



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APEAL NO 179 OF 2012

NATHAN K TUM.....APPELLANT

VERSUS

INSPECTOR OF STATE CORPORATION ... RESPONDENT

(Appeal from the decision of the State Corporations Appeal Tribunal delivered on 13th March 2012 in its Appeal No 133 of 2010).

R U L I N G

1. This is an application by the Respondent under **Order 42, rule 35(2)** of the **Civil Procedure Rules, 2010** (the **Rules**) for dismissal of the Appellant's appeal for want of prosecution. That subrule states -

“(2) 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 of the parties list the appeal before a judge in chambers for dismissal.”

I see nothing wrong with a respondent applying under this subrule. His application will achieve the same purpose – of placing the appeal before a judge *inter partes* for dismissal.

2. It is the Respondent's case in this application that he was served with the memorandum of appeal on 18th April 2012, yet by the time the application was filed on 21st June 2013, a period of over a year, the appeal had not been set down for hearing. The Respondent has further pointed out that the Appellant filed his record of appeal and served the same upon the Respondent on 5th June 2012, yet he has not taken any steps towards having directions given by a judge to enable the appeal to be set down for hearing.

3. The Appellant has opposed the application by a replying affidavit sworn by his advocate, one **Charles Yano**. He has explained his side of the story as follows, *inter alia* –

(i) That on 22nd June 2012 he requested of the Deputy Registrar that the appeal be listed before a judge for directions, but the same was not done as the High Court had not yet received the original record of the Tribunal whose decision was appealed against.

(ii) That the High Court received the said original record of the Tribunal in July 20102.

(iii) That since then he has “been making a follow-up” with the High Court registry to have the matter placed before a judge for directions but was always informed that the file was with a judge for admission of the appeal. As evidence of these “follows-ups” the Appellant has exhibited a letter dated 26th February 2013 addressed to the court.

4. My reading of the **Order 42, rule 13** of the **Rules** is that the original lower court record is not strictly necessary to enable an appeal to be heard. If there is a record of appeal and the parties are agreed that it contains copies of all documents required by rule 13 aforesaid, the appeal can proceed to hearing. At any rate, the absence of the original lower court record should not unduly hamper the hearing of the appeal.

5. In the present case I note that the original record of the Tribunal was forwarded to this court in July 2012 – more than 2 years ago! The appeal itself was admitted under **section 79B** of the **Civil Procedure Act, Cap 21** on 23rd December 2013. All that remains now is directions under rule 13 aforesaid to enable the appeal to be heard.

6. Considering all the above factors and the fact that the appeal is against a judgment of over KShs 21 million, I will refuse the application at hand. It is hereby dismissed. The Appellant has not been blameless for the delay, particularly since the original record of the Tribunal was forwarded to this court more than two years ago. He will pay the Respondent’s costs of this application, hereby assessed at KShs 30,000/00, within twenty-one (21) days of delivery of this ruling. In default the Respondent may execute for the same. I shall upon delivery of this ruling give a date for the taking of directions. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014