



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL. NO. 380 OF 2017**

**JOHN MUCHUI LUBETA.....APPLICANT**

**VERSUS**

**APA INSURANCE CO. LTD.....RESPONDENT**

**RULING**

1. The application dated 28<sup>th</sup> February, 2019 seeks orders that:

- 1. That the Memorandum of Appeal lodged in this honourable court on 28<sup>th</sup> July, 2017 be and is hereby struck out.**
- 2. This appeal hereby be and is hereby dismissed.**
- 3. Cost of this application and be awarded to the Applicant/Respondent.**

2. The application is premised on the grounds stated therein and the affidavit in support. The gist of the application is that the appeal herein was filed on 28<sup>th</sup> July, 2017 but that the Appellant is yet to serve the Respondent with the Memorandum of Appeal and has not yet complied with Order 42 Rule 12 of the Civil Procedure Act.

3. The application is opposed as per the grounds of opposition dated 6<sup>th</sup> May 2018 which state as follows:

- 1. No notice as is contemplated under Order 42 rule 12 was served upon the appellant and time cannot run unless and until the notice is served.**
- 2. The appeal was admitted on a date unknown to the appellant but the court did give notices for taking of directions dated 5<sup>th</sup> February, 2019 meaning it had admitted the appeal. Section 79B cannot, therefore, assist the respondent. It is water under the bridge.**
- 3. Indeed on 1<sup>st</sup> March, 2019 the Hon. Mr. Justice M Msagha gave directions for the hearing of the appeal.**
- 4. The application is therefore overtaken by events.**
- 5. Order 42 rule 12 does not provide for striking out of an appeal whose memorandum of appeal has not been served within 7 days after admission of an appeal.**
- 6. The record of appeal has been filed and served and directions given. No prejudice has been demonstrated.**
- 7. Courts now do substantive as opposed to procedural dictatorship of yesteryears.**

4. I have considered the application, the response to the same and the submissions filed by the counsels for the respective parties. A perusal of the court file reflects that the Appeal was admitted on 4<sup>th</sup> February, 2019. The Appeal was certified ready to proceed on 1<sup>st</sup> March, 2019 in the presence of the counsels for the respective parties.

5. By the time the application at hand was fixed for hearing on 24<sup>th</sup> April, 2019, the same had already been overtaken by events. Consequently, the application is dismissed with costs in cause. The Appeal to be given a hearing date in the registry on priority basis.

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of Dec. 2019

**B.THURANIRA JADEN**

**JUDGE**