



**Kenya Power & Lighting Company Limited v Wasike (Civil Appeal  
557 of 2016) [2023] KEHC 1084 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1084 (KLR)

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

**CIVIL**

**CIVIL APPEAL 557 OF 2016**

**JN MULWA, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT**

**AND**

**JOSEPH SIMIYU WASIKE ..... RESPONDENT**

**RULING**

1. By an application dated 21<sup>st</sup> August 2019 the Appellant Kenya Power & Lighting Company Limited approached this court, under provisions of Order 42, Rule 11, 13, (4) and 35 (1) & (2) of the *Civil Procedure Rules* and Article 159 (2) of *the Constitution* for orders that: -
  1. Spent
  2. Spent
  3. That the appeal be set down for directions
  4. ....
  5. That the Deputy Registrar be directed to list the appeal for dismissal for want of prosecution.
  6. That the decretal amount deposited in court be released to the Respondent /Applicant
  7. That costs of the application be borne by the Appellant.
2. The supporting affidavit is sworn by Joseph Simiyu Wasike the Respondent herein on the 21<sup>st</sup> of August 2019, and a further affidavit on the 20<sup>th</sup> of January 2020.

In opposing the application, Henry Macharia an Advocate having conduct of the suit on behalf of the Respondent swore the replying affidavit on the 18<sup>th</sup> of November 2019



Oral arguments were thereafter tendered before the court.

The court has considered the above as well as the genesis of the application.

3. Judgment by the trial court Nairobi CMCC No. 2025 of 2011 was delivered on the 28<sup>th</sup> July 2016. The Appellant filed the appeal on the 25<sup>th</sup> August 2016 by a Memorandum of Appeal dated 24<sup>th</sup> August 2016. The Judgment sum in dispute is Kshs 300,000/- as awarded by the trial court, with costs. Execution proceedings were arrested and stayed pending hearing and determination of the appeal on the 18<sup>th</sup> of January 2017 after several attempts to execute the decree. The stay was upon the said decretal sum being deposited in court, which was done on the 18<sup>th</sup> of January 2017 vide deposit receipt number 0375120.
4. By an application dated 29<sup>th</sup> September 2017 the Respondent sought an order for dismissal of the appeal for want of prosecution. The application was heard interpartes and a ruling delivered on the 18<sup>th</sup> May 2018 (Sergon J) dismissing the application for reasons that the trial court had not supplied to the Appellant with typed proceedings and judgment despite requests, thereby upholding the Appellants reasons for not prosecuting the appeal.

Since then (18<sup>th</sup> May 2018), nothing towards prosecution of the appeal seems to have happened, up to when the present application dated 21<sup>st</sup> August 2019 was filed and served.

#### **The Application Dated 21<sup>st</sup> August 2019**

5. There are several orders sought as stated at paragraph 1 above.  
In my view, prayer 5 for dismissal of the appeal for want of prosecution is the main, as determination thereof will determine prayer number 6 and 7.
6. The Applicant's submissions as contained in the supporting affidavit which the Applicant adopted are that no steps had been taken by the Appellant for a period of three years since filing of the appeal, nor had it set down the appeal for directions as required by Order 42 Rule 35(1) of the [Civil Procedure Rules](#).
7. In response, the Appellants urged that the application was pre-mature, hopelessly defective and lacks legal foundation and therefore sought for its dismissal for the main reasons that despite requesting for typed proceedings form 2016, no proceedings have been provided. It is a further argument that the Respondent too has an option to set the appeal down for hearing citing provisions of Order 42 Rule 13 & 35 [Civil Procedure Rules](#).
8. In his oral submissions, the Respondent's advocate Mr Macharia told the court that they had the certified copies of proceedings, certified on the 10<sup>th</sup> of May 2021 – way after the application was filed, and sought to have the application compromised to enable them file the Record of Appeal stating that the Appellant has a right to be heard on the appeal.

#### **Analysis and Determination**

9. There is no dispute that the decretal sum of Kshs 300,000/- was deposited in court as security pending hearing and determination of the appeal filed on the 24<sup>th</sup> of August 2016. That in itself locked the Applicant out of enjoyment and use of his judgment fruits, now for about seven years. The Applicant cannot be blamed for the delay caused by the court Registry in its failure to provide the typed proceedings as captured in court's ruling dated 18<sup>th</sup> May 2018.



10. However, the court notes, and by own admission by the Appellant, that certified proceedings were supplied to the Appellant about 10<sup>th</sup> May 2021 after the application.

The question then that begs an answer is why up to the date of hearing the Application on the 21<sup>st</sup> June 2022, the Applicant had found it not fit to file the record of Appeal to progress its hearing – a period of over one year without any action at all. Has this delay or inaction been sufficiently explained by the Appellant?

11. The court in *Nzoia Sugar Company Limited Vs West Kenya Sugar Company* (2020) e KLR, the Hon. Justice Mohamed (as he then was) held that:

“...There is no set period of delay in law, so long as the delay is explained..... that there is no precise measure of what amounts to inordinate delay; inordinate delay will differ from case to case depending on the circumstances of each ....”

12. In my view, up to the date the typed proceedings were supplied to the Appellant about 10<sup>th</sup> May 2021, could be explained. But what about the one year since? The Appellant in my view fell short of any plausible reasons. No step has been taken while the Respondent continues to suffer prejudice for the Appellant’s inaction for at least one year.

13. Order 42 Rule 35 (i) of the *Civil Procedure Rules* provides:

“ 35 (1) unless within three months after giving of directions under Rule 13 the appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.” (emphasis added)

14. The above provision offers the Respondent an option to set down the appeal for directions if the Appellant does not. It is the Appellant who clearly has the onus and duty to set its appeal for directions. The Respondent is at liberty meaning it is not mandatory for the Respondent to take any action. Indeed, the Respondent took the second option to apply for dismissal for want of prosecution.

15. The Court of Appeal decision in *Peter Kipkurui Chemoiwo Vs Richard Chepsergon* (2021) e KLR when the Learned Judges discussed the application of Order 42 Rule 35 (1) *Civil Procedure Rules* dismissing an appeal filed in 2012 where the Appellant took no action to prosecute the appeal, thus denying the Respondent use and enjoyment of the fruits of his judgment. In the same breath, the court of Appeal in *Airtel Networks Kenya Limited Vs – Nyutu Agrovet Limited* (2021) e KLR, in similar circumstances held that

“The courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of Justice require them to do so.”

16. Further the court observed in *Winnie Wanjiku Mwai Vs Attorney General & 3 others* in Nairobi High Court Constitutional & Human Rights Division Petition Number 522 of 2015 that:

“With regard to dismissal for want of prosecution, there indeed are no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by



the delay with attention being paid to the reasons for the inactivity and there is no credible excuse. The inference is that the delay is inexcusable”

17. The classic test suit *Ivita Vs Kyumbu* (1984) KLR 441 set the principles in respect to dismissal of suits for want of prosecution. (including appeals) – to paraphrase that either:

“That justice delayed without explanation is denied and delay defeats equity; that discretion must be exercised on the basis that it is in the interest of justice regard to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting this suit inordinate, unreasonable, in excusable and is likely to cause serious prejudice to the defendant on account of that delay...”

18. In addition, in the matter of *Mwangi S Kaimenyi Vs Attorney and another*, Misc. Civil Suit No. 720 of 2009, the court restated the test as follows:

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following Issues:

- I. Whether the delay has been intentional and contumelious.
- II. Whether the delay is inordinate and inexcusable
- III. Whether the delay is one that gives rise to a substantial risk to fair trial, or causes serious prejudice to the defendant and
- IV. What prejudice will the dismissal cause to the Plaintiff? By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of both parties”

19. Upon examination of the tests set by the Court of Appeal in the decisions I have cited, there is no doubt that the Appellant has been indolent, and at all times waited for the Respondent to move the court for progression of the appeal.

20. It is trite that a case, including an appeal belongs to the Plaintiff (Including an Appellant) and at no time should the Appellant be pushed to take action unless it so wishes as ably stated under Order 42 Rule 35 (1) *Civil Procedure Rule* where it clearly states the Respondent shall be at liberty.....

21. To that extent then, this court finds and holds that the failure by the Appellant to take the necessary steps to progress the appeal, more so after the certified proceedings of the trial court were provided leaves the Appellant without any reasonable or excusable reasons for its indolence, which for all purposes and intent have caused serious prejudice to the Respondent. There is no justice in my view, that can be done to salvage the appeal despite the Appellants failures and inexcusable delay.

22. For the above reasons, the Respondent’s application dated 21<sup>st</sup> August 2019 succeeds.

Consequently, the following orders do issue:

1. That the Appeal is hereby dismissed for want of prosecution.
2. That the decretal amount deposited in court, in the sum of Kshs 300,000/- vide receipt number 0375120 on the 18<sup>th</sup> of January 2017 by the Appellant be released to the Respondent, Joseph Simiyu Wasike, through his Advocates forthwith.



3. That interest on the decretal sum does accrue at court rates from the date of the judgment on the decretal sum together with costs as directed by the trial court in its judgment dated 28<sup>th</sup> July 2016.
4. That costs of this application shall be borne by the Appellant.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**J. N. MULWA**

**JUDGE**

