



REPUBLIC OF KENYA



**Africa Royal (K) Ltd & another v Kiriba (Civil Appeal 384 of 2021)
[2022] KEHC 13510 (KLR) (Civ) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 384 OF 2021

JN MULWA, J

SEPTEMBER 20, 2022

BETWEEN

FREDRICK MBOGO MUTUA 1ST APPELLANT

AFRICA ROYAL (K) LTD 2ND APPELLANT

AND

SIMON MBOGO KIRIBA RESPONDENT

RULING

1. Before the court is an application dated January 19, 2022, brought by the respondent in the appeal, Simon Mbogo Kiriba; under provisions of section 3A of the *Civil Procedure Act* and order 42 rule 13(1) and 35(1) of the *Civil Procedure Rules* seeking orders:
 - a. That the court be pleased to dismiss the appellants appeal for want of prosecution for their failure to comply with court orders.
 - b. That the sum of kshs 1,009,200/= deposited in court on August 4, 2021 be released to the respondent/applicants advocates.
 - c. That costs of the application and the appeal be provided for.
2. At the face of the application are the grounds for the application, and further supported by an affidavit sworn by Simon Mbogo Kiriba, the applicant.
3. The respondents/appellants in the appeal have neither filed a response to the application nor submissions as directed by the court on the May 18, 2022 in the presence of their advocates. As such the application is unopposed.



4. I have checked the judiciary e filing portal. I have not seen any memorandum of appeal filed. What is on record, and clearly stated in the ruling dated July 1, 2021 is a “draft memorandum of appeal, from which this appeal as assigned the number. This is well captured by the court in the July 1, 2021 ruling, to the effect that “the draft memorandum of appeal” was received in court on December 30, 2020 when this appeal file was opened. It is this draft memorandum of appeal that was annexed to the application dated December 15, 2020 seeking orders of stay of execution and filing appeal out of time.
5. It is therefore clear that there is no competent appeal on record, as a draft memorandum of appeal cannot be substituted with a memorandum of appeal that ought to have been filed 14 days after the July 1, 2021 as per the court order.
6. To that extend then, I am persuaded that the application dated January 19, 2022 is merited, in terms of prayer No 2. I further add that prayer No 1 falls by the way as there is no appeal on record to warrant a court order for its dismissal for want of prosecution under provisions of the Civil Procedure Rules, and specifically rule 35(1) thereof.
7. Consequently, I make the following orders:-
 - a) That the decretal sum of Kshs 1,009,200/= deposited in court on the August 4, 2021 by the appellants advocates Kimondo Gachoka & Co Advocates be forthwith released to the respondent’s/ appellants advocates, Gakoi Maina & Co Advocates for onward transmission to the respondent, Simon Mbogo Kiriba.
 - b) There shall be no orders as to costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2022

J. N. MULWA

JUDGE

