



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL 538 OF 2016**

**GUYO GALGALO.....APPELLANT**

**VERSUS**

**VERONICAH KAVINDU MUVIKU.....RESPONDENT**

**RULING**

The lower court decision was against the appellant who was condemned to pay a decretal sum of Kshs. 338,277.19/=. Aggrieved by the said judgment he filed this appeal. However, other than the Memorandum of Appeal lodged on 17<sup>th</sup> August, 2017 the record of appeal has not been filed to date.

There is now before me an application by way of Notice of Motion under Order 42 Rule 35 (2) of the Civil Procedure Rules seeking the dismissal of the appeal for want of prosecution. The reasons for seeking that order are set out on the face of the application alongside an affidavit sworn by the advocate for the respondent.

The application is opposed and there is a replying affidavit sworn by the appellant. There is no indication in the court file to show when the Memorandum of Appeal was served but the sited provisions state that, if within one year after service of the Memorandum of Appeal the appeal shall not have been set down for hearing, the registrar shall list the appeal before a Judge for dismissal after giving the parties notice therefor.

The present application is by the respondent and not the registrar as provided under the said provisions. That notwithstanding, in an application for stay of execution, the court directed that the appellant shall deposit the decretal sum in an interest earning account in the joint names of the advocates which the appellant complied with. The appeal was thereafter to be listed for hearing on priority basis after the pre-requisite directions had been taken. It is clear that such directions have not been taken.

After the filing of the Memorandum of Appeal, the record of appeal is thereafter filed after the proceedings of the lower court have been provided. The appeal is then placed before a Judge for admission and subsequently directions given as to the hearing.

The record of appeal can only be prepared after the lower court proceedings have been provided. The appellant herein applied in writing to the Executive Officer to be provided with the lower court proceedings which to date have not been received. As set out in the replying affidavit, the delay has been occasioned by non-availability of the said proceedings which may not be attributed to the appellant.

This court has observed elsewhere that the delay in the preparation of the lower court records is a systemic challenge which should not be blamed on any party. In this case therefore, the reasons given are plausible and satisfactory.

Having so explained, the appellant cannot be blamed for the delay and therefore this application cannot succeed. It is accordingly dismissed. Considering the delay in securing the said proceedings, I now direct that the Deputy Registrar shall facilitate the availability of the said proceedings within 30 days from the date of this ruling so that the appellant is able to prepare the record of appeal and subsequent

hearing thereof. Each party shall bear their own costs.

*Dated, signed and delivered at Nairobi this 27<sup>th</sup> Day of September, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**