



Gatheru v Chege (Civil Appeal 7 of 2020) [2023] KEHC 20953 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 7 OF 2020
CW GITHUA, J
JULY 26, 2023**

BETWEEN

JOSEPH GITHANGA GATHERU APPLICANT

AND

MICHAEL NGARIYU CHEGE RESPONDENT

RULING

1. In the Notice of Motion dated March 6, 2023, the applicant Joseph Githanga Gatheru (the appellant) sought for reinstatement of his appeal which was dismissed for want of prosecution on January 17, 2023.
2. The application is premised on the grounds stated on its face together with the supporting and further affidavits sworn by Ms. Naomi Achieng, learned counsel for the applicant on March 6, 2023 and 3rd April 2023 respectively. In the supporting affidavit, learned counsel deposed that the applicant filed his appeal on July 14, 2020 and served the respondent with the memorandum of appeal on June 27, 2022. She explained the reason for delay in prosecuting the appeal by averring that the delay was caused by the trial court's failure to supply the appellant with typed copies of its proceedings, judgement and decree; that on June 24, 2022, the appellant wrote to the trial Court's Executive Officer seeking his intervention in fast tracking supply of the typed proceedings and decree and despite subsequent follow up with the registry, the same had not been supplied by the time the appeal was dismissed on January 17, 2023.
3. The deponent further asserted that the appeal was dismissed under order 42 rule 35 of the *Civil Procedure Rules* (CPR) before directions on the hearing of the appeal had been issued and before a notice to show cause why the appeal should not be dismissed for want of prosecution was served upon him. The appellant asserted that he has always been keen to prosecute his appeal and that the delay in doing so was not intentional and was beyond his control.



4. The application is opposed by the respondent vide a replying affidavit sworn on 27th March 2023 by Mr. Jeremiah Mbuthia, learned counsel for the respondent. In his affidavit, Mr. Mbuthia deposed that the respondent has never taken any action towards prosecuting his appeal since it was filed and that the undue delay was intentional and was meant to deny the respondent from enjoying fruits of his judgement.
5. It was further contended on behalf of the respondent that the prolonged delay in prosecuting the appeal was not justified given that the appellant requested for copies of proceedings, judgement and decree 2years and 2months after the Memorandum of Appeal was filed and the allegation that he had made several attempts to follow up with the registry on the matter was false since it had not been evidenced.
6. In addition, the respondent averred that the appellant only showed interest in the appeal when it was dismissed as despite being served with an application filed by the respondent dated 16th June 2022 seeking dismissal of the appeal for want of prosecution, he never attended the court to oppose the same. It was the respondent's case that the application should be dismissed with costs for lack of merit.
7. In her further affidavit sworn in response to the respondent's replying affidavit, Ms. Achieng denied that the applicant was served with the respondent's application dated 16th June 2022.

She averred that the appellant was now in possession of the typed proceedings and judgment of the trial court and was only awaiting the signing of the decree; that if the appeal was reinstated, the appellant was ready to file his record of appeal after 21 days and it was in the interest of justice that the application be allowed.

8. The application was canvassed by way of written submissions. The applicant's written submissions were filed by his advocates Ms. J.K kibicho & Company Advocates on the 22nd of May, 2023 while those of the respondent were filed by Ms. J.M Mbuthia & Company Advocates on 14th June 2023.

1. In their rival written submissions, learned counsel for the parties re-iterated and expounded on the positions taken by their respective clients as reflected in the affidavits sworn in support and in opposition to the application which are summarised above.

2. I have carefully considered the application, the submissions filed

on behalf of the parties as well as all the authorities cited. Having done so, I find that the only issue for my determination is whether the applicant has established sufficient cause to justify the exercise of this court's discretion in his favour by reinstating his appeal as sought.

Order 42 rule 35 of the [Civil Procedure Rules](#) which deals with dismissal of appeals for want of prosecution states 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.

11. The above provision contemplates two scenario's in which an appeal can be dismissed for want of prosecution. The first one is, if within three months after directions are given, the appellant does not



fix the appeal for hearing, the respondent has an option of either setting down the appeal for hearing or applying to the court to have the appeal dismissed for want of prosecution.

The second scenario envisages a situation where the appeal is not set down for hearing for over a year after service of the memorandum of appeal. In such a case, the registrar shall on notice to the parties list the appeal before a judge for dismissal.

12. In this case, it is not clear from the proceedings of 17th January 2023 whether the appeal was dismissed under order 42 rule 35(1) or order 42 rule 35 (2) but whichever the case, it is clear that directions on the disposal of the appeal had not been issued before the appeal was dismissed. I agree with the respondent's submissions that even if directions had not been issued, the court had inherent jurisdiction to dismiss an appeal for want of prosecution if it was satisfied that there was prolonged and unjustified delay in prosecuting the appeal and that the delay was deliberate and was aimed at defeating the course of justice.
13. That said, my perusal of the court record and the depositions made by the parties in support and in opposition to the application leads me to conclude that there has been inordinate delay in the prosecution of this appeal which has not been adequately explained. For instance, the appellant has not explained why it took him about two years to serve the respondent with the memorandum of appeal and to write to the lower court's Executive Officer to follow up on the supply of the trial court's typed proceedings, judgement and decree.
14. I have taken note of the fact that this appeal was filed on 14th July 2020 about three years ago and by the time it was dismissed, the appellant had not even taken the initial step of filing the record of appeal. The claims that he had made several efforts to follow up on the issue of supply of typed copies of the lower court proceedings to enable him file the record of appeal has not been substantiated by any evidence. The appellant has however maintained that he is interested in pursuing his appeal and will file the record of appeal in 21 days if the appeal was reinstated.
15. In applications of this nature, the court is called upon to weigh the competing interests of both parties and to make a decision that best serves the interests of substantive justice. The court is alive to the fact that being aggrieved by the trial court's decision, the applicant had a right to be facilitated to exercise his constitutional right of appeal. On the other hand, the respondent being the successful party in the lower court had a right not to be unduly delayed before enjoying the fruits of his judgement.
16. In weighing and balancing the interests of the parties, the court is enjoined to consider the prejudice each party was likely to suffer if the application was decided one way or the other. In my view, if the application was allowed, the respondent was not likely to suffer any prejudice that cannot be ameliorated by an award of costs. But if the application was dismissed, the appellant will definitely suffer grave prejudice as he will be denied the right to be heard on appeal which will violate his constitutional rights under article 48 as well as article 25 and article 50 (1) of *the Constitution* which guarantees to all persons access to justice and the right to a fair trial.
17. In view of the foregoing, I am persuaded to allow the application but on conditions which will ensure that the appellant does not go back to sleep after the appeal was reinstated. Consequently, I exercise my discretion and allow the application as prayed but on the following conditions:
 - i. The appellant shall file and serve his record of appeal within 30 days of today's date.
 - ii. The appellant shall thereafter take all necessary steps to ensure that the appeal was prosecuted within six months of expiry of the time limited for filing and serving the record of appeal.
 - iii. In default of compliance with any of the above two conditions, the appeal shall stand dismissed with costs to the respondent for want of prosecution.



18. Costs of the application are awarded to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26TH DAY OF JULY 2023.

C.W. GITHUA

JUDGE

In the presence of:

Ms. Rigaga for the Appellant

Mr. Mbuthia for the Respondent

Mr. Quinteen: Court Assistant

