



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 29 OF 2012**

**GATEWAY INSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**JAPHETH ARITHO KINYUA.....RESPONDENT**

**RULING**

The appellant was the defendant in the lower court while the respondent was the plaintiff. Judgment was given in favour of the respondent herein following a claim based on the loss of the respondent's motor vehicle which was alleged to have been stolen. The appellant was aggrieved by the said judgment and lodged an appeal.

Going by the material before me, the record of appeal has been prepared but the original lower court file is not part of the record. The respondent has filed an application seeking an order that the appeal be dismissed for want of prosecution and that the decretal sum held in a joint account of the parties at Standard Chartered Bank Ltd be released to him. The reasons for the application are set out on the face of the application and the respondent has filed a supporting affidavit.

The application is opposed and there is a replying affidavit sworn by the counsel for the appellant alongside grounds of opposition. The application was argued by way of written submissions.

This court is alive to the provisions of Order 42 of the Civil Procedure Rules and in particular rules 12 and 35 thereof. On perusing the record before me I have come across 10 letters addressed to the deputy registrar by the council for the appellant inquiring or seeking dates for direction. The Deputy Registrar has also requested for the lower court record in vain. As at the time of arguing this application the lower court record had not been received. It is clear that the delay in the prosecution of the appeal cannot be wholly attributed to the appellant and his counsel because what comes to light is evidence of systemic shortcomings within the court.

The appellant having written severally to the Deputy Registrar is a clear demonstration that no indolence can be attributed to it or its counsel. Having said so, this application must fail and is therefore dismissed. The Deputy Registrar shall within 14 days of this ruling facilitate the availability of lower court file and set a date for mention to confirm the position with notice to both counsel. The costs shall be in the cause.

***Dated, signed and delivered at Nairobi this 27<sup>th</sup> Day of October, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**