



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJ A)

CIVIL APPLICATION NO NAI 121 OF 1986

BETWEEN

KRISHEN DEV HANDA APPLICANT

AND

FATUMA MOHAMED RESPONDENT

(Application to strike out the Notice of Appeal from a judgment of the High Court of Kenya at Nairobi
(Aganyanya J) dated November 2, 1982

in

High Court Civil Case No 770 of 1981)

RULING OF THE COURT

In this application by way of motion on notice, the respondent was duly served with the motion and the hearing notice for the hearing on December 16, 1986. The applicant or her advocate failed to attend. Under rule 55(2) of the Court of Appeal rules, the hearing proceeded ex parte.

The applicant in his motion prayed that the notice of appeal filed on November 4, 1982 be struck out and that the order for stay of execution granted by the court on April 10, 1984 in Civil Application No Nai 22 of 1983 be discharged and that the applicant be awarded costs of the application. The application was presented to court under rules 80 and 42 of the Court of Appeal Rules.

The grounds upon which the application is presented are set out in the motion. They are (a) that the respondent has failed to file the appeal within the period prescribed by the rules; (b) that the notice of appeal was not served on the applicant within the prescribed period or at all; (c) that the applicant continue to suffer hardship in that the respondent has failed to pay mesne profits and has failed to pay arrears of rent while she still enjoys possession of the premises and (d) that the respondent has failed to provide appropriate security as ordered by the court on April 10, 1984.

These grounds are supported by the affidavits sworn by Kokila Devi Khanna and Luciano Riunga Raiji both advocates who had or have the conduct of this case at one time or the other for the applicant.

The facts stated in the affidavits indicate that judgment was entered on November 2, 1982. Application to

set aside the said judgment was dismissed. The application for stay of execution was also dismissed. This court on its original jurisdiction under rule 5(2) (b) in the application No Nai 22 of 1985 granted the stay on condition that the applicant shall furnish satisfactory security to be approved by the Deputy Registrar for an amount of Kshs 410,000.00.

In order to file the appeal, the respondent had to obtain copies of the proceedings. Typed copies of the proceedings and judgment / ruling were ready for collection on payment of the necessary fees on July 11, 1985. These proceedings were asked for by both parties. The applicant obtained his copies. No appeal was filed and no application was made for extension of time. It is now over four years since judgment was entered and no steps have been taken, apart from filing notice of appeal, in prosecuting the appeal. Rule 82(a) provide that if a party who has lodged a notice of appeal fails to institute an appeal wihtin the appointed time, he shall be deemed to have withdrawn his notice of appeal unless the court otherwise orders.

It is also mandatory under rule 76 (1) that all persons directly affected by the appeal must be served with the notice of appeal Taracisio Githaiga Ruithubo vs Mbuthia Nyingi C A No 21 of 1982 (unreported). No evidence that the applicant was served.

The stay of execution was granted on condition that the respondent do furnish satisfactory security for an amount of Kshs 410,000.00. There is no evidence shown or that can be located in the record to show that the respondent was provided the security in terms of the court order for the last two and a half years. Yet, according to the motion, the respondent is still in occupation of the premises where she continues enjoying possession without payment of rent at the rate of Kshs 6,000.00 per month. He has failed to pay amount which, as at the time of filing the motion was Kshs 650,000.00 in arrears. These arrears are at the detriment of the applicant.

Having considered the motion and the affidavits with annexures in support of the application to strike out the notice of appeal, and the conduct of the respondent and or her counsel not appearing at the hearing of the motion, shows clearly that neither the intended appelliant nor her advocate have interest in pursuing the appeal. In the circumstance, the stay of execution previously granted by this court is vacated and the notice of appeal is ordered to be struck out with costs to the respondent / applicant.

Dated at Nairobi this December 19, 1986.

J O NYARANGI

JUDGE OF APPEAL

H G PLATT

JUDGE OF APPEAL

J M GACHUHI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

