



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), OKWENGU & SICHALE, JJA]

CIVIL APPLICATION NAI NO. 96 OF 2017

BETWEEN

JAMES MUNGAI MAGARI.....APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT

(Being an application for an order that the respondent has withdrawn its notice of appeal.

Alternatively the notice of appeal be struck out for the reason that no appeal has been instituted

within the requisite time in relation to the decision of the High Court of Kenya at Nairobi

(Mabeya, J) dated 8th March, 2013 in Milimani Commercial & Tax Division Hccc No. 376 of 2007)

RULING OF THE COURT

The applicant, **James Mungai Magari** filed a Notice of Motion dated **21st April, 2017** and sought *inter alia*:

“1)....

2). *That the Notice of Appeal filed by the Respondent on 4th April, 2013 be considered as withdrawn and an order of this Honourable Court be made accordingly.*

3). *That in the alternative, the Notice of appeal filed by the respondent on 4th April, 2013 be struck out and an order of this Honourable Court be made accordingly.*

4).”

In the motion, Housing Finance Company of Kenya Limited is named as the respondent.

The motion is supported by an affidavit of **Jane Ondieki**, Advocate sworn on **21st April, 2017** in which she deponed that her firm is on record as appearing for the applicant; that the judgment, the subject of the intended appeal was delivered on **8th March, 2013**; that the respondent’s counsel lodged a Notice of Appeal on **8th April, 2013**; that although the respondent intends to appeal, it has no chances of succeeding on appeal; that the applicant is an old sickly man; that the sum of Kshs 600,000/= ordered as part payment cannot be released to the applicant as the respondent’s counsel in his letter of **5th May, 2016** forwarding his cheque for Kshs 600,000/= termed this as “**security for costs**”; and finally, that the respondent’s counsel “**just sat back and done nothing about the appeal**”.

The motion was opposed vide a replying affidavit sworn on **23rd January, 2018** by **Ouma George**, counsel for the respondent. In the response, counsel deponed that it was aggrieved by the judgment of **8th March, 2013**; that it duly filed the Notice of Appeal dated **15th March, 2013**, that on **28th March, 2013**, the respondent applied for typed proceedings; that although the respondent was intent on filing an

application for stay, when it presented its application on **17th April, 2013**, the file was not available; that on **10th May, 2013**, the High Court advised that an application for reconstruction of the file be made; that an application dated **27th June, 2013** for reconstruction of the file was prepared but this was not filed as the file was soon thereafter traced; that upon presentation of an application for stay, the file went missing again; that it was not until **21st October, 2014** when a notice to show cause was issued against the respondent that the file was available; and that to-date, the proceedings have never been availed. Counsel also attributed the delay(s) to attempts to settle the matter out of court.

According to counsel, all these factors have hampered the progression of the appeal.

On **2nd July, 2019**, the motion came before us for plenary hearing. Each counsel reiterated the contents of the supporting and replying affidavits.

We have considered the motion, the supporting affidavit, the replying affidavit, the rival oral submissions made before us and the law.

It is common ground that the respondents filed a Notice of Appeal on **21st March, 2013**, and that on **28th March, 2013**, they applied for certified copies of the proceedings.

On **17th April, 2013**, the respondents had an application for stay of execution ready for filing together with draft grounds of appeal annexed to the application for stay.

However, the motion could not be filed as the court file was not available. On **10th May, 2013**, the Deputy Registrar of the Court wrote to the respondent's counsel as follows:

“

RE: HCCC NO. 376 OF 2007

JAMES MUNGAI MAGARI =VRS= H.F.C. LIMITED

Your letter Ref: HEL/IMM/07/07 dated 18th April, 2013 refers.

The concerted action taken to trace the court file in the above matter has not been successful.

In this current of state of (sic) affairs, I wish to advise that you make an application for re-construction of the court file to expedite the civil dispensation of justice and to defeat the motive, if actual, of the hiding or loss of the file while the combined action to trace the original file continue (sic) to be taken.

Yours faithfully

N. Otieno

For Deputy Registrar ”

Following the advice from the Court, the respondents prepared a Notice of Motion seeking orders:

- “1. That this Honourable Court be pleased to order a reconstruction of the court file from the copies of documents annexed to the Affidavit in support of this application;**
- 2. That the pleadings and other documents annexed to the affidavit in support of the application herein be accepted as copies of the originals filed in court;**
- 3. That the reconstructed file be kept in the strong room for safe custody;**
- 4. That the costs of this application be in the cause.”**

However, this became unnecessary as the file resurfaced when the matter came up for Notice to Show Cause on **30th October, 2014**.

Given the undisputed sequence of events, more so as it relates to the file that kept on disappearing, we cannot, in good conscience, find that the respondent sat back and refused to file the appeal. The record is replete with letters written to the registry by the respondent on the issue of the missing file.

It is therefore not true to state that the respondent made no effort to progress the appeal. It would be unfair and unjust to dismiss the respondent's Notice of Appeal given the frustrations encountered by the respondent. It is evident that most of these frustrations are attributable to the court.

We sympathize with the applicant but it is clear that the court is also to blame for the delay in the filing of the intended appeal and that to-date, they have not supplied proceedings to the respondent and yet these are necessary for the compilation of the record of appeal.

It is in view of the above findings that we find no merit in the Motion before us.

It is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 8th day of November, 2019.

W. OUKO (P)

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR