



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

**CIVIL APPEAL NO. 681 OF 2007**

**COMMERCIAL TRANSPORTERS CO. LIMITED..... APPELLANT**

**VERSUS**

**EVANS KIBE NDUNG’U..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 4<sup>th</sup> July, 2013. The application is expressed to be brought under Order 42 Rule 35(1) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya. The application essentially seeks orders:
  - a. That the appeal be dismissed with costs for want of prosecution and/or abuse of court process.
  - b. That the orders of stay of execution made on 29<sup>th</sup> August, 2007 be vacated and decretal sum deposited in court be forthwith released to the applicant.
2. The grounds for which the application is brought is set out in the face of the application and the supporting affidavit of Nzamba Kitonga. These were that the appeal arises from judgment of Nairobi CMCC No. 2310 of 2006 delivered on 13<sup>th</sup> July, 2007. The appellant subsequently obtained 29<sup>th</sup> August, 2007 obtained an order for stay of execution and filed this appeal on 7<sup>th</sup> August, 2007. That since then, the appellant has taken no steps to prosecute its appeal.
3. The application was opposed vide the replying affidavit of Evans N. Mussilli. He contended that there was a delay in drawing the decree and certificate of costs in the lower court and moving the lower court file to the High Court; that negotiations have been on going in the matter; that the appeal is meritorious and if dismissed the appellant shall suffer irreparable loss.
4. When this application came up for hearing, there was no appearance for the appellant. Mr. Mutemi, Learned Counsel for the respondent relied on the grounds of the application and urged that the application be allowed.
5. I have considered the affidavits on record. The law governing dismissal of an appeal for want of prosecution is enunciated in Order 42 Rule 35 of the Civil Procedure Rules which stipulates:

***“35. (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

***(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”***

6. In the instant case no directions have been taken therefore the application is premature.

7. For the foregoing reasons, the application is struck out with no orders as to costs.

Dated, Signed and delivered in open court this 12th day of November 2014.

J.K.SERGON

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent