



REPUBLIC OF KENYA



**Owuor v Modern Coast Express Limited (Civil Appeal E262 of 2021)  
[2023] KEHC 3793 (KLR) (Civ) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3793 (KLR)

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

**CIVIL**

**CIVIL APPEAL E262 OF 2021**

**AA VISRAM, J**

**APRIL 28, 2023**

**BETWEEN**

**BONIFACE GABRIEL OWUOR ..... APPELLANT**

**AND**

**MODERN COAST EXPRESS LIMITED ..... RESPONDENT**

**RULING**

1. This ruling relates to the applicant's notice of motion dated November 4, 2022, seeking the following orders:-
  - a) That this suit be dismissed for want of prosecution.
  - b) That the costs of this application and of the entire appeal be awarded to the respondent/applicant.
2. The application is premised on the grounds on the face of the application and the further grounds set out in the supporting affidavit of Boniface Gabriel Owuor, sworn on November 4, 2022.
3. The applicant deponed that judgment was entered against the respondent on April 16, 2021. Following the same, the respondent filed its Memorandum of Appeal on May 17, 2021, and since then, it has failed to take any further action to prosecute its appeal, which is a period of over 17 months to date.
4. The applicant submitted that the respondent's excuse that it could not obtain typed proceedings from the lower court has not been evidenced and has no basis.
5. The applicant relied on the decision of the Court of Appeal in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR in support of its submission that the principles that the court ought to be



guided by in the present application are: whether the delay in prosecuting the appeal is inordinate and is inexcusable; and if so, whether the delay can be excused and justice can be done despite the delay.

6. The respondent opposed the application vide a replying affidavit sworn by Mr. Victor Ng'ang'a on February 1, 2023. Mr. Ng'ang'a deponed that the delay was not inordinate, and that the same had not been occasioned by the appellant, but rather, was the fault of the lower court, which had not caused the proceedings to be typed.
7. The respondent submitted that under order 42, rule 35 which is the governing provision in the present application, directions ought to have been given as provided under section 79B of the Civil Procedure Act. Because no such directions had been made so far, the appeal was not yet ripe for dismissal for want of prosecution.
8. In support of the above argument, the respondent relied on several decisions of the High Court of Kenya, including: Jurgen Paul Flach v Jane Akoth Flach, Nakuru Civil Appeal No. 119 of 2012 and Kirinyaga General Machinery v Hezekiel Mureithi Ireri [2007] eKLR, where the court reiterated the principle that before a respondent can move the court either to set the appeal down for hearing, or to apply for dismissal for want of prosecution, directions ought to have been given as provided in Rule 8B.

### **Analysis and determination;**

9. I have carefully considered the ground on the face of the Notice of Motion, and further grounds set out in the affidavit in support of the application. I have also considered the opposition to the same as stated in the replying affidavit with the exhibits attached thereto, and the rival written submissions of the respective parties.
10. The issue is whether or not the appellant's appeal ought to be dismissed for want of prosecution?
11. Order 42, rule 35 of the *Civil Procedure Rules*, 2010 provides for the circumstances and manner of dismissal of an appeal as follows:
  - “(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.
  - (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.”
12. From the foregoing, it is clear that there are two scenarios when an appeal may be dismissed for want of prosecution. The first scenario is where the appeal has not been listed for hearing within three months after directions have been made under order 42 rule 13 and; secondly, if after one year since the service of memorandum of appeal, the appeal has not been listed for hearing.
13. In deciding the prayer for dismissal, I am guided by the principles aptly summarized in the case of Ivita v Kyumbu [1984] KLR 441 thus:
  - “The test by the court in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will



not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

14. It is clear from the reading of order 42, rule 35 that an application for dismissal for want of prosecution should only be made where the court has admitted an appeal, provided directions, and if after three months no action has been undertaken by the appellant. It is clear from the record that no directions have been made by a Judge in respect of the current appeal.
15. Be that as it may, this court has stated it the past, and I am of the view that it is ordinarily an appellant’s responsibility to pursue his or her appeal. This includes setting down the appeal for directions and complying with court orders relating to time lines. In this regard, my brother Odunga J (as he then was) in the High Court decision of *China Road & Bridge Corporation v John Kimenyi Muteti* [2019] eKLR held that; -

“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).
16. Based on the above authority, I am of the view that even where no directions have been given, this court still has discretion to dismiss an appeal if the appellant is blameworthy.
17. Based on the chronology of events, it is apparent that the respondents filed their Memorandum of Appeal on May 17, 2021. The record shows that on September 6, 2021, the Deputy Registrar - Civil wrote to the parties with a copy to the appellant’s advocates, stating that it had received the original case file and two certified copies of proceedings, ruling, and judgment for the appellant’s further necessary action.
18. Once again, on September 19, 2021, the Deputy Registrar issued a Notice to the appellant’s advocates notifying the appellant that the lower court file had been received by the High Court; and further, directing the appellant to file its record of appeal within 21 days, failure to which, the appeal would be placed before a judge for dismissal.
19. The chronology of events as stated above demonstrate clear laxity on the part of the appellant. If it was desirous of prosecuting its appeal, it would have acted after the said Notice. It is evident that it had no intention to do so until the present application was filed.
20. Based on the chronology of events as stated above, I am not persuaded that the appellant’s reasons for delay are excusable because the lower court file and typed proceedings were available to the appellant from as early 6<sup>th</sup> October, 2021. The appellant knew this, or ought to have known this because it had been notified on two separate occasions. In spite of this, it still failed to take steps to prosecute its appeal. This is not acceptable.
21. Further to the above, I have considered the various letters marked as exhibits, and the attached appellant’s replying affidavit as evidence of its efforts to follow up on the typed proceedings on three separate occasions. I noted with concern, several red flags in relation to the said evidence. First, none of the letters have been signed. Second, none of the letters have been stamped as having been received



by the Registry. It is impossible for this court to discern who the author of those letters are, and who, if anyone, received the said letters. In the circumstances, I do not think the said exhibits are of any probative value.

22. Applying the test set out in Peter Kipkurui Chemoiwo supra and Ivita supra and based on the reasons set out above, I am satisfied that the period of delay was prolonged and that the reasons for delay are not excusable.
23. On the limb relating to prejudice, and whether justice can be done, I am of the view that the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a higher court. In balancing these rights, I do not think a party may sit on its appeal and take cover behind the duties of the Registry. This is especially the case when the Registry was not be blame for the delay in the first place. Accordingly, on the issue of prejudice, I am persuaded that the scales tip in favour of the applicant.
24. Based on the reasons above, I am satisfied that the Notice of Motion application dated November 4, 2022 is with merit. The orders of this court are as follows:
  - a. The appellant's appeal is dismissed for want of prosecution.
  - b. The costs of this application are awarded to the applicant.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL 2023**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

.....for the Appellant

.....for the Respondent

