



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 103 OF 2016

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

VERSUS

KABURU CHAMANGONI MWAZI.....RESPONDENT

RULING

1. The application before me is dated 7th February, 2018. It has been brought under the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, Cap 21, Laws of Kenya and other enabling provisions of the law. It seeks the following orders:-

- (i) That this Honourable court be pleased to dismiss this appeal;
- (ii) That this Honourable court be pleased to award costs of the application to the respondent;
- (iii) That this Honourable court be pleased to award costs of the appeal to the respondent; and
- (iv) Any other orders that this Honourable court may deem just.

2. The application is supported by the grounds on the face of it and the affidavit of the applicant sworn on 7th February, 2018. The application is opposed through the replying affidavit sworn on 28th February, 2018.

3. Mr. Tarus, Learned Counsel for the applicant sought orders for dismissal of the appeal for want of prosecution. He urged the court to look at the supporting affidavit and the grounds in support of the application, which are self explanatory.

4. Mr Ajigo, Learned Counsel for the respondent relied on the affidavit they filed on 28th February, 2018. He submitted that they had not been supplied with proceedings of the lower court case. He indicated that the annexure marked MO1 attached to the respondent's deponent's affidavit bore correspondence from them to the court on the issue of the said proceedings. He indicated that the annexure marked MO2 was correspondence from the court regarding the appeal. He submitted that without the proceedings they had been unable to file and serve a record of appeal.

5. Counsel made reference to the annexure marked MO3 which shows that the applicant deposited the decretal sum in a joint interest earning bank account. It was his view that the application was brought prematurely. He prayed for the application to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if the appeal herein should be dismissed for want of prosecution.

6. The record reveals that the memorandum of appeal was filed on 29th July, 2016. As per the annexure attached to the respondent's deponent's affidavit marked as MO2, the Deputy Registrar on 4th August, 2016 called for the original record, certified copies of proceedings and Judgment and exhibits for Mombasa CMCC No. 1952 of 2007 from the Executive Officer, Chief Magistrate's court civil registry. On 11th January, 2017, Counsel for the respondent wrote to the Executive Officer, Mombasa Chief Magistrate's court civil registry, requesting for typed and certified copies of the proceedings and Judgment to enable him to complete the record of appeal.

7. Although there is a letter dated 1st February, 2017 attached to the applicant's affidavit to indicate that he forwarded to the respondent's Counsel a draft copy of typed proceedings for perusal and necessary amendments, it is common knowledge that such proceedings cannot form part of the record of appeal unless and until they are certified by the relevant court.

8. Order 42 rule 35(1) of the Civil Procedure Rules provides for the respondent to either set down the appeal for hearing or to apply for its dismissal for want of prosecution, if within 3 months after the giving of directions under rule 13 of the same Order, the appellant shall not have set the appeal for hearing. Such directions have not been given in this appeal, which has not been admitted to hearing.

9. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri**, HCCC No. 98 of 2008 the Court observed thus:-

“It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given.”

10. Even though the appellant deposited security in the sum of Kshs. 3,624,163/= pending the hearing and determination of the appeal, that on its own does not mean that it and its Counsel should lean back and relax without making a concerted effort to obtain certified copies of the lower court proceedings and Judgment with the aim of filing the record of appeal. It is in the interest of the decree holder to have the appeal heard and determined expeditiously. As he has stated in his affidavit, the pendency of the appeal is causing him a lot of anxiety, distress and inconvenience.

11. Having considered the factors that have led to the delay in the filing of the record of appeal, I decline to dismiss the appeal for want of prosecution. I give the appellant 60 days to file its record of appeal and to fix the appeal for directions. I make no order as to costs as the appellant has put in some effort towards obtaining certified copies of the proceedings and Judgment of the lower court.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. V. Otieno holding brief for Mr. Busieka for the appellant

Mr. Tarus for the respondent

Mr. Oliver Musundi - Court Assistant