



REPUBLIC OF KENYA



**Kan Travellers Ltd & 2 others v Nakhungu (Civil Appeal 87 of 2019)  
[2023] KEHC 27287 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27287 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 87 OF 2019  
SM MOHOCHI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**KAN TRAVELLERS LTD ..... 1<sup>ST</sup> APPELLANT**

**NORTH RIFT SHUTTLE ..... 2<sup>ND</sup> APPELLANT**

**EVANS KIPKEMBOI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MARY CARINE NAKHUNGU ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 8<sup>th</sup> March 2021 supported by the sworn Affidavit of Mary Carine Nakhungu, the Applicant moved this court seeking;
  - a. That, this Honourable Court be pleased to dismiss the instant appeal for want of prosecution.
  - b. That, costs of this application and appeal be borne by the Respondents.
2. The Application is based on the following four (4) grounds;
  - i. That, the memorandum of appeal was filed on 15<sup>th</sup> May 2019 and one year has since lapsed since it was filed.
  - ii. That, there has been no effort by the Respondents to file a Record of Appeal.
  - iii. That, the Respondents apparently no longer have conceivable interest in the appeal
  - iv. That, the continued pendency of the appeal herein remains prejudicial and vexatious to the Applicant.
3. The Applicant/Respondent submits that, the appeal was filed on 15<sup>th</sup> May 2019 four (4) earlier and that, it was not until two years later on 8<sup>th</sup> June 2021 that, the Respondents applied for certified copies



of the proceedings and judgment. No explanation has been given for such inordinate delay in applying for proceedings. The date the said request for proceedings was received by court is not Clear. Whether it was presented to court on 8<sup>th</sup> June 2021 cannot be confirmed. No receipt has been attached to confirm payment of deposit for the proceedings if at all they were ever paid for.

4. The Applicant/Respondent contends that, without such evidence, the Appellants/Respondent's assertion that they are interested and eager to prosecute this appeal cannot be true. They are just hollow statements of interest. Moreover, since 8th June 2021, nothing else has happened. No evidence has been placed before the court to show any follow-up. Where then is this interest the Appellant purports to have, demonstrated? Not at all.

5. The assertions in the Replying Affidavit that directions have not been given and therefore the Respondent's application is premature are misplaced. Order 42 rule 11 provides 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.”

6. That, it is the Appellants/Respondents duty to cause an appeal to be placed before a Judge for directions

7. That, the Appellants/Respondents cannot sit down, take no step to prosecute their appeal and only keep blame on the registrar as intimated in paragraph 9 and 41 of the Replying Affidavit.

8. Order 42 rule 13(1) enjoins the Appellant to move the court, it states:

“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 under this rule”

9. The Applicant /Respondent submits that, no evidence has been placed before the court, to demonstrate any action taken to expedite the prosecution of this appeal. Complying with stay orders doesn't touch on prosecution of this appeal. They were orders granted in the lower court and they can't be a recipe for the Appellants idling.

10. The Applicant/Respondent places reliance on the case of Peter Kipkurui Chemoiwo -Vs- Richard Chepsergon Eldoret Civil Appeal No. 58 of 2018 the Learned Judges of the Court of Appeal/stated in this appeal against dismissal forward of prosecution as follows:-

“In the end we find that there is nothing on record to show that the appellant offered any cogent explanation for the delay in prosecuting his appeal. In our view the respondent who has been denied the fruits of his judgment for so many years is bound to suffer more prejudice than the appellant in the circumstances. The ends of justice will not be served in keeping the appeal - alive when the appellant has not been interested in taking any action since filing his record of appeal on 5<sup>th</sup> July 2013 until he was prompted by the Respondent's application. That, in this authority the record of appeal had been filed but appeal not prosecuted. In the instance cause nothing has been done by the appellant for keeping it alive will -prejudice the respondent more.”

11. That Fair and expeditious disposal of cases apply to both the Appellant and the Respondent. This court has always endeavored to hear and dispose cases expeditiously and therefore any blame on the court has no substance. The Respondent cannot be held at ransom simply because stay orders were granted. She is entitled to get and enjoy the fruits of her judgment. Waiting for 4 years cannot be described as



fair and expeditious dispose of this appeal. Thus a litigant who doesn't move the court cannot claim not to have been given a fair hearing if his appeal is dismissed.

12. The Applicant humbly exhort this court to find merit in this application and dismiss this appeal with costs to the respondent.

### **Respondent's Case**

13. The Respondents/Appellants opposed the Application by filing a replying affidavit sworn by Victor Nganga dated 18th March 2023 and written submissions dated 28th May 2023
14. That, there is no likelihood that the Applicant/Respondent will suffer prejudice if any, in the event that the Respondents/Appellants are given time to prosecute their appeal to finalization.
15. That, indeed, there is no prejudice at all to be suffered by the Respondents as the conditions for stay of execution pending hearing of the appeal were fully complied with. The sum of Kshs. 484,355 was paid into a joint account and Kshs. 484,355 was paid to the Respondent's Counsel in fulfillment. The Applicant/Respondent's interests are thus secured.
16. The Respondents/Appellants aver that, they have not obtained the requisite documents in order to file their Record of Appeal and have attached evidence of follow-up.
17. The Respondents/Appellants content that, on the other hand the gist of the matter is that, the Appellants stand to suffer prejudice in the event that the appeal is not heard on merit since the Appellants would have lost their right to Appeal.
18. The Appellants appeal has merits as demonstrated in the Memorandum of Appeal, and in the event that the Appeal is not heard to completion, the Appellants stand to lose their Constitutional right to Appeal and the right to have their case heard and determined on its merits. Indeed this Court has on diverse occasions pronounced itself on striking a balance between the competing rights of the rival parties as the scenario herein.
19. In the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR the Court opined that every person is entitled as envisaged under Article 50 of *the Constitution* of Kenya to have a fair trial and held;

“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.”

20. That in view of the foregoing, it is the Respondents/Appellants submissions that the Appeal was not yet ripe for dismissal for want of prosecution.
21. The Respondents/Appellants rely on the case of *Jurgen Paul Flach Vs Jane Akoth Flach*, Nakuru Civil Appeal No.119 of 2012, the court rightly stated that where directions hadnot been issued, dismissal of an appeal for want of prosecution cannot be granted.



22. Further reliance is placed on the case of *Kirinyaga General Machinery vs. Hezekiel Mureithi Ireri* [2007] eKLR, Kasango J. ruled as follows :

“It is clearly seen from that rule before the Respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution directions ought to have been given as provided in Rule 8B. Directions have never been given in this matter.

Directions having not been given the orders sought by the Respondent cannot be entertained.”

23. That in the case of *Allan Otieno Osula vs. Gurdev Engineering & Construction Ltd* [2015] eKLR, the Court held as follows;-

“It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal...

In the circumstances, I shall invoke the overriding objective principle in Order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay that it is in the interest of justice that the appeal should not be struck out as the Respondent can adequately be compensated by an award of costs.”

24. Further in the case of *Elemn Investment Limited v John Mokora Otwoma* [2015] eKLR, Aburili J noted as follows;

...in my view, the Court will not dismiss an appeal for want of prosecution unless directions are issued.

In addition, the prejudice that the Appellant is likely to suffer if this Appeal is dismissed is likely to be graver than the prejudice that the Applicant/Respondent would suffer if the Appeal is ordered to proceed, given that the Appellant has deposited the decretal amount in Court and settled some of the undisputed costs. In arriving at that conclusion, I am enjoined by the Court of Appeal decision in *Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] | eKLR, Civil Application No. Nai. 173 of 2010 where the Court stated:

The Court has to weigh the prejudice that is likely to be suffered by the innocent party and to weigh it against the prejudice to be suffered by the offending party if the Court strikes out its document. The Court in that regard exercises judicial discretion’

... I think it would be appropriate in the wider interest of justice to allow the Appellant a chance to take appropriate steps to ensure the Appeal is set down for directions and hearing expeditiously.”

25. From the foregoing, it is clear that the Courts have been consistent when interpreting Order 42 Rule 35 and the same principle enunciated in the above cases also apply to this Appeal as directions have not been issued yet.

26. In view of the above, it is the Respondents/Appellant’s submissions that the hardship and prejudice likely to be occasioned to the Respondents/Appellant’s in this matter is greater than the hardship



- to be occasioned to the Applicant/Respondent since the Respondents/Appellant's will lose their opportunity to prosecute their Appeal and have the same determined on its merits.
27. Further, Article 159 of *the Constitution* of Kenya 2010 requires the Court to be more concerned with substance justice where possible instead of giving undue regard to technicalities and if this Appeal is not heard on merit, the Respondents/Appellant's would have been denied the benefit of substantive justice.
  28. In view of all the foregoing, it is the Respondents/Appellant's submissions that, the Appeal herein should not be dismissed and time granted to the Appellants file their Record of Appeal.
  29. Further, it is the Respondents/Appellant's submissions that. it is in the interests of justice that the Appeal is heard in the normal way with the Respondents/Appellant's being granted the chance to regularize the same so that directions may be given.
  30. The Respondents/Appellant's thus pray that the Application dated 8<sup>th</sup> March 2021 be disallowed.

### **Analysis and Determination**

31. As a general rule, appeals cannot be dismissed under Order 42 Rule 35 (1) unless directions have been given under Order 42 Rule 11 of the Civil Procedure Rules. The legal position in this respect was well articulated by Hon. Justice J. Kamau in *Pinpoint Solutions Limited and Another -vs- Lucy Waithegeni Wanderi* (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR and which decision I am fully in agreement with. The Learned Judge held that: -  

“ .....20. 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.

  21. This court took the view that an appeal cannot 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. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. 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 aforesaid...”
32. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay is not inordinate and has been explained and evidence furnished. The Appellant is not to blame for the long period it took the lower court to type and supply her with the proceedings.
33. The record of appeal has not been compiled, filed and served thus the court is inclined to exercise its discretion and allow appeal to be heard on its merit rather than dismissing it for want of prosecution.
34. It is this court's considered opinion that, the Application herein is premature as it was filed before directions were given as is required by the Rules.
35. The court notes that, the Respondent does not stand to suffer any loss, noting that part of the decretal sum is already secured by some of it being deposited in a joint account of both counsels and will in



the event that the appeal fails to be entitled to interest on the decretal sum for whatever period that the money has remained unpaid.

36. In the premises, I do find the Application dated 8<sup>th</sup> March 2021 to be without merit and to expedite the hearing of the appeal, make the following orders;

- i. The Application dated 08/03/2021 is dismissed.
- ii. The Appellant to set-down the Appeal for Directions and Hearing within the next sixty (60) days from the date hereof.
- iii. A default of directions in (ii) above shall lead to an automatic dismissal of the Appeal.
- iv. Costs shall be in the cause.

It is So Ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 30<sup>TH</sup> NOVEMBER 2023**

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**MOHOCHI S.M**

**JUDGE**

