



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Civil Appeal 28 of 2009**

**LAKE BASIN DEVELOPMENT AUTHORITY.....APPELLANT**  
**VERSUS**  
**SAMWEL OTHIENO NGOLO.....RESPONDENT**

**(APPEAL FROM JUDGEMENT AND DECISION OF  
SENIOR RESIDENT MAGISTRATE WINAM COURT:  
IN  
SRMCC NO.196 OF 2007  
\*\*\*\*\*  
R U L I N G**

The application before me is a chamber summons brought pursuant to Order V1 rule 13(1)(a) and (d) of the Civil Procedure Rules seeking to have the memorandum of appeal struck out and/ or the appeal dismissed, the sum deposited as security released forthwith to the applicant's counsel. It also seeks for costs of the suit. The application is supported by the grounds on the face of the application.

The Respondent/Appellant filed grounds of opposition to the effect that the application as drawn and filed is misconceived, bad in law, an abuse of court process. Further that the appeal was filed on time and there has been no review of the subject of appeal. The respondent contends that the appeal is fatally defective and ought to be dismissed.

Order V1 rule 131(a) and (d) provides:

**“13(1) At any stage of the proceedings**

**the court may order to be struck out**

**or amended any pleading on the ground that –**

- (a) it discloses no reasonable cause  
of action in defence or**
- (b) .....**
- (c) .....**
- (d) .....it is otherwise an abuse  
of the process of the court.”**

The Order 13 rule (2) states that:

**“No evidence shall be admissible on the  
application under sub-rule (1)(a)  
but the application shall state concisely  
the grounds, on which it is made.”**

No affidavit accompanied the application presumably on account of this proviso. However, it is notable that the applicant brought this application based on sub-rules **a & d** and ought to have adduced evidence by way of affidavit in support of sub-rule (d).

That as it may, I am of the view that an application seeking to have the appeal struck out ought to be by way of notice of motion under

Order L rule 1 and section 79(g) of the Civil Procedure Act. I, therefore, find the application incompetent and dismiss the same with costs.

The applicant be at liberty to file a proper application within the next 14 days hereof.

**DATED AND DELIVERED THIS 23RD DAY OF APRIL 2010**

**ALI-ARONI**

**J U D G E**

**IN THE PRESENCE OF:**

.....**Counsel for the appellant**

.....**Counsel for the respondent**