



**Cannon Assurance Company Limited v Maina (Civil Appeal
22 of 2020) [2023] KEHC 19056 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19056 (KLR)

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

**CIVIL
CIVIL APPEAL 22 OF 2020**

DO CHEPKWONY, J

MAY 25, 2023

BETWEEN

CANNON ASSURANCE COMPANY LIMITED APPELLANT

AND

ERIC MAINA RESPONDENT

*(An appeal from the Ruling of the Hon. D. M. Mbeja, Senior Resident Magistrate
delivered on 10th January, 2020 in Milimani Chief Magistrate's Civil No.2387 of 2019)*

RULING

Introduction

1. In its Notice of Motion dated May 18, 2021 the Respondent/Applicant has sought orders that:-
 - a) The Honorable Court dismisses the Appellant's Appeal for want of prosecution being the instant suit against the Respondent;
 - b) The Deputy Registrar lists the Appeal before a Judge in Chamber for dismissal for want of prosecution; and,
 - c) Costs be awarded to the Respondent/Applicant in the Appeal.
2. The Application is based on the grounds that the Appellant has failed to take the steps to prosecute the Appeal for a period of over one year which delay is intentional, inordinate and inexcusable on the part of the Appellant as they have not shown any reason for the same. That as a result of the delay in having the appeal prosecuted, the Respondent/Applicant continues to suffer unnecessarily, and delayed in enjoying the award given by the Honorable Magistrates Court.



3. The Application is supported by the sworn Affidavit of Musili Mbiti dated May 18, 2021 which maintains the same grounds as advanced on the face of the application and add that the Appeal is an abuse of the court process which should be dismissed with costs in the interest of justice as the same is not made in good faith.
4. The Application was canvassed by way of written submissions wherein it is stated that the Applicant herein filed a suit in Milimani CMCC No 3178 of 2016 and on July 11, 2018 obtained Judgment in his favor against the Appellant's insurer. The Applicant denotes that the said Judgment went unsettled hence a declaratory suit being Milimani CMCC No 2387 of 2019 was filed against the Appellant as per Section 10(1) of Motor Vehicles Third Party Insurance Act. That a ruling was delivered in which the Appellant's statement of defense was struck out and Judgment entered declaring the Appellant liable to satisfying the Judgment in Milimani CMCC No 3178 of 2016. Being dissatisfied with the Ruling delivered on June 10, 2019 by Hon DO Mbeja (SRM), the Appellant instituted this appeal.
5. However, since filing the Memorandum of Appeal on January 17, 2020 the Appellants have not prosecuted or taken any steps to prosecute this appeal.
6. The Respondent vide a Relying Affidavit dated March 4, 2022, the Respondent deposed that the delay in filing the Record of Appeal has been occasioned by a delay in preparing the typed and certified proceedings from the lower court. The Respondent maintains that constant follow ups from the registry have borne no fruits as the file cannot be traced hence the delay in the prosecution of the Appeal is not its fault. The Respondent then requests the court to dismiss this Application and the lower court be compelled to hasten the finalization of having the proceedings typed and certified to enable the determination of the Appeal to its conclusion.

Analysis and Determination

7. I have considered the application herein together with the Supporting Affidavit. I have also considered the grounds of opposition filed by the Respondent herein and the Respondent's Replying Affidavit. Further, I have read through the submissions filed and considered the applicable statute and case law. To determine an application in dismissal of an appeal for want of prosecution, the governing law is provided for under Order 42 Rule 35 of the Civil Procedure Rules and which is the provision under which the instant application is brought.

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 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) of the Civil Procedure Rules goes on to state that:-

“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”.

8. From these provisions, the principles to be considered in an application for dismissal of an appeal for want of prosecution have been set out therein. The same were restated by the Court of Appeal in the case of Peter Kipkurui Chemoiwo v Richard Chepsergon [2021]eKLR and they include whether the



delay is prolonged and inexcusable, and if it is, whether the delay can be excused and whether justice can still be served despite the delay.

9. Where there are sufficient reasons, the court has discretionary powers as bestowed on it by the provisions in the *Civil Procedure Act* and the Rules to dismiss an appeal for want of prosecution, even where directions have not been given. In the case of *China Road & Bridge Corporation v John Kimenye Muteti* [2019]eKLR, it was 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.....”

10. As such, where the Appellant files an appeal and goes to sleep, this court can use its discretion to make such orders as it may deem fit for justice to be served or to prevent abuse of the court process and further the provisions of Article 159(2) (b) of the *Constitution* to do justice without undue delay. This is notwithstanding that directions have not been given in the matter. Indeed a delay of two years, 4 months inordinate. The Respondent has explained that the delay on failure to be provided with the original record of proceedings in the Registry, which has not been rebutted.
11. Having found as above, the court is of the considered view that justice can still be done despite the delay as dismissal of a matter before party is substantively heard is denial of justice. It is pertinent that all parties in a dispute be accorded fair trial.
12. In this regard, I allow the application and make the following orders;
- a. The Deputy Registrar to follow up, call for and avail the original record of proceedings within 30 days from the date of the Ruling.
 - b. The Appellant to prepare, file and serve a record of Appeal within 30 days from the date of the original record being availed.
 - c. Mention on June 26, 2023 before the Deputy Registrar for further directions.
 - d. Failure to comply with direction No (c), the appeal to be dismissed with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Martin

