



**Abung'ana v Luteya (Civil Appeal 54 of 2022)
[2024] KEHC 11674 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 54 OF 2022
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

ROBERT ABUNG'ANA APPELLANT

AND

PHILIP MULOCHI LUTEYA RESPONDENT

RULING

1. The Applicant's Notice of motion dated 12th September 2023 seeks for the following prayers ;-
 - a. The appeal herein be dismissed with costs for want of prosecution
 - b. That the cost of the application and the entire appeal be awarded to the respondent.
2. It is brought under Order 42 rule 35 of *Civil procedure Rules* and section 1&2 of the *Civil Procedure Act*. It is based on the grounds appearing on the face of the Application and the supporting Affidavit sworn by the Applicant.

The Applicant's case
3. The Applicant states that the Appeal was filed a year ago, that was on 25th August 2023 and since then ,the Appellant has not taken any steps to prosecute the Appeal.
4. According to the appellant the failure to prosecute the appeal amounts to abuse of the process .

The respondent's case

5. The Application is opposed through the Respondent's Reply Affidavit dated 19th October 2023. The respondent states that the Application is misguided and misconceived.



6. He states that he did a letter to the chief magistrate's court requesting for the typed proceedings and judgment on 23rd August 2022 and later filled an application for stay of execution of the lower court decree which was allowed on 18th October 2023.
7. That since then his advocate has been serving the respondent's counsel from time to time with the mention notice as far as the appeal is concerned.

Analysis and Determination

8. The only issue for determination is whether this court should dismiss the appeal for want of prosecution.
9. The law dealing with dismissal of Appeals is Order 42 Rule 35 of the [Civil Procedure Rules](#). Rule 35(1) provides as follows:-

“ unless within three months after the giving of directions under Rule 13 the Appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty either to set down the Appeal for hearing or to apply by summons for its dismissal for want of prosecution”
10. A perusal of the court's record shows that the appellant filed the memorandum of appeal on 25th August 2022. The respondent through a letter dated 22nd August 2022 wrote to the chief magistrate court in Kakamega requesting for certified copies of the Judgment, orders and typed proceedings for purpose of filling the appeal.
11. Through a Notice of Motion filed on 1st February 2023, the applicant sought for stay of execution of the judgment/decree which was allowed on 2nd May 2023 at the lower court.
12. On 18th October 2023 when the matter was coming for mention to confirm compliance on the ruling delivered on 2nd May 2023, the court ordered that the proceedings be typed and a mention issued for 5th December 2023 to confirm compliance.
13. Order 42 Rule 35 of [Civil Procedure Rules](#) provides that if the appellant fails to fix the appeal for hearing, three months after the directions have been given, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the [Civil Procedure Rules](#)
14. On this Appeal the record shows that the present Application was filed on 12th September 2023 while directions on the Appeal were given on 15th January 2024 by Justice Hon. P.J.O Otieno. Thus in terms of Order 42 rule 35(1) as aforesaid, the Appeal was not yet ripe for dismissal. An Appeal is only legible for dismissal after directions have been taken and no steps are taken within 3 months thereafter. The Applicant ought to have taken the trouble to ascertain whether the directions have been taken before filing the present Application.
15. The Application was therefore premature. The same is hereby dismissed with costs to the Respondent.

DATED , SIGNED AND DELIVERED AT KAKAMEGA , THIS 26TH DAY OF SEPTEMBER 2024
S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant.



Mr. Mbaka for the Appellant.

