



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 484 OF 2018**

**DEWISH OUMA BODI.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**PLATINUM CREDIT LIMITED.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**ERASTUS GATOBU.....RESPONDENT/APPLICANT**

**RULING**

1. Erastus Gatobu who is the respondent/applicant (“the applicant”) herein, took out the Chamber Summons dated 9<sup>th</sup> September, 2020 and sought an order to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> appellants’/respondents’ (“the respondents”) appeal be dismissed for want of prosecution with costs.
2. The Summons is sustained by the grounds presented on its face and the facts stated in the affidavit of advocate Stephen Gitonga Mureithi.
3. To oppose the Summons, Ruth Monyangi swore a replying affidavit on 27<sup>th</sup> November, 2020 in her capacity as the Legal Officer of the 2<sup>nd</sup> appellant/respondent.
4. The Summons was dispensed with through the filing of written submissions, which I have duly considered together with the grounds laid out on the face of the application, as well as the facts deponed in the affidavits supporting and resisting the Summons.
5. It is clear from the Summons that the sole issue for determination before me is whether the appeal filed by the respondents is ripe for dismissal.
6. Advocate Stephen Gitonga Muerithi states on behalf of the applicant that the respondents have failed to set the appeal down for hearing despite having filed the same more than one (1) year ago and hence the appeal is ripe for dismissal.
7. In reply, Ruth Monyangi through her replying affidavit avers that soon after filing the appeal, the parties negotiated a possible out-of-court settlement which fell through and hence it is not true that no action has been taken by the respondents since filing the appeal. The deponent further avers that despite written correspondences by the respondents’ advocate to the Executive Officer-Chief Magistrate’s Court at Milimani Commercial Courts, requesting for certified copies of the typed proceedings and impugned judgment but that the same have not been availed.
8. In his submissions, the applicant echoed the averments portrayed in the supporting affidavit save to add that the out-of-court negotiations were made on a “without prejudice” basis and have nothing to do with the prosecution of the appeal, which position was refuted by the respondents at the submission stage.
9. In their reply submissions, the respondents further argue that the appeal is yet to be admitted for hearing and directions are yet to be given on the same, and hence it cannot be dismissed in the manner prayed in the Summons.
10. Order 42, Rule 35 of the Civil Procedure Rules, 2010 which was cited by the parties herein sets out for the circumstances and manner of dismissal of an appeal in the following manner:

***“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

***(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the***

*registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”*

11. It is clear that the applicant has moved this court under Order 42, Rule 35(1) above.
12. From the record, it is apparent that the respondents filed their memorandum of appeal on 12<sup>th</sup> October, 2018.
13. I note that the correspondence referenced in the replying affidavit requesting for copies of the relevant documents to enable the respondents prepare their record of appeal were not availed to this court. Nonetheless, the record shows that the Deputy Registrar-Civil Appeals Division sent correspondence on various dates to the Chief Magistrate’s Court requesting for the lower court file and certified copies of the typed proceedings and judgment/decree. It is apparent that those requests did not elicit any response.
14. The above position supports the explanation given by the respondents for not compiling and filing the record of appeal and which explanation I find to be reasonable in the circumstances.
15. From the foregoing, it is clear that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of **Order 42, Rule 35(1)** (supra). A similar finding was arrived at by the court in the case of **Njai Stephen v Christine Khatiala Andika [2019] eKLR** cited by the respondents.
16. There is also nothing to indicate that the Deputy Registrar has listed the appeal for dismissal before a judge pursuant to the provisions of Order 42, Rule 35(2) (supra).
17. Moreover, I have established from the record that the lower court file has not been made available to this court which therefore means that it would not have been possible in any event for the appeal to be admitted and/or set down for directions in absence of the said file.
18. Consequently, I find the Summons premature and the same is hereby struck out, with the following orders being made:
  - a) The Executive Officer (Chief Magistrate’s Court-Milimani Commercial Courts) shall avail certified copies of the typed proceedings, judgment delivered on 12<sup>th</sup> September, 2018 and decree in CMCC NO. 1579 OF 2014 to the appellants/respondents within 30 days from this day.
  - b) The appellants/respondents shall thereafter compile, file and serve their record of appeal within 14 days from the date of receipt of the aforementioned documents.
  - c) The Executive Officer shall avail the lower court file to the High Court-Civil Appeals Division within 30 days from this day.
  - d) The parties shall take a date before the Deputy Registrar to confirm availability of the lower court file and to take further directions.
  - e) Each party shall bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Nyamweya for appellant for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Respondents

Mr. Gitonga for the r for the Respondent/Applicant