



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 234 OF 2017**

**HEBATULA BROTHERS LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**MICHAEL NGUTHU KIMWELE.....RESPONDENT/APPLICANT**

**R U L I N G**

Following the judgment of the lower court delivered on 28th April, 2017 the appellant being aggrieved by the said judgment filed a memorandum of appeal on 16<sup>th</sup> May, 2017.

The record before me shows that the High Court Registry dispatched a letter dated 21<sup>st</sup> May, 2015(which should read 2017) requesting for the lower court record. To-date no record has been delivered to that Registry. Subsequently, the appellant filed an application for stay of execution of the lower court judgment which was allowed by Serگون J in a ruling delivered on 10<sup>th</sup> November, 2017.

The Appellant was ordered to deposit the decretal sum in an interest earning account in the joint names of the advocates on record. This was done.

The application before me is dated 6<sup>th</sup> September, 2018 seeking an order that the appeal be dismissed for want of prosecution. It is brought under Order 17 Rule 2(1) and (3), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act. The grounds for seeking that order are set out on the face of the application alongside an affidavit sworn by the advocate for the appellant. The respondent filed grounds of opposition to the application and both parties have filed submissions addressing the application.

Order 17 of the Civil Procedure Rules cited by the applicant does not apply. Once an appeal has been filed Order 42 of the Civil Procedure Rules comes into play, and in particular Rule 35 which relates to applications such as the one lodged by the applicant.

I have already observed that the lower court record has not been forwarded, and although the appellant has the duty to pursue the same it remains the responsibility of the court to ensure that the said record is forwarded as requested. The dismissal of an appeal should be sought where there has been laxity on the part of the appellant and where it is established no other party is to blame. In the instant case, there has been laxity on the part of the lower court in the transmission of the record requested by the High Court.

It is true that the respondent has a valid judgment which he is keen to execute, while on the other hand the appellant has the right of appeal. Other than the delay in enjoying the fruits of his judgment, there is no other prejudice that the respondent can suffer because the decretal sum has already been secured in an interest earning account.

Going by the circumstances of this case and cited authorities by both sides, this application cannot be allowed without resultant injustice on the part of the appellant. Accordingly the same is dismissed.

It is directed that the Deputy Registrar shall facilitate the availability of the lower court record within 30 days from the date of this ruling whereupon, on receipt of the proceedings, the appellant shall file the record of appeal within 30 days. The costs shall be on appeal.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of June, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**