



**Kenya Power & Lighting Co Ltd v Gacucu & another (Suing as
Legal Representative of Gideon Gacucu Ngugi - DCD) (Civil Appeal
E162 of 2020) [2023] KEHC 21151 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21151 (KLR)

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

CIVIL

CIVIL APPEAL E162 OF 2020

JN NJAGI, J

JULY 25, 2023

BETWEEN

KENYA POWER & LIGHTING CO. LTD APPELLANT

AND

ANNE NJOKI NDINGU 1ST RESPONDENT

DANIEL NGUGI GACUCU 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF GIDEON GACUCU NGUGI - DCD

RULING

1. The respondents have filed an application dated May 10, 2022 seeking for orders that:
 - (1) The appellant's appeal be dismissed for want of prosecution.
 - (2) Costs of this application as well as the appeal be awarded to the respondents.
2. The application is premised on grounds that the Appellant filed an appeal vide a memorandum of appeal dated May 7, 2020 and since then has not taken any other steps to prosecute the appeal for a period of over two years. Further that the Appellant did not comply with the directions of stay given by the trial court of depositing the decretal sum in court. That on the November 18, 2021 the respondent's advocate wrote to the appellant seeking evidence of depositing of the balance of the decretal amount but there was no response from the appellant. A letter dated 18/11/2021 was annexed to the application. It was thus contended that the appellant has lost interest in the appeal and the same should be dismissed with costs.



3. The application was opposed by the appellant vide the replying affidavit of their advocate, Kennedy Modi. Counsel deposed that they applied for decree in the matter in October 2021 and only managed to obtain it on the May 19, 2022. That the COVID 19 challenges delayed the processing of the decree and proceedings in this case. That they have since filed the record of appeal and they are ready to take directions so as to proceed with the hearing and determination of the appeal. That the Respondent will not suffer any prejudice if the appeal proceeds as they have received part of the decretal sum and the balance thereof is in joint interest earning account of the two law firms on record for the parties.
4. The application was canvassed by way of written submissions. The respondents submitted that the appeal was instituted by a memorandum of appeal dated May 7, 2020 and as at the time the respondents filed the instant application the appellant had not taken any steps to prosecute the appeal including the filing of the record of appeal. That the delay is inordinate yet there is no explanation for the delay of two years.
5. The respondents submitted that there is no evidence that the appellant has deposited the balance of the decretal sum in a joint interest earning account as no such account was opened by the advocates for the parties.
6. It was submitted that equity aids the vigilant and not the indolent. That article 159(2) of *the Constitution* provides that justice shall not be delayed. That by dragging its feet the appellant has condemned the respondent to wait for too long to know whether they shall enjoy the fruits of the trial court's judgment.
7. It was submitted that the appellant has not placed documents before the court to show why they requested for proceedings and the decree from the trial court and evidence of paying for the same. Neither have they placed before the court the certificate of delay to show when they were issued with copies of proceedings. The respondent urged the court to dismiss the appeal for want of prosecution. They relied on the case of *Eldoret Express Co. Ltd & another v Angela Nyaboke Tinga*, Nakuru HCCA No.61 of 2016 where the court while allowing an application for dismissal of an appeal for want of prosecution stated that:

“In my view the Appellant should not use compliance section 79B in situation where it is clear there is no effort to progress the Appeal is shown by the appellant. The appellant should not hide in that technically in a situation where it is clear no action has been taken by the Appellant for a long period. This appeal has been pending for about 5 years now and a response to this application was filed after 10 months. The appellant should not be allowed to hide under section 79B of the *Civil Procedure Act*. I see merit in this application and do proceed to dismiss this appeal for want of prosecution.”
8. The appellant on the other hand submitted that they filed the appeal within the stipulated time and took further steps by applying for the decree in October 2021. That the decree was not issued to them until the May 19, 2022. That the delay was as a result of COVID 19 challenges which led to the late filing of the record of appeal. That the delay was beyond their hands and is thus justifiable and excusable.
9. It was submitted that a matter cannot be dismissed for want of prosecution before directions have been taken under order 42 rule 11 of the *Civil Procedure Rules*. That in this case directions have not been taken. Therefore, that the application is pre-mature and should be dismissed. The appellant relied on the case of *John Njagi Karua v Njiru Gatumu* (2021) eKLR where the court stated that:



15. What is clear from the above therefore is that the directions as required under order 42 rule 11 and also under order 42 rule 13 of the Civil Procedure Rules 2010 were never made in this file. Under order 42 rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the appellant.
16. It is my considered opinion therefore that the application herein is premature as it was filed before directions were given as is required by the Rules.
10. The appellant urged the court to dismiss the application and allow the appeal to be heard despite the delay.

Analysis and Determination

11. The appellant in this matter filed the memorandum of appeal on the May 7, 2020. By the time the Respondent filed the instant application on the May 10, 2022, the appellant had not taken any steps to prosecute the appeal for over a period of two years. It is after the respondent had filed the application that the appellant filed the record of appeal on the July 22, 2022.

12. The principles to be considered in an application for dismissal of the suit for want of prosecution were espoused in the case of Ivita V Kyumbu [1984] KLR 441 thus:

“The test applied by the courts in the application for 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 time. It is a matter of and in the discretion of the court.”

13. In the same case it was stated that:

“...the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

(See also the Court of Appeal in Peter Kipkurui Chemoiwo –vs- Richard Chepsergon [2021] eKLR).

14. In Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR the court addressed the issue as follows:

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff’s case for want of prosecution. See the case of Ivita –vs- Kyumba (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”



15. Being an exercise of discretionary power, dismissal of a matter for want of prosecution must be done judiciously. In the case of *Alex Wainana t/a John Commercial Agencies - vs - Janson Mwangi Wanjibia* (2015) eKLR, the Court of Appeal set out the principles governing the exercise of discretion in the following terms:-

“The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of *Gatbiaka vs Nduriri* (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it.”
16. The appellant herein attributes the delay due to challenges of COVID-19 which led the trial court delaying to issue them with the decree and copy of proceedings.
17. The appellant stated that they applied for the decree in October 2021 which was about one-and-a-half years after the delivery of the judgment in April 2020. There was no explanation as to why it took them that long to apply for the decree. More so, the appellant did not indicate as to whether they applied to the trial court to be supplied with a copy of proceedings and if so, the date they so applied. Neither did they file a certificate of delay from the trial court to demonstrate that the court supplied the documents late. Taking all these into consideration, I am not convinced that the reasons given for the delay are genuine. The appellants seem to have gone to sleep after filing the appeal and were only woken up by the Respondent's application for dismissal of the appeal for want of prosecution. It is then that they came up with the excuses being given now. The reasons given for the delay are not plausible. It has not been shown that it is the trial court which was to blame for the delay. The delay is inordinate and inexcusable.
18. Despite so holding, the question is whether the respondent has been prejudiced by the delay and whether justice can still be done in the matter despite the delay.
19. The delay in hearing the appeal is for a period of two years. The appellant purports to have now filed the record of appeal. If that is so, the appeal can be heard without further delay. The respondents have not shown that they will suffer any prejudice or that justice will be compromised in any way if the appeal proceeds to hearing. In my view, they can be adequately compensated by way of costs for any delay occasioned to them.
20. The court is alive to the right of the appellant herein to exercise its right of appeal which has to be balanced with the right of the respondent/applicant to access the fruits of a lawful judgment. The court bears in mind that dismissal of a matter is a draconian act that should be done sparingly and that each party ought to be given an opportunity to be heard on the merit of its case. In view of these principles, I am inclined to disallowing the application but order the appellant to meet the costs of the application.
21. The Appellant states that they have now filed the Record of Appeal. I have perused the court file and noted that there is a purported Record of appeal received by the court on July 12, 2022. I have not seen any receipt of payment. More so, no leave of the court was sought to file the record of appeal out of time.
22. In the end, I make the following orders:
 - (1) The application to dismiss the appeal for want of prosecution is declined but with costs to the respondents/applicants.



- (2) The respondents/applicants are awarded throw away costs assessed at Ksh.10,000/- to be paid within the next 14 days from the date hereof.
- (3) The appellants to formally file and serve the Record of Appeal within the next 14 days and if they have filed and served, to exhibit evidence of payment.
- (4) Thereafter, the appeal to be listed for directions within 30 days of the new term.

23 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 25TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant/Respondent

No appearance for Respondents/Applicants

Court Assistant – Jarso

30 days R/A.

