



**Ngeri v Kinyua (Civil Appeal E021 of 2022)
[2024] KEHC 13447 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E021 OF 2022
SM MOHOCHI, J
OCTOBER 29, 2024**

BETWEEN

BENSON GICHUHI NGERI APPELLANT

AND

BONIFACE KINYUA RESPONDENT

RULING

1. By Notice of Motion Application dated 4th October, 2023 brought under Sections 1A, 1B, 3A and 79B of the *Civil Procedure Act* and Order 42 Rule 11, 13 and 35 (1) and (2) of the *Civil Procedure Rules* the Applicant moved this Court seeking for orders that the appeal herein be dismissed with costs for want of prosecution and further that the costs be in the cause.

Applicant's Case

2. The Application is premised on the grounds on its face and further supported by the affidavit of Mr. Boniface Kinyua of even date. The Applicant's case is that the Respondent preferred an Appeal against the judgement delivered on 28th January, 2022 in favour of the Applicant and filed a Memorandum of Appeal dated 10th February, 2022.
3. It was argued that Respondent has not filed a Record of Appeal or listed the Appeal for directions which is inexcusable and inordinate. It was his case that the inaction in prosecuting the Appeal is prejudicial to the Applicant hence why the Application should be allowed in the interest of justice.

Respondent's Case

4. The application is opposed by way of Replying Affidavit sworn on 25th March 2024 by Janerose Nanjira, Advocate. The Respondent's case is that they are interested in prosecuting the Appeal and that even complied with the stay conditions by paying half the decretal amount in a joint earning interest



account but the delay was occasioned by the inability to get typed proceedings as they had trouble in retrieving the Lower Court file. That if there is any delay, it can be compensated by way of damages.

5. It was her averments further that the application is premature as directions ought to have been issued first. That the Respondent believes that there is a viable appeal against quantum and stands to suffer great prejudice in the event the Appeal is dismissed since he will be compelled to settle for the Lower Court's judgement.
6. She contended that the Respondent is keen on prosecuting the Appel and should not to be outset form the seat of justice. That the appeal ais arguable and should be determined on its merits and they are willing to abide by any orders that the Court will impose.
7. Further that it would be in the interest of justice that in dismissing this application for being premature, the Court should maintain the matter with directions been issued for the logical determination of the Appeal.
8. The application was canvassed by way of written submissions. The Applicant filed submissions on 26th April, 2024. The Respondent's Submissions are not on record.

Applicant's Submissions

9. The Applicant in his submissions relied on the case of *Protein & Fruits Processors Limited * & Another v Trust Bank Kenay Ltd* [2015] eKLR where the Cout held that under Order 2 Rule 35 of the *Civil Procedure Rules* an appeal can be dismissed before directions are given.
10. It was argued that the Court has wide unfettered discretion and the Applicant relied on the decision of Odunga J. in *China Road & Bridge Corporation v John Kimenye Muteti* [2019] eKLR where it was held that the Appellant had the duty to trigger the process of giving directions. The Court went on further to state inter alia that nothing bars the Court from dismissing an appeal before directions are given.
11. It was argued that despite the fact that directions had not been given, this Court can invoke its inherent powers under Section 3A of the *Civil Procedure Act* to make any orders for the ends of justice and to prevent abuse of Court and further under Article 159(2) (b) of the *Constitution* to do justice without undue delay.
12. It was submitted further that no sufficient or plausible reasons have been advanced for the delay and the delay was deliberate.

Analysis and Determination.

13. I have considered the pleadings and the parties' arguments. The sole issue for determination is whether the Application dated 4th October, 2023 has merit.
14. The Applicable law in this regard on dismissal for want of prosecution in this instant, is provided for under Order 42 of the *Civil Procedure Rules*.

Order 42 Rule 11

“ Upon filing of the appeal, the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.



Order 42 Rule 13

“Upon Notice to the parties delivered not less than 21 days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for giving directions by a judge in chamber.”

Order 42 Rule 35 (1)

“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”.

Order 42 Rule 35 (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 to the parties list the appeal before a judge in chambers for dismissal”

15. Further Section 79B of the [Civil Procedure Act](#) provides that:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”

16. The simple reading of the above provisions is that before any dismissal order can be given an appeal shall first and foremost be placed before a judge for perusal and directions are given or summarily dismissed. It is thereafter that motion to Court for dismissal for want of prosecution can be filed or alternatively the Registrar lists the appeal before a judge for dismissal for want of prosecution.

17. The Court in [Pinpoint Solutions Limited and Another v Lucy Waithiegeni Wanderi \(as the Legal Administrator of the Estate of James Nyanga Muchangi\)](#) [2020] eKLR held that:

“20. 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 fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the *Civil Procedure Rules*, 2010.

21. 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 the *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...”



18. Odunga J (as he then was) was of a contrary view in *China Road & Bridge Corporation -v- John Kimenye Muteti* (supra) held that: -

“ 19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given.....” (See also *Abraham Mukhola Asitsa -v- Silver Style Investment Company Ltd* [2020] eKLR).

19. There was zero effort from the Respondent for 2 years 10 months to prosecute the Appeal which is unreasonable and inconsiderate of the precious judicial time. It goes without saying that the Respondent would have continued being indolent were it not for the instant Application.

20. The Respondent although complied with the stay conditions imposed did nothing and rode on those orders to the detriment of the Applicant who is a successful party.

21. A party cannot file an appeal and ride on the fact that directions had not yet been given to justify his laxity and indolence. Justice delayed is justice denied.

22. I am of the similar view that, this Court can in deed invoke its inherent powers and dismiss the Appeal for want of prosecution. Despite this Court having inherent powers to make orders that would meet the ends of justice, justice demands that no one should be locked out from the seat of justice.

23. In the case of *Ivita v Kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:-

“... Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time...”

24. I have to consider the rights of each party and I am not convinced that dismissing the appeal for want of prosecution at this point would not meet the ends of justice. However, the Court can issue orders to prevent further abuse of Court processes.

25. In the upshot the Application dated 4th October, 2023 is disallowed and I order that: -

- a. The Respondent files and serves the Record of Appeal within sixty (60) days of this Ruling.
- b. The Applicant is awarded throw away costs assessed at Kshs. 20,000/= to be paid within thirty (60) days from the date of this Ruling.
- c. Failure to comply with (a) and (b) above, the Appeal shall stand dismissed.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 29TH DAY OF OCTOBER, 2024.



MOHOCHI S.M
JUDGE

