



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF NAIROBI**

**CIVIL APPEAL NO. 45 OF 2015**

**MASTERPOWER SYSTEMS LTD .....APPELLANT**

**VERSUS**

**PUBLIC PROCUREMENT**

**ADMINISTRATION REVIEW BOARD .....1<sup>ST</sup> RESPONDENT**

**TOURISM FUND..... 2<sup>ND</sup> RESPONDENT**

**CENTRAL ELECTRICALS**

**INTERNATIONAL LTD.....3<sup>RD</sup> RESPONDENT**

**GLAMA ELECTRICAL &**

**MECHANICAL COMPANY LTD ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

This is an application by way of Chamber Summons under Order 42 Rule 35, Order Rule 42 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order that the appeal be dismissed for want of prosecution and costs of the application and the entire appeal be awarded to the 2<sup>nd</sup> respondent.

The main ground is that the appellant has failed to set down the appeal for hearing or take any steps to prosecute the same for over a period of five months as at the time of filing the application. It is the applicant's position that the appeal is now an abuse of court process.

There is a supporting affidavit sworn by the advocate for the appellant to which the advocate for the respondent has filed grounds of opposition. Both parties have filed submissions to address the application.

This application was filed on 20<sup>th</sup> January, 2016. From the time the application was filed going by the record, the main appeal has been listed for hearing at least twice; on 22<sup>nd</sup> March, 2018 and 13<sup>th</sup> June, 2018. On 13<sup>th</sup> June, 2018 the hearing was put off because the respondent's counsel did not appear in court. Thereafter, this application was listed for hearing.

An application such as the one before this court may only be entertained after some procedural steps have been completed either by the court or the parties themselves. Before an appeal is heard, it must be admitted for hearing under Section 79 B of the Civil Procedure Act. I have perused the record and confirmed that there is no order admitting this appeal for hearing. Even after the admission of the appeal, directions must be given under Order 42 Rule 35 (1) of the Civil Procedure Rules. I bear in mind the fact that it is the appellant's duty to cause the appeal to be listed for directions. However, it is only after the court confirms that the record is complete for directions to be given.

Only after directions have been given does time start to run for any party to move the court for dismissal of the appeal or otherwise – see **Nancy A. W Gitau & Another vs. David K. Gitau & Another [2015] e KLR** and **Benson Mang'era & Another vs. Wambua Mbuva [2014] e KLR**.

On the other hand, I know that under Order 42 Rule 11 of the Civil Procedure Rules, the appellant is supposed to move the court but again this can be done only if the record is complete. There is no indication that the appellant has refused to comply with the said provisions.

The 2<sup>nd</sup> respondent has not demonstrated what prejudice shall be occasioned to it if the appellant is given time to prosecute the appeal. Above all, dismissal of any cause is a drastic measure which should be invoked sparingly and only in clear cases. This is because such an order has the effect of driving a party out of the judgment seat without a hearing and the courts have taken the position of maintaining suits rather than dismissing them except in very deserving cases.

This application however, is a wakeup call on the part of the appellant to play a more proactive role in the prosecution of the appeal. The end result is that this application hereby fails and is dismissed. The appellant shall cause this appeal to be listed for hearing within 120 days from the date of this ruling. Costs shall be on appeal.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of December, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**