



**Directline Assurance Company Limited v Kibara & another (Suing as the
Legal Representatives of Estate of Lucy Wairimu - Deceased) (Civil Appeal
213 of 2019) [2023] KEHC 1531 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 213 OF 2019
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

IRENE NJERI WACHIRA 1ST RESPONDENT

MICHAEL MUTUNGI KIBARA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF ESTATE OF LUCY WAIRIMU -
DECEASED**

RULING

1. There are two applications pending before the court for determination. The first is the appellant's notice of motion application (hereafter referred to as "the appellant's application) dated February 22, 2021 and the second one is the respondents' notice of motion application (hereinafter referred to as "the respondents application) dated February 25, 2021.
2. The appellant's application seeks for the following orders;
 - a) Spent;
 - b) Spent;
 - c) That this honourable court be pleased to find that the condition for stay of execution issued on March 5, 2020 – namely that the sum of Kshs3,000,000/ = be deposited in joint interest earning account – has been satisfied through payment of the said sum to the respondents directly and accordingly that the stay of execution pending appeal that was issued on March 5, 2020 is in force;



- d) That the costs of this application be borne by the respondents.
3. That application is premised on the grounds on its face and further supported by the affidavit of Pauline Waruhiu, the appellant's head of legal claims. The appellant's case is that on March 5, 2020, this court delivered a ruling wherein it granted stay of execution on the judgment and decree in Mombasa CMCC No 1291 of 2018 under the condition that the decretal sum for Kshs 3,000,000/= be deposited in a joint interest earning account in the names of the advocates on record. On November 4, 2020, the appellants paid the decretal sum directly to the respondents' account but on February 17, 2021, the respondents extracted a decree for the sum of Kshs 884,263/= alleged to be the estimated balance in the lower court case. The respondents proceeded to procure the services of Messrs Makini Auctioneers to proclaim the appellant's assets in order to satisfy the alleged balance. Based on the foregoing, it is the appellant's case that the proclamation and ongoing execution by the respondents is illegal given that the condition for stay was satisfied in good faith and the same is sufficient security in this case.
 4. In response to the appellant's application, the respondents filed grounds of opposition on March 17, 2021. They termed the application as mischievous, bad in law and an abuse of the court process having been made in bad faith with the ulterior motive of frustrating the recovery of costs. For those reasons, the respondents are convinced that the appellant has approached the court with unclean hands and not deserving the orders being sought.
 5. In that connection, the appellants filed the second application dated February 25, 2021 seeking the substantive prayer that the appeal be dismissed for want of prosecution. The grounds adduced in support of the application are that the Judgment in the primary suit was for Kshs 3,000,000/= plus costs and interests; that conditional stay was granted on directions that the appellant deposits the decretal sum in joint account but instead the appellant paid the sum to the respondents directly contrary to the directions of the court. Therefore, in the respondent's view, the present appeal was rendered nugatory and there simply lies no appeal before the court.
 6. The appellant did not file any response to the respondents' application but in its submissions it has submitted on whether the appeal should be dismissed for want of prosecution.
 7. As per court's directions issued on December 3, 2019, the two applications were jointly canvassed through written submissions and as the record reflects, the appellant's submissions were filed on June 14, 2021 while those for the respondents were filed on June 16, 2021.

The Appellant's Submissions

8. The appellant submitted that its application simply seeks the court to review its judgment and find that the decretal sum paid to the respondent directly was in order and served the purpose for stay. In its view, that is a sufficient ground to allow the review of the application in terms of order 45(1) of the [Civil Procedure Rules](#). It is also the appellant's view that it was in the benefit of the respondents that the decretal sum was paid directly to them and no prejudice would be caused to them if the orders sought are granted.
9. As to whether the appeal should be dismissed for want of prosecution, the appellant relies on the provisions of order 42 rule 35(1) of the [Civil procedure Rules](#) to submit that an appeal cannot be dismissed unless directions on the appeal had been issued. Since directions are yet to be issued in the present appeal, then the appeal cannot be dismissed. These submissions are further supported with an excerpt from the case of [Panij Automobiles Ltd v Matbeka Kaluku & another](#) [2021] eKLR.



The Respondents' Submissions

10. For the respondents, their submissions are a reiteration of the averments made in their pleadings with an addition that the appellant had not established grounds for review of the court's ruling in terms of order 45 of the [Civil Procedure Rules](#) and section 80 of the [Civil Procedure Act](#).

Analysis and Determination

11. I have considered the two applications on the basis of their substance together with the respective submissions filed by the parties and the authorities relied on. The only two issues arising for determination are:-
- a) Whether the appeal can be dismissed for want of prosecution;
 - b) Whether the condition for stay of execution as directed in the ruling delivered on March 5, 2020 was satisfied; and if so,
 - c) Whether the stay granted is in force.
12. As regards the first issue, the relevant provision of law regulating dismissal of appeals for want of prosecution is order 42 rule 35 of the [Civil Procedure Rules, 2010](#) which states as follows:-
- “Unless within three months, after granting 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.
- (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.”
13. Order 42 rule 35 of the [Civil Procedure Rules](#) as reproduced above clearly envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under section 79B of the [Civil Procedure Act](#) as is envisaged in order 42 rule 11 of the [Civil Procedure Rules](#). The second scenario is that if after service of memorandum of appeal, the appeal would not have been set down for hearing for a period of one year, the registrar shall on notice to the parties list the appeal before the judge for dismissal.
14. Under the first scenario, section 79B of the [Civil Procedure Act](#) provides that the judge hearing the appeal is to peruse the memorandum of appeal and the lower court record to infer whether sufficient grounds exist to interfere with the decree. In the event the judge is satisfied that no plausible grounds exist, the appeal is to be summarily dismissed. However, the relevant aspect under section 79B is the requirement for the appellant to schedule the appeal for directions. Considering the first scenario to the facts in this appeal, the record confirms that directions are yet to be issued in this appeal and it would therefore be premature to file an application for dismissal of the appeal.
15. Turning to the second scenario under order 42 rule 35 of the [Civil Procedure Rules](#), the process for dismissal of the appeal is initiated by the deputy registrar in the event that parties fail to list the appeal for hearing within a period of one year after the memorandum of appeal has been served. In the present case, the application seeking to dismiss the appeal is not an initiative of the deputy registrar hence the second scenario under order 42 rule 35 (supra) is not relevant to the facts of this appeal.



16. In the end, it is therefore clear that the present appeal cannot be dismissed for want of prosecution in the terms presented since the conditions set under order 42 rule 35 of the *Civil Procedure Rules* for dismissal of appeals have not been met. To wit, there is no indication that directions have been issued in this appeal nor has the registrar issued notice to warrant the dismissal of the appeal.
17. The explanation by the respondents that the appeal has been spent after the appellant paid the decretal sum is also not persuasive enough to warrant the dismissal of the appeal. This is so because the release of the decretal sum to the respondent has not determined the issues raised in the memorandum of appeal and until the court renders a judgment on the same, it cannot be gain-said that the appeal is a frivolous one or has otherwise been rendered nugatory. However, the foregoing does not signify that the appeal is to be left hanging on the respondents' head forever as the same would be against the spirit of the provisions of sections 1A and 1B of the *Civil Procedure Act* that advocate for the just determination and disposal of proceedings in an efficient and timely manner. Time is therefore of essence and the court has to prescribe timelines to achieve fairness as between the parties.
18. The other issue is on whether the stay orders issued by this court to subsist until the determination of the appeal were dispensed with after the appellant paid the decretal sum directly to the respondents. While I agree with the respondents that the ruling delivered on March 5, 2020 directed the appellant to deposit the decretal sum as security in a joint interest-earning account, it has to be noted that the purpose of security is to strike a balance between the competing rights of a party to enjoy the fruits of his judgment and the right of appeal which is equivalent to the right of a party to access court and have his dispute heard and determined by a court or tribunal of competent jurisdiction. The two competing rights should not necessarily co-exist, if the successful party is paid the decretal sum and allowed to enjoy the fruits of the judgment, it does not mean that the appellant's right of appeal and access to justice is automatically determined. The competency of an appeal cannot be affected by the payment of the decretal amount pending its hearing at all. Notably, every person is entitled, as envisaged under article 50(1) of the *Constitution* of Kenya, 2010, to have a fair trial.
19. It is therefore this court's considered view that the payment of the decretal sum directly to the respondents did not alter the conditional order of stay that was issued by this court on March 5, 2020. The appellant has provided sufficient security for the appeal and should not be shut out from accessing court or having his day in court.
20. For the foregoing reasons, the upshot of this court's decision is that the respondents' notice of motion application dated February 25, 2021 is not merited and the same is hereby dismissed. Subsequently, the appellant's application dated February 22, 2021 is hereby allowed to the extent that an order issued confirming that the conditional order for stay was sufficiently met and the stay of execution pending appeal that was issued on March 5, 2020 remains in force.
21. To progress this matter further, the appellant is hereby directed;-
 - a. To file and serve the record of appeal within thirty(30) days from date of this ruling;
 - b. Prior to the expiry of the set timeline, the appellant shall cause the matter to be mentioned before the deputy registrar within 14 days from today to confirm whether the proceedings of the lower court and the lower court file have been placed in the file herein;
 - c. And if in any event the appellant shall have failed to file the record of appeal as aforesaid or caused the matter to be mentioned before the deputy registrar, the



appeal herein will stand as automatically dismissed at the lapse of thirty (30) days hereof.

22. Costs of the two applications shall lie in the outcome of the appeal.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Achieng counsel for Appellant/Applicant

M/S Wanyama counsel for Respondent

Court Assistant – Simon

