated that the decretal amount of Kshs.3,819,061.80 has been deposited by the parties in a joint interest earning account in the name of both firms of advocates and that the respondent is still able, ready and willing to lodge a record of appeal.

We have considered the submissions made on behalf of the parties and are of the view that the delay occasioned, is slightly over four and a half (4½) years and therefore inordinate. With great respect to the advocates for the respondent, they have not demonstrated any follow-up apart from the initial letter of 6th December, 2004, which sought copies of proceedings, and the filing of the Notice of Appeal. We think that the assertion that inquiries were properly made, concerning what is holding up the release of the alleged exhibits is hollow as it is not supported by tangible evidence. We also note that the respondent has not filed any formal application to have the allegedly missing file reconstituted.

For the reasons outlined above, we are of the view that the delay occasioned is inordinate and that no sufficient reasons have been given for the delay. We are also of the view that a delay of 4½ years without lodging a record of appeal is prejudicial to the applicants, taking into account the joint deposit made by the parties coupled with anxiety and lack of finality in the matter.

In the result the notice of appeal is struck out with costs to the applicants.

Dated and delivered at Nairobi this 5th Day of June, 2009.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR