

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

On 13th June, 2019 this court delivered a ruling which sought the dismissal of the appeal for want of prosecution. In dismissing the application, the court ordered that the Deputy Registrar should facilitate the availability of the lower court record within 30 days from the date of that ruling, and on receipt of the proceedings the appellant should file the record of appeal within 30 days.

There is now before me an application by way of Notice of Motion under Order 45 Rules 1, 2 and 3 (2), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act, seeking an order of review of the said ruling on account of some mistake or error apparent on the face of the record. The reasons for seeking that order have been set out on the face of the application.

Parties decided to rely on the affidavit evidence and this court make a ruling based thereon.

I have gone through the supporting affidavit sworn by the advocate for the applicant and also the replying affidavit sworn by the advocate for the respondent. In the ruling complained of, I referred to a ruling by Serгон J, delivered on 10th November, 2017 where the appellant, in an application for stay of execution, was ordered to deposit the decretal sum in an interest earning account in the joint names of the advocates on record. I observed in the ruling that this was done.

The applicant has now brought to the attention of the court that the appellant has not complied with that order. Clearly, that is a mistake on the face of the record. To date, the record of appeal has not been filed as ordered by both Serгон J, and this court. That is default on the part of the appellant which has not been explained.

In the ruling of this court dated 13th June, 2019, I observed that the delay in filing the appeal was to be blamed on the lower court in the failure to transmit the proceedings to the High Court. That remains the position, and as I said the appellant has the right of appeal. The impairment visited upon the respondent at this stage is that he is unable to execute his judgment. On the other hand, the appellant is making no steps to advance the appeal process.

Having failed to deposit the decretal as ordered by Serгон J, on 10th November, 2017 and this court having mistakenly observed that the appellant had complied, there is every reason that this court reviews its ruling made on 13th June, 2019.

The effect of failure to deposit the decretal sum is to expose the appellant to the execution process and so, to ensure that the appellant takes full responsibility and consequences of default, while maintaining the right to appeal, the stay of execution is now lifted. The Respondent is now at liberty to execute the judgment against the appellant. The end result is that this application is allowed with costs to the respondent/applicant.

Dated, signed and delivered at Nairobi this 14th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE