



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO 876 OF 2005**

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

**VERSUS**

**SIMON NJENGA WAINAINA.....RESPONDENT**

**R U L I N G**

1. The Respondent in this appeal has applied by **chamber summons dated 23<sup>rd</sup> August 2012** for dismissal of the appeal for want of prosecution. The application is brought under **Order 42, rule 35(2)** of the **Civil Procedure Rules, 2010** (the **Rules**). Under that subrule, if within one year after service of 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 chambers for dismissal.
2. I hold the view that a respondent is entitled to move the court under this sub-rule for dismissal of the appeal for want of prosecution as the effect of his application would be to place the appeal before a judge in chambers *inter partes* for dismissal. I therefore deem the application at hand to be properly before the court.
3. In the supporting affidavit the Respondent has pointed out that the memorandum of appeal was filed on 8<sup>th</sup> of November 2005; the record of appeal was filed on 4<sup>th</sup> June 2009; and that thereafter the Appellant took no action at all towards disposal of the appeal. At the hearing of the application learned counsel for the Respondent pointed out that the memorandum of appeal was served on 12<sup>th</sup> June 2009, and that notwithstanding a number of promptings from the Respondent's advocates the Appellant's advocates never took any steps towards having the appeal heard.
4. The Appellant has opposed the application by replying affidavit filed on 28<sup>th</sup> September 2012 sworn by its advocate, **Ben Musundi**. Grounds of opposing emerging therefrom include -
  - (i) That on 29<sup>th</sup> April 2010 the learned counsel wrote to the Deputy Registrar requesting for a date for directions and that the registry said that the matter could not be listed for directions as the original lower court record had not been received.
  - (ii) That on 5<sup>th</sup> May 2010 the learned counsel made a follow up with the Executive Officer of the lower court requesting him to forward the original court record to the High Court.

(iii) That the Executive Officer responded in writing and pointed out that no request for the original lower court record had been received from the High Court.

(iv) The on 18<sup>th</sup> June 2011 the Appellant's learned counsel again requested, unsuccessfully, for the matter to be listed before a judge for directions.

(v) That without directions (which could not be given in the absence of the original lower court record) the appeal was not ready for hearing, and the Appellant cannot be accused of delaying prosecution of the same.

(iv) That the Appellant is in any case ready and willing to prosecute the appeal to its logical conclusion and should be allowed to do so, and will do so as soon as the lower court makes its original record available to the High Court.

5. I have considered the submissions of the learned counsels appearing. Before an appeal can be certified ready for hearing by the court under Order 42, **rule 13** of the Rules, the judge must be satisfied that all necessary documents are on the court record. Those documents are listed under subrule (4) of that rule as follows –

“(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand typist's notes, electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment order, or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that –

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

6. Although, as seen above, the original record of the lower court does not appear to be strictly necessary in order for the appeal to proceed to hearing as long as the proceedings and judgment of the lower court (preferably certified) are before the High Court, it has been the practice for a long time to have the original lower court record present. This is usually in order for the High Court to have access to any documentary exhibits admitted by the lower court, and also to resolve any disputes that might arise regarding the typed proceedings or judgment where a comparison with the original handwritten record may be necessary. But that is not to mean that the absence of the original lower court record should prevent hearing of the appeal indefinitely.

7. In the present case, I am satisfied that the Appellant has not been indolent and has done the necessary to move its appeal towards hearing. The absence of the original lower court record has unfortunately held things up. It is not the function of the Appellant to transmit the original lower court record to the High Court; that is the function of the lower court at the request of the High Court.

8. The Appellant having filed and served record of appeal, which I note contains copies of all documents required by rule 13 aforesaid, there is nothing to stop the appeal from being heard in the circumstances of this case, notwithstanding the absence of the lower court record. While refusing the

application at hand, therefore, I shall give a date for the taking of directions under Order 42, rule 13 so that the appeal can be heard without any further delay.

9. The upshot is that the application at hand is refused; it is hereby dismissed. Costs of the application shall be in the appeal. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2014**

**H P G WAWERU**

**JUDGE**

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