



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPLICATION 252 OF 2008

OCCIDENTAL INSURANCE CO. LTD.....APPLICANT

AND

PANGANI CHEMIST LIMITED.....RESPONDENT

(An application to strike out a notice of appeal in an intended appeal from the judgement of the High Court of Kenya at Milimani Commercial Courts (Mwera, J) dated 7th July 2003

in

HCCC NO. 2172 OF 2000)

RULING OF THE COURT

This is an application by way of notice of motion brought pursuant to Rules 80 and 82 of the Court of Appeal Rules in which the applicant, Occidental Insurance Co. Ltd, seeks an order that the Notice of Appeal dated 7th July 2003 and filed in this Court's registry on 10th July 2003 be struck out or be deemed as having been withdrawn. The application is supported by the affidavit Joseph Njoroge Mbugua. In that affidavit Mr. Mbugua depones:-

“2. That on the 7th day of December, 2000 the respondent herein filed civil suit No. 2172 of 2000 against the applicant as per copy plaint now annexed hereto marked “JNM 1”

3. That on 10th January, 2001 a defence was filed in the said suit as appears from copy exhibit now annexed hereto marked “JNM 2”

4. That the said suit was finally heard and a decision on it dismissing the suit with costs was delivered on 7th July, 2003.

5. That the respondent filed notice of appeal on 10th July, 2003 as appears from copy annexed hereto marked “JNM 3”

6. That application for certified copies of proceedings and judgment in the said suit were applied for on 7th July, 2003 as per copy letter annexed hereto marked “JNM 4”.

7. That on 14th July, 2003 the High Court registry wrote to the advocates for respondent herein with a copy to my chambers saying that the parties would be notified when proceedings and judgment were ready for collection. Annexed hereto marked “JNM 5” is a copy of the said letter.

8. That on 1st March, 2004 the respondent applied for stay of execution of costs in the said High Court Civil suit No. 2172 of 2000 whence the court ordered the respondent to deposit taxed costs for Kshs. 85,901 and to also pay auctioneers charges of Kshs. 15,000 within thirty (30) days.

9. That on 8th September, 2004 the firm of Simani & Associates advocates wrote to my said firm confirming that the said orders of the court had been complied with. Annexed hereto marked “JNM 6” is a copy of the letter.

10. That on 21st March, 2005 my firm received a letter dated 11th March, 2005 from the court registry advising my said firm that the required proceedings and judgment would be supplied to my office upon payment of Kshs 2,430. Annexed hereto and marked “JNM7” is a copy of the said letter.

11. That on 24th March, 2004 I sent a copy of the said letter from court dated 11th March, 2005 to the firm of Simani & Associates advocates under certificate of posting as would appear from copies annexed hereto marked “JNM 8” and “JNM 9”.

12. That I verily believe the said firm of advocates received the said letter as the same was never returned to my said firm unclaimed.

13. That I verily believe the respondent is guilty of delays as nothing has been done by it to my knowledge to prosecute the said appeal.”

When the application came up for hearing before this Court on 1st October, 2009 Ms Githaiga appeared for the applicant but there was no appearance for the respondent though served with a hearing notice. In her submission Ms Githaiga merely emphasized the contents of the supporting affidavit. In view of what is deponed to in the said supporting affidavit and as there is no replying affidavit there can be no doubt that the respondent is not interested in pursuing its appeal. It follows that this application cannot be resisted. Accordingly, the application dated 3rd September, 2008 is allowed and the notice of appeal dated 7th July, 2003 struck out with costs to the applicant.

Dated and delivered at Nairobi this 2nd day of October, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR