



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

**Civil Appli. 149 of 2008**

**AKAMBA PUBLIC ROAD SERVICES LIMITED .....APPLICANT**

**AND**

**BERNARD GITHATU KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**CONSOLATA AKINYI ..... 2<sup>ND</sup> RESPONDENT**

*(An application for striking out the notice of appeal dated 6<sup>th</sup> October, 2004 from the judgment of the High Court of Kenya at Nairobi (Ang’awa, J.) dated 30<sup>th</sup> September, 2004*

**in**

**H.C.C.C. NO. 63 OF 2001)**

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**RULING OF THE COURT**

On the 6<sup>th</sup> of October, 2004, *Bernard Githatu Kamau* (hereinafter the “1<sup>st</sup> respondent”) lodged a notice of appeal to challenge the decision of the superior court (Ang’awa J) delivered on 30<sup>th</sup> September, 2004. The decision was made on a “*test case on liability*” arising out of a horrific road traffic accident which occurred on 29<sup>th</sup> March, 2000 along the Nakuru-Kericho highway involving two buses, one owned by M/S. Akamba Public Road Services Ltd, the other by the 1<sup>st</sup> respondent, trading as Shaggy Investments. The superior court assessed liability against the 1<sup>st</sup> respondent at 100% and ordered that the various cases which had been stayed before the superior court shall proceed with assessment of quantum of damages on that basis. Akamba Public Road Services Ltd (hereinafter “*the applicant*”) was absolved of blame and was awarded costs of the suit.

More than 3 ½ years after the notice of appeal was lodged and served, no record of appeal was filed and therefore the applicant filed a notice of motion on 27<sup>th</sup> June, 2008, seeking to strike out the notice of appeal. That was the application placed before us for hearing on 25<sup>th</sup> June, 2009 and the subject matter of

this ruling. The grounds upon which the motion is based are stated as follows: -

“1. The 1<sup>st</sup> respondent herein, being dissatisfied with the judgment of the Honourable Lady Justice Ang’awa in Nairobi HCCC No. 63 of 2001, Consolata Akinyi vs. Akamba Public Road Services Limited and Another, lodged a Notice of Appeal dated 6<sup>th</sup> October, 2003 at Nairobi High Court Civil Registry with the intention of appealing before this Honourable court.

2. The 1<sup>st</sup> respondent applied to the Deputy Registrar of the High Court of Kenya for the certified copies of proceedings vide a letter dated 1<sup>st</sup> October, 2004 and served a copy thereof upon the applicant’s advocate together with the aforementioned notice of appeal on the 12<sup>th</sup> and 13<sup>th</sup> October, 2004 respectively.

3. The 1<sup>st</sup> respondent has to date not filed a record of appeal.

4. It has now been well over three (3) years since the 1<sup>st</sup> respondent applied for copies of the typed proceedings and he has not taken any steps to establish if the same are ready, neither has he demonstrated any interest in pursuing his intended appeal, and the inordinate delay is prejudicial to the applicant.

5. The 1<sup>st</sup> respondent (sic) inactivity and lack of diligence in pursuing his intended appeal is a travesty of justice and gross abuse of the appellate process of the court.”

Learned counsel for the applicant Mr. Rimui relied on the supporting affidavit of Gaurishanker Babhania giving the history of the suit in the superior court and the multiplicity of suits emanating from the road traffic accident. The deponent then averred to the following facts:

“7. That on 13<sup>th</sup> October, 2004 the applicant’s advocates on record were served with the said Notice of Appeal and had on 12<sup>th</sup> October, 2004 been served with a copy letter dated 1<sup>st</sup> October, 2004 from the 1<sup>st</sup> respondent’s advocates to the Deputy Registrar, High Court of Kenya requesting certified copies of the proceedings and judgment. Annexed hereto and marked “GB 5” is a copy of the said letter.

8. That I am informed by the applicant’s advocates on record which information I verily believe to be true that it has been well over three (3) years since he 1<sup>st</sup> respondent applied for copies of the typed proceedings or took any steps to establish if the same are ready, and no attempts have been exhibited by him in following up the progress made in typing the proceedings or having the certified copies of proceedings availed to him. And further that our said advocates did within two (2) months of the Judgment of 30<sup>th</sup> September, 2004 obtain typed and certified copies of the Judgment and Decree thereof.

9. That I am further informed by the said advocates which information I verily believe that the 1<sup>st</sup> respondent has failed to demonstrate any interest in pursuing his intended appeal as evidenced by the inordinate delays in obtaining the certified copies of the proceedings and filing a Record of Appeal.

10. That 1<sup>st</sup> respondent’s failure to diligently and expeditiously pursue the disposal of the intended appeal within reasonable time is prejudicial to the applicant as:

a) the continuance and/or pendency of the case keeps hovering over the head of the Applicant with no foreseeable end to the same causing unnecessary anxiety; and

b) the continuance and/or pendency exposes the applicant to unnecessary legal costs and attendant costs.

11. That further to the foregoing the 1<sup>st</sup> respondent’s inactivity with respect to pursuing intended appeal is denying the applicant the fruits of the superior court’s judgment.

12. That I am of the view that the 1<sup>st</sup> respondent has lost interest in the intended appeal as demonstrated by the fact that, (sic) I am informed by Mr. James Rimui Advocate practicing as such in the firm of Messrs Mohamed Madhani & Company Advocates and verily believe to be true, that:

a) the applicant's bill of costs as against the 1<sup>st</sup> respondent was taxed on 20<sup>th</sup> March, 2008 unopposed at the sum of Kshs. 5,936,205/=.

b) The formal proof in the test suit proceeded and a judgment hereof was delivered on 14<sup>th</sup> June, 2006 and the 1<sup>st</sup> respondent did not appeal or seek a stay of execution in view of the Notice of appeal filed herein.

13. That I am also aware that the applicant instituted a material damage claim arising from the subject accident against the 1<sup>st</sup> respondent vide Nairobi HCCC 1847 of 2002 and the case proceeded for formal proof when on 24<sup>th</sup> August, 2007 the court entered judgment for a sum of Kshs.2,303,346.00. The applicant is yet to enjoy the fruits of its judgment as neither the 1<sup>st</sup> respondent nor his attachable assets can be traced with a view of proceeding with execution of the judgment. Annexed hereto and marked "GB6" is a copy of the judgment.

14. That I verily believe that neither the 1<sup>st</sup> respondent nor his advocate on record has any intention of prosecuting the intended appeal."

To those averments on oath, there has been no response from the 1<sup>st</sup> respondent, or the 2<sup>nd</sup> respondent who had sued the two bus companies in the superior court. At the hearing of the application, Mr. Rimui submitted that there has been total inaction on the part of the 1<sup>st</sup> respondent for the last five years since no efforts have been made by the 1<sup>st</sup> respondent or his advocates to pursue the copies they applied for on 1<sup>st</sup> October, 2004. In his view, since the court supplied copies of the judgment and decree to the applicant within two months of application for those copies, there was no reason why the 1<sup>st</sup> respondent could not have pursued and obtained all the copies they had sought. The explanation for such conduct, in Mr. Rimui's submission, was lack of interest in the intended appeal and therefore the notice of appeal serves no purpose.

Mr. Machira, learned counsel who appeared for the 1<sup>st</sup> respondent had nothing to say on the application. Instead he reminded us that he had been instructed in the matter late and had only filed a notice of appointment on the morning of the hearing to act for the 1<sup>st</sup> respondent together with the advocates on record for him who were absent. He had earlier applied for adjournment of the application but for reasons stated in our ruling on that application, we declined to adjourn the matter. In the absence of any replying affidavit or submissions on behalf of the 1<sup>st</sup> respondent, the averments made on oath by the applicant remain uncontroverted. Mr. Maweu, for his part sympathized with Mr. Machira and did not wish to oppose the application.

We have considered the application, the affidavits on record and the submissions of counsel. We are satisfied that there has been no explanation for the delay in lodging the record of appeal after service of the notice of appeal. The most glaring omission is the total inaction on the part of the applicant and/or his advocates on record and such conduct cannot form the basis of any discretion in favour of the 1<sup>st</sup> respondent. We are also satisfied that further delay in lodging the record of appeal would be prejudicial to the applicant, let alone other numerous litigants in the superior court awaiting the outcome of the intended appeal. The notice of appeal is for striking out and we order that it be and is hereby struck out with costs to the applicant only.

*Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2009.*

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**