



**Kinyua & another v Ogola (Civil Appeal E696 of 2021)
[2023] KEHC 24223 (KLR) (Civ) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24223 (KLR)

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

CIVIL

CIVIL APPEAL E696 OF 2021

AN ONGERI, J

OCTOBER 27, 2023

BETWEEN

ISOLINA KAWIRA KINYUA 1ST APPELLANT

GEORGE NDIRANGU WERU 2ND APPELLANT

AND

CHRISTIN AKINYI OGOLA RESPONDENT

RULING

1. The application coming for consideration in this ruling is dated May 23, 2023 brought under Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 2 Rule 15 (1) (c) and (d) of the Civil Procedure Rules 2010 seeking the striking of the memorandum of appeal filed herein with costs to the respondent.
2. The application is supported by the affidavit of Christin Akinyi Ogola sworn on May 23, 2023 in which it is deposed that the memorandum of appeal herein was filed on October 21, 2021 and the appellants have not yet prepared the record of appeal or list this appeal for direction for a period of well over a year. On each occasion that this matter came up for mention it was directed that the appellants advocates follow up and their responses has always been that the backlog is still affecting the progress.
3. She averred that the appellants advocates have not been truthful by alleging that they have been following up on the issue of typed proceedings because had that been the case then the trial court's file ought to have been taken to the typing pool.
4. It is evident that since the filing of the memorandum of appeal to date the appellants have not taken any practical steps towards expeditious disposal of this appeal. The appellants filed this appeal and obtained stay of execution with the aim of denying or delaying and frustrating her efforts of enjoying



- the fruits of a successful litigation. Great prejudice is being occasioned to her as she is still suffering from the effects of her injuries as a result of the accident as requires funds to access medical care.
5. The appellant's advocate Lawrence Njuguna filed a replying affidavit sworn on June 16, 2023 opposing the application in the following terms; that they complied with the stay conditions by opening a joint interest earning account in the names of both firms dated January 19, 2022. Since filing the memorandum of appeal to date the respondents have not obtained the copies of the proceedings, judgement and decree to enable them prepare the record of appeal despite numerous requests made to the registry.
 6. The parties filed written submissions which I have duly considered. The applicant submitted that the respondents have not advanced any plausible reasons as to why they have not complied with the statutory requirements pertaining to preparation of the appeal. There is no evidence or proof that the letters sent were actually received by the Executive officer or were even sent via email to the relevant departments.
 7. Further the applicants advocate has not been truthful by alleging that they have been following up on the issue of typed proceedings because had that been the case then the trial court file ought to have been taken to the typing pool and lying at the pigeon in the registry without any action being taken thereon.
 8. The applicant submitted that this matter has come up for mention 14 times and on each of these occasions the Respondent's Advocates have sought more time to prepare the Record of Appeal but have not put any efforts to expedite the disposal of this Appeal. A period of almost two (2) years has now lapsed since the filing of the Memorandum of Appeal and the Appellants have not taken any practical steps towards the expeditious disposal of this Appeal.
 9. It was submitted that the conduct of the respondent's advocate not to prepare a record of appeal when required to do so is not a technicality but rather it is indolence and omission on their part. They are enjoying a stay of execution with the aim of delaying or denying the applicant by frustrating her efforts of enjoying the fruits of her successful litigation.
 10. The respondents on the other hand submitted that they complied with the stay conditions by opening a joint interest earning account in the name of both firms dated January 19, 2022. Since filing the memorandum of appeal to date the respondents have not obtained the copies of the proceedings, judgement and decree to enable them to prepare the record of appeal despite numerous requests made to the registry at Milimani.
 11. This refusal and/or error by the registry at Milimani is occasioning great injustice to the respondent who is desirous to prosecute this appeal. The respondent therefore seeks more time to enable them prepare the record of appeal. The Respondents further rely on Article 159 (2) (d) of the Constitution which state that; 'justice shall be administered without undue regard to technicalities.'
 12. The sole issue for determination in this application is whether the memorandum of appeal herein should be struck out.
 13. The appeal was filed in 2019 and the memorandum of appeal is dated October 22, 2021.
 14. I find that there has been inordinate delay in prosecuting this appeal.
 15. Article 159 espouses that justice ought to be dispensed without undue delay.
 16. No record of appeal has been filed to this date.
 17. I dismiss this appeal for want of prosecution with costs to the respondents.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
27TH DAY OF OCTOBER, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the 1st Appellant

..... For the 2nd Appellant

..... for the Respondent

