



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO 104 OF 2009**

1. BUSTRACK LIMITED  
2. KENYA BUS SERVICES LIMITED.....APPELLANTS

VERSUS

MUTHIANI KIILU.....RESPONDENT

**RULING**

1. The Respondent in this appeal has applied by **notice of motion dated 8<sup>th</sup> August 2013** for dismissal of the Appellant’s appeal for want of prosecution. Though not stated, it is clear from the grounds for the application on the face thereof and the supporting affidavit that the application is brought under **Order 42, rule 35(2)** of the **Civil Procedure Rules, 2010** (the **Rules**). That subrule states -

**“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 chamber for dismissal.”**

I see nothing wrong with a respondent applying under this subrule.

2. The supporting affidavit is sworn by the Respondent’s advocate, **Mercy Nduta Mwangi**. She deponed, *inter alia*, that the memorandum of appeal was filed on 6<sup>th</sup> March 2009 and served upon her firm on 2<sup>nd</sup> April 2009; that the Appellant has never caused the appeal to be listed before a judge for directions; and that despite passage of about five years the Appellant has never set down the appeal for hearing.

3. The Respondent has opposed the application by replying affidavit filed on 26<sup>th</sup> June 2014. The same is sworn by the Appellant’s advocate, **Lawrence Kimondo**. Paragraph 5 of that affidavit lists and exhibits some seven letters addressed to the lower court requesting various documents to enable preparation of the record of appeal. Those letters span the period 6<sup>th</sup> February 2009 to 12<sup>th</sup> July 2012. The present application was filed on 2<sup>nd</sup> October 2013. It is further deponed that the requested documents (which include proceedings and judgment) have never been supplied.

5. There is also exhibited in the replying affidavit a letter dated 10<sup>th</sup> of August 2010 addressed by this court to the lower court requesting for the lower court’s original record together with certified copies of proceedings, judgment and decree, *inter alia*. This court’s record shows that the lower court has never complied.

6. It appears to me that the Appellants cannot be blamed for the delay in disposal of this appeal. They have done all that they possibly could to move the appeal forward. The delay has been caused entirely by the lower court by its failure to forward to the Appellants copies of proceedings and judgment and other relevant documents to enable them to prepare the record of appeal. The lower court has also failed to forward to this court its original record together with certified copies of the proceedings, judgment and other documents to enable this court to give directions as to hearing of the appeal.

7. In the circumstances I will refuse the application at hand. The same is dismissed with no order as to costs. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014**