



REPUBLIC OF KENYA



**Ikhlas Auto Trading Ltd & another v Ouko (Civil Appeal E210 of 2021)
[2024] KEHC 13501 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E210 OF 2021**

AN ONGERI, J

OCTOBER 29, 2024

BETWEEN

IKHLAS AUTO TRADING LTD 1ST APPELLANT

JUSTUS OMANDI ORENGE 2ND APPELLANT

AND

JAMES OKELLO OUKO RESPONDENT

RULING

1. The application coming for consideration is the one dated 2/2/2024 seeking to strike out this appeal for want of prosecution.
2. The application is brought under Sections 1A and 3A of the *Civil Procedure Act*; order 42 Rule 35 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law.
3. The appellant/respondent opposed the application in a replying affidavit by Lawrence Njuguna dated 8/5/2023. In it he stated that the appeal arises from the judgement of Hon. E Wanjala in Milimani CMCC 2419 of 2019. Pending the hearing and determination of the appeal the applicant deposited Kshs. 1,306,370.00 in the Respondent's/Applicants account and provided a bank guarantee of Kshs. 1,306,370.
4. He deponed that the respondent requested for proceedings but have not yet received copies of the proceedings, judgment and decree to enable them to file a record of appeal. This has occasioned a great injustice to the respondent who is desirous to prosecute this appeal. The court has not given directions and therefore dismissing the appeal will be contrary to the civil procedure rules.
5. The parties filed written submissions as follows; the respondent/applicant submitted that from the record and on their own admission, the appellants/respondents upon obtaining stay took a back seat in



the prosecution of this matter. It can be inferred therefore that appellants/respondents have no interest in the prosecution of this appeal as there has been inordinate and intentional delay of prosecuting this appeal as there is no threat of execution.

6. Further, the respondent/applicant relied on *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR where it was held that;

“In analyzing the matter, the learned Judge correctly appreciated the principles in dismissing an appeal for want of prosecution as espoused in various cases such as in *Ivita v Kyumba* [1984] KLR 441; that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. In view of this the learned Judge concluded that the appellant had not taken any steps to prosecute his appeal since the matter was concluded before the lower court in the year 2012.”

7. The respondent/applicant argued that the delay herein is not excusable as the appellant/respondent absconded on their duty to prosecute the appeal. The respondents were only roused from slumber when the applicant filed his application to dismiss the appeal for was of prosecution.

8. The appellants/respondents alternatively submitted that the appeal raises triable issues which need to be heard and determined on merit. Article 50 (1) provides that;

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

9. The respondent also relied on article 159 (2) (d) which state that Justice shall be administered without undue regard to technicalities together with the case of *Grace Njeri Theuri v John Mburu Wainaina* [2022] eKLR where it was held;

42. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the *Civil Procedure Rules*, 2010.

43. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the *Civil Procedure Rules*. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of *Civil Procedure Rules*. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

10. The sole issue for determination is whether this appeal should be dismissed for want of prosecution.
11. I find that no record of appeal has been filed to date and the delay in prosecuting this appeal is prolonged and inexcusable.
12. There is no genuineness in prosecuting this appeal.
13. The same is dismissed with costs to the applicant/respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.



.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

