



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 123 OF 2011

KUKENA SACCO.....APPELLANT/RESPONDENT

VERSUS

CATHERINE WAMUTIRA CUBI.....RESPONDENT/APPLICANT

RULING

1. This is the Notice of Motion dated 20th November, 2013 brought under Order 42 Rule 35(2), Order 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act for the following orders:-

- (a) *The appeal be dismissed with costs for want of prosecution.*
- (b) *The appeal be dismissed as it does not lie or at all.*
- (c) *The Respondent/Applicant be granted costs of this application.*

2. The application is premised on the two grounds on its face plus the supporting affidavit of Wachira Mari advocate sworn on 21st November 2013.

3. Mr. Mari who appeared for the Respondent/Applicant told this Court on 27/5/2014 that the Appellant/Respondent had filed no response to the application and the Court allowed him to proceed with the hearing of the application.

4. However upon perusal of the record I have only found one affidavit of service by one Dickson Musyimi confirming service of the hearing notice dated 11/4/2014.

5. Also on record is a copy of a letter dated 19/3/2014 inviting the Appellant/Respondent for fixing of a hearing date.

6. There is however no evidence of service of this application dated 20/11/2013 on the Appellant/Respondent. Its therefore not clear whether counsel was served or not. I can not therefore make a finding that the Appellant/Aespondent has failed to respond to the said application.

7. The application was therefore fixed for hearing prematurely. I hereby direct the Respondent/Applicant to serve the Appellant/Respondent with the application dated 20/11/2013. The Appellant/Respondent to file its response within 7 days of service.

8. The Respondent/Applicant to have corresponding leave to respond within 3 days of service.

The Registry to fix the application for hearing within the shortest time possible.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF JULY, 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Mogusu for Wachira for Respondent

Njue CC