



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 13 OF 2016**

**MADHU PAPER KENYA LIMITED .....APPELLANT/RESPONDENT**

**VERSUS**

**RONALD NTEREBA RANGOLI.....RESPONDENT/APPLICANT**

**RULING**

This is an application by way of Chamber Summons dated 5<sup>th</sup> and filed on 12<sup>th</sup> June, 2018 seeking three substantive orders. There is a pending appeal lodged by the appellant challenging the lower court judgment which is in favour of the respondent/applicant.

This application seeks to strike out the said appeal for want of prosecution; discharge of the order of stay obtained by the appellant and directions for the release of the decretal sum deposited at Bank of Africa, Reinsurance Plaza branch by the appellant pursuant to a court order. The main reason advanced for seeking the said orders is that the appellant has not set down the appeal for directions, nor taken any steps within the prescribed time, and therefore has failed to show any intention to prosecute the appeal. The respondent/applicant accuses the appellant of taking advantage of the order for stay to frustrate him.

The application is opposed and there is a replying affidavit sworn by the advocate for the appellant. Both parties have filed submissions which I have noted. There is already a Record of Appeal filed on 10<sup>th</sup> November, 2017. The appeal itself has not been admitted for hearing nor have directions been given. I have looked at the provisions of law cited by the respondent/applicant and in particular Section 79 B of the Civil Procedure Act, and Order 42 of the Civil Procedure Rules.

Whereas it is true that a suit should not be left to hang over the head of a litigant for unnecessarily long period, there are occasions when such situations are dictated by circumstances entirely beyond the parties. Under the Act and Order 42 of the Civil Procedure Rules, there are steps prescribed which should be initiated by either the appellant or the Registrar of the court or both to advance the prosecution of an appeal. Those steps have not been taken and therefore the application is premature.

The striking out of any pleading which includes an appeal, is a drastic measure which should be applied sparingly. Such an action if allowed, has the result of locking out a party from the corridors of justice before the avenues of litigation are exhausted. That is not to say that parties should not be vigilant in the exercise of their duties in advancing the course of justice.

As at the time the application was filed, there was a delay of about six months from the last action on record. What is pending in this matter is the admission of appeal and giving directions as to the hearing. These two steps when weighed against the order sought for dismissal, justify the sustenance of the appeal subject to payment of costs occasioned by the delay.

I note that the order for stay of execution was conditional upon the appellant depositing the decretal sum as clearly shown by the record. That in itself was a demonstration that the appellant desires to have the appeal determined on merit.

I agree that litigation must come to an end and with that in mind, I shall as I hereby do, dismiss the application but order that the appeal shall be prosecuted within 90 days from the date hereof, failure of which it shall stand dismissed without any recourse to the court. The costs shall be in the appeal.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> Day of February, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**