



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appli 333 of 2006

TANJAL INVESTMENTS LIMITED 1ST APPLICANT

AWADH ABEID SAID 2ND APPLICANT

AND

CHARLES KOMBO OKIOGA1ST RESPONDENT

ROSELYN KOMBO 2ND RESPONDENT

(Application to strike out notice of appeal in an intended appeal from the ruling and order of the High Court of Kenya Mombasa (Khaminwa, Comm. of Assize) dated 14th August, 2000

in

H.C.C.C No. 89 of 2000)

RULING OF THE COURT

In an application by way of notice of motion dated 29th March 2000 and filed in the superior court, the applicants in this notice of motion, Tanjal Investments Limited and Awadh Abeid Said, sought orders in the superior court for summary judgment for vacant possession and *mesne* profits against the respondents, Charles Kombo Okioga and Roselyn Kombo. The superior court (Khaminwa J.) in a ruling delivered on 14th August 2000 granted the orders sought. The respondents felt aggrieved by that ruling and filed a notice of appeal on 25th August 2000. By 30th October 2003, no record of appeal had been filed pursuant to that notice of appeal. That necessitated the filing of a notice of motion dated 30th October 2003 seeking to have the notice of appeal filed by the respondents on 25th August 2000 struck out for failure to file an appeal within the time prescribed by the Rules. That application was heard by this Court and in a ruling dated and delivered on 16th July 2004, it was dismissed. In dismissing it, this Court stated, *inter alia*:

“We think that in these circumstances it would be unjust for us to strike out the notice of appeal though as we say the respondents must bear some blame for the delay. Even as on 14th April, 2003 when they were told the proceedings were ready for collection, their only complaint was that the proceedings had not been certified, not that the proceedings were not complete. Taking all these

matters into account, the orders which we think will serve the ends of justice and which we now make shall be that while we dismiss the notice dated 30th October 2003 and lodged in this Court on 4th November, 2003, yet the respondents shall pay to the applicants the costs of the dismissed motion,

Over two years lapsed after that ruling and by 20th December 2006, the respondents had not filed the record of appeal. That prompted the applicants to file this notice of motion before us which seeks orders that:

- “1. The Notice of Appeal filed by the appellants/ respondents herein on 25th August 2000 be struck out.**
- 2. The costs of this application be awarded to the applicants.**
- 3. There be such further order as the court may deem just and fair in the circumstances.”**

The reasons in support of the application are that notwithstanding the Court’s ruling part of which we have reproduced above, and notwithstanding that over two years had expired since that ruling, the respondents had not filed the appeal; that the appellants (respondents) have taken no steps to pursue the matter and hence inordinately delayed in filing the appeal and that the applicants are in the meanwhile suffering as they have been denied possession of their property for close to seven years after they purchased the property. There is also annexed to the application an affidavit sworn by the general manager of the first applicant which explains in details the history of the dispute and the suffering the applicants are undergoing as a result of the delay by the respondents to file the intended appeal and thus to have the matter finalised. Mr. Abeid, the learned counsel for the applicants, relied on the supporting affidavit and urged us to allow the application. Mr. Ochwa supported him.

The respondents were represented before us by Mr. Kinyua Kamundi who in response to the submissions by Mr. Abeid and Mr. Ochwa, stated that he had no submissions to make on the application. There was no replying affidavit filed by the respondents in rebuttal of the allegations in the applicants’ affidavit.

We have anxiously considered the application. As the affidavit in support of the application was not controverted, the allegation in it stand. These are that since the respondents filed notice of appeal dated 25th August 2000, they have not filed a record of appeal pursuant to that notice of appeal. It is now over seven years and three months since that notice of appeal was filed. **Rule 81(1)** of this Court’s Rules states in pertinent part as follows:

“81(1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged –

- (a) a memorandum of appeal in quadruplicate;**
- (b) the record of appeal, in quadruplicate;**
- (c) the prescribed fee; and**
- (d) security for the costs of the appeal.”**

The respondents have failed to comply with the requirements of that rule and have offered no explanation for that failure. In the circumstances, we have no alternative, but to grant the application as prayed.

The notice of appeal filed by the respondents in this application on 25th August 2000 is struck out. The applicants and Savings & Loan Kenya Limited will have the costs of this application. Those are the orders of the Court.

Dated and delivered at Mombasa this 24th day of January, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR