



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal (Application) 333 of 2010

DISHON OCHIENG ..... APPELLANT/RESPONDENT

AND

SDA CHURCH, KODIAGA ..... RESPONDENT/APPLICANT

(An application to strike out Civil Appeal No 333 of 2010 from a judgment of the High Court of Kenya at Kisumu (Mwera, J) dated 6<sup>th</sup> March, 2008

in

HCCC NO. 162 OF 2001)

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**RULING OF THE COURT**

**SDA Church, Kodiaga**, the applicant herein, asks us to strike out Civil Appeal No 333 of 2010 which was lodged against them on 16<sup>th</sup> December, 2010, by **Dishon Ochieng**, the respondent herein. The motion to strike out the appeal is brought pursuant to **Rule 84 of the Court of Appeal Rules** and is premised on two grounds, namely:

“(a) that the record of appeal filed herein was filed and served out of time contrary to the order granting the extension of time to do so.

(b) that the said notice does not indicate that the same was to be served on the 1<sup>st</sup> defendant in the High Court and there is no indication that he was ever served.”

There is no dispute that the record of appeal was filed three days late, without leave of the Court. By an order of the Court, (*Visram, JA, sitting as a single Judge*) made on 22<sup>nd</sup> November, 2010, the respondent was granted leave to file and serve the notice of appeal within seven days of the date of the order (22<sup>nd</sup> November, 2010) and the record of appeal within fourteen days thereafter. Indeed, the notice of appeal was filed and served within time but the record of appeal was not. It should have been filed and served by the 13<sup>th</sup> December, 2010, but was filed on 16<sup>th</sup> December, 2010 – three days late, and was served on 17<sup>th</sup> December, 2010 – four days late, without leave of the court further extending the time to do so.

These facts are not in dispute, and Mr B. O. Odeny, learned counsel for the respondent, while admitting the delay, simply relied on **Section 159 of the Constitution**, and **Sections 3A and 3B of the Appellate Jurisdictions Act** to cure the omission. We agree with Mr I. E. N. Okero, learned counsel for the applicant, that these provisions of the law would not help the respondent circumvent the Rules of the Court.

In the event, we allow the notice of motion dated 2<sup>nd</sup> February, 2011, and lodged in Court on the same date with the result that **Civil Appeal No. 333 of 2010** is hereby struck out.

We award the costs of the motion to the applicant but we make no order as to costs of the struck out appeal. Those shall be our orders.

Dated and delivered at Kisumu this 22<sup>nd</sup> day of March, 2012.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

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