



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 557 OF 2016**

**KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**- V E R S U S -**

**JOSEPH SIMIYU WASIKE.....RESPONDENT**

**RULING**

1) Joseph Simiyu Wasike, the respondent herein, took out the motion dated 29.9.2017 in which he sought to have this appeal dismissed for want of prosecution. The motion is supported by the affidavit of the respondent. When served with the motion, Kenya Power & Lighting Co. Ltd, the appellant herein, filed the replying affidavit of Richard Otieno to oppose the motion.

2) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. The background of the application is short and straight forward. The respondent instituted a compensatory suit before the Chief Magistrate's Court at Milimani against the respondent for malicious prosecution. It was pleaded that the appellant unjustifiably made a complaint against the respondent to the police to the effect that the respondent had stolen thirty (30) meters of power transmission cables, fuse carrier, a ball hook and other assorted materials. Pursuant to the aforesaid complaint the respondent was arrested and arraigned in court for stealing contrary to Section 275 of the Penal Code. The respondent was tried for the offence and was eventually acquitted on 30.11.2010. He then filed the suit earlier alluded. On 22.2.2016, the respondent was awarded damages in the sum of ksh.300,000/=. Being aggrieved by the aforesaid decision, the appellant filed this appeal and put forward the following grounds:

- 1. The learned magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence before it and in arriving at a decision which is not supported by or is manifestly against the weight of the evidence.***
- 2. The learned magistrate erred in law and in fact by disregarding the totality of the appellant's pleadings, submissions and cited authorities and as a result arrived at materially unsupported findings of fact and law quite contrary to established jurisprudence.***
- 3. The learned magistrate erred in law and in fact in failing to appreciate the proper effect and import of the proceedings of the Criminal Court in Criminal Case no. 374 of 2009 and the judgement rendered therein.***
- 4. The learned magistrate erred in law and in fact in failing to appreciate the appellant's limited involvement in the police investigations, arrest and subsequent prosecution of the respondent.***
- 5. The learned magistrate erred in law and in fact in holding that appellant was liable for malicious prosecution.***
- 6. The learned magistrate erred in law and in fact in failing to find that the appellant was legally obligated to assist the police in their investigations upon being requested to do so by the Divisional Criminal Investigation Officer (DCIO).***
- 7. The judgement of the honourable judge is manifestly against and contrary to the overwhelming evidence and submissions of the appellant.***
- 8. The learned magistrate erred in law and in fact in awarding the respondent the sum of kshs.300,000/=.***

3) The respondent is now seeking for the appeal to be dismissed for want of prosecution pursuant to the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. It is the submission of the respondent that since the filing of the appeal, the appellant has failed to file the record of appeal therefore it has lost interest in pursuing this appeal. It is also argued by the respondent that the appellant has failed to set down the suit for directions or take any steps to make the appeal ready for hearing. The respondent further pointed out that directions cannot be given in the absence of the Record of Appeal which the appellant has failed to prepare.

4) The appellant urged this court to dismiss the motion seeking for the dismissal of the appeal. The appellant pointed out that on two separate occasions it applied to the executive officer of the trial court to supply it with certified copies of the typed proceedings and judgement to enable it prepare the record of appeal. The typed proceedings have not been supplied to date. The appellant has beseeched this court to find that the delay was not intentional nor deliberate but was solely occasioned by the subordinate court's registry to supply typed proceedings and judgment.

5) After a careful consideration of the rival submissions, I have come to the conclusion that the appellant has given a plausible explanation for the delay in prosecuting the appeal. I am convinced that in the absence of a complete record of appeal, the file cannot be placed before a judge in chambers to admit the appeal for hearing. The record shows that the appellant wrote two letters seeking to be supplied with typed proceedings and judgment. That assertion is not disputed. It is also not in dispute that the trial court has not supplied the typed proceedings and judgment as requested. In the circumstances, I do not think the appellant should be blamed for the delay. I find the explanation given by the appellant for the delay in prosecuting the appeal to be plausible.

6) In the end, I find no merit in the motion dated 29.9.2017. The same is ordered dismissed. A fair order on costs is to direct which I hereby do that each party meets its own costs.

**Dated, Signed and Delivered in open court this 18<sup>th</sup> day of May, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents