



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 324 OF 2013**

**EDNA BOSIBORI ARATI T/A**

**SANDY BEACHES SAFARIS & LOGISTICS.....APPELLANT/RESPONDENT**

**VERSUS**

**LA MADA HOTELS LIMITED.....RESPONDENT/APPLICANT**

**RULING**

This ruling relates to an application dated 22<sup>nd</sup> August, 2018 seeking the dismissal of the appeal for want of prosecution. The appellant filed a Memorandum of Appeal on 10<sup>th</sup> June, 2013 following judgment of the lower court delivered on 10<sup>th</sup> May, 2013. The said Memorandum of Appeal was filed within time required to do so under the Civil Procedure Rules.

The record shows that the Civil Appeals registry requested for the lower court record soon after the filing of the Memorandum of Appeal followed by a reminder but to date that record has not been received.

There is also no reply by the court to the advocates for the appellant following a request for proceedings. I have looked at the cited provisions of law, the affidavits and rival submissions by the parties.

Order 17 of the Civil Procedure Rules cited by the respondent is not applicable. Order 42 Rule 35 (1) is the one that applies to such applications. However, those provisions come into play after compliance with Section 79B related to admission of appeals and Section 79C relating to giving directions as to the hearing of the appeal.

Those steps have not been taken for the reason that the lower court record has not been submitted. The appellant in my view is a victim of systemic shortcomings of the institution rather than deliberate action on its part.

To dismiss the appeal is a drastic measure, the result of which shall drive out a party from the seat of justice without a hearing. I hesitate to grant the orders sought for the main reason that the appellant is not to blame for the delay in the prosecution of this appeal. The application is therefore dismissed.

I direct that the Deputy Registrar shall ensure that the lower court record is availed to the appellant within 30 days from the date of this ruling. Thereafter the appellant shall file the record of appeal within 30 days. The costs shall be on appeal.

***Dated, signed and delivered at Nairobi this 4<sup>th</sup> Day of June, 2019.***

**A.MBOGHOLI MSAGHA**

**JUDGE**