



REPUBLIC OF KENYA



**Kisumu Teachers Investment Ltd v Xerographics Ltd (Civil Appeal
E023 of 2021) [2023] KEHC 3653 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E023 OF 2021**

JN KAMAU, J

APRIL 26, 2023

BETWEEN

KISUMU TEACHERS INVESTMENT LTD APPELLANT

AND

XEROGRAPHICS LTD RESPONDENT

*(Being an appeal from the Ruling of Hon R.K. Ondieki (SPM) delivered at
Kisumu in Chief Magistrate's Court Case No 429 of 2019 on 9th March 2021)*

RULING

Introduction

1. In its Notice of Motion dated March 25, 2022 and filed on March 28, 2022, the respondent sought orders for the dismissal of the Appeal herein for want of prosecution.
2. Paul Ouma Adwar, a Director at the respondent swore an affidavit in support of the said application on March 25, 2022. The respondent averred that the appellant filed a Memorandum of Appeal dated March 11, 2021 after being dissatisfied with the Ruling by Hon R. K. Ondieki that was delivered on March 9, 2021. It asserted that the appellant filed an application dated April 19, 2021 seeking an order for stay pending the hearing of the Appeal which was allowed on May 4, 2021.
3. It averred that the appellant had made no effort to prosecute its Appeal even after the case was mentioned before the Deputy Registrar on October 13, 2021, February 15, 2022 and on March 24, 2022. It pointed out despite having been duly served, the appellant did not appear physically, virtually or send a representative on the aforesaid dates and had also failed to explain what efforts it has made to set the appeal process in motion.
4. It contended that it stood prejudiced if the appeal process was not concluded and the hearing of Kisumu CMCC No 927 of 1998 is not fast-tracked. It added that the appellant was using the appeal



herein as a ploy to delay the hearing and determination of Kisumu CMCC No 927 of 1998. It asserted that on March 24, 2022, the Deputy Registrar directed it to move this court vide this application for purposes of dismissal of the appeal for want of prosecution.

5. In opposition to the repondent's application, on September 22, 2022, Hezekiah Ochilo swore a replying affidavit on behalf of the appellant herein. The same was filed on September 26, 2022.
6. The appellant admitted that it filed the Appeal herein and contended that despite its advocates having applied and paid for certified copies of proceedings and Ruling on March 15, 2021, the court had never notified if the typed proceedings and Ruling were ready to enable it file a Record of Appeal. It termed the repondent's application as bad in taste, premature and frivolous.
7. The repondent's Written Submissions were dated October 7, 2022 and filed on October 14, 2022. The appellant did not file any Written Submissions. This Ruling is therefore based on the repondent's Written Submissions and the appellant's Replying Affidavit only.

Legal Analysis

8. The repondent placed reliance on the case of *Peter Kipkirui Chemoiwo vs Richard Chepsergon* [2021] eKLR where it was held that there was nothing to show that the appellant had any cogent explanation for the delay in prosecuting his appeal and that the repondent had been denied the fruits of his judgment for so many years and was bound to suffer more prejudice than the appellant in the circumstances.
9. It asserted that the appellant's replying affidavit did not respond to the issues it had raised in its application. It argued that save for the letter dated March 15, 2021 that the appellant filed, the appellant failed to attend court on several occasions to explain the steps it had taken to prosecute its Appeal. It contended that the delay in prosecuting the matter was inordinate, unexplained, inexcusable, an abuse of the court process and prejudicial to it and thus urged this court to allow its application.
10. Notably, Order 42 Rule 35 (1) of the *Civil Procedure Rules* stipulates as follows:-

“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 repondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution”.
11. In addition, Order 42 Rule 35 (2) of the *Civil Procedure Rules* stipulates as follows:-

“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. Order 42 Rule 35 of the *Civil Procedure Rules*, 2010 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*, 2010. The second scenario is that, if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.



13. Section 79B of the [Civil Procedure Act](#) cap 21 (Laws of Kenya) provides as follows:-

“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”.

14. It is evident from the provisions of section 79B of [Civil Procedure Act](#) that a judge has to peruse the appeal before he can summarily reject the same.

15. The appellant is required to move the judge as contemplated in Order 42 Rule 11 of the [Civil Procedure Rules](#) that states as follows:

“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”.

16. Order 42 Rule 13 of [Civil Procedure Rules](#) provides as follows:-

1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
Provided that—
 - i. a translation into English shall be provided of any document not in that language;



- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).
17. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the [Civil Procedure Rules](#).
18. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the [Civil Procedure Rules](#).
19. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the [Civil Procedure Rules](#). However, this procedure does not seem to be strictly followed and differs from one court to another. In the instant case, a reading of the record does not show whether or not the appeal herein was admitted.
20. Having said so, it is important to point out that under Order 42 Rule 13 (4) of the [Civil Procedure Rules](#), the judge shall not allow a matter to proceed for hearing unless the record of appeal is duly filed.
21. Once directions are given under Order 42 Rule 13 of [Civil Procedure Rules](#) and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the [Civil Procedure Rules](#) or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of [Civil Procedure Rules](#).
22. 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.
23. This court took the view that an appeal could not 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](#), consequently the same could not be dismissed under Order 42 Rule 35(2) of the [Civil Procedure Rules](#). In any event, 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 provided under the aforesaid Rule.
24. Notably, every person is entitled as envisaged under article 50(1) of the *Constitution of Kenya, 2010* to have a fair trial. The said article 50(1) of [Constitution of Kenya](#) provides as follows:-

“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.”
25. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, 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 court or tribunal of competent jurisdiction.
26. It was therefore the considered opinion of this court that allowing the present application would be shutting out the appellant from accessing the court and would be contrary to article 50(1) of the [Constitution of Kenya](#).



Disposition

27. For the foregoing reasons, the upshot of this court's decision was that the respondent's Notice of Motion application dated March 25, 2022 and filed on March 28, 2022 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
28. To progress this matter further, the appellant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the appellant shall have failed to file its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.
29. Since the appellant does not have control of the typing of proceedings and placing of the lower court file, the Registrar of High Court Kisumu be and is hereby directed to facilitate the typing of said proceedings and placing of the said lower court file within ninety (90) days from date of this Ruling.
30. This matter will be mentioned on September 27, 2023 to confirm compliance and/or for further orders and/or directions.
31. Costs of the application herein will be in the cause.
32. Either party is at liberty to apply.
33. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2023

M. S. SHARIFF

JUDGE

