



REPUBLIC OF KENYA



KENYA LAW
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AIPCA Nyandarua North Diocesan Committee (Through its officials namely: - Rt Rev David Kiboi Mundia (Bishop) Joseph Kimani Wakahiu (Chairman) Alfred Wachira Mugo (Secretary) Joseph Maina Ngatia (Treasurer)) v AIPCA Nyandarua North Diocesan Co (Through its officials namely: - John Maina Nyambura (Chairman) Teresia Wanjiru Kinuthia (Secretary) Monica Nyawira (Treasurer)) (Civil Appeal E007 of 2021) [2023] KEHC 27057 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E007 OF 2021
CM KARIUKI, J
DECEMBER 20, 2023**

BETWEEN

**AIPCA NYANDARUA NORTH DIOCESAN COMMITTEE APPELLANT
THROUGH ITS OFFICIALS NAMELY: - RT REV DAVID KIBOI MUNDIA
(BISHOP) JOSEPH KIMANI WAKAHIU (CHAIRMAN) ALFRED WACHIRA
MUGO (SECRETARY) JOSEPH MAINA NGATIA (TREASURER)**

AND

**AIPCA NYANDARUA NORTH DIOCESAN CO RESPONDENT
THROUGH ITS OFFICIALS NAMELY: - JOHN MAINA NYAMBURA
(CHAIRMAN) TERESIA WANJIRU KINUTHIA (SECRETARY) MONICA
NYAWIRA (TREASURER)**

JUDGMENT

1. Before the court is an application dated 18 November 2022 by the Respondents seeking orders that:-
 - i. This court be pleased to dismiss this Appeal with costs.
 - ii. That the interim orders issued on 7/10/2021 be lifted.
 - iii. That the costs of this application be provided for.

The application is supported by the affidavit of Teresia Wanjiru Kinuthia together with the grounds listed hereunder:-



- i. That the memorandum of Appeal herein was lodged at the registry on 30/4/2021 and was served upon the Respondents' advocate on 1/5/2021.
 - ii. That contemporaneous with the memorandum of Appeal, the Appellants also filed the notice of motion dated 30/4/2021 under certificate of urgency seeking for interim orders of injunction against the Respondents.
 - iii. That the court deliberated upon the said notice of motion application and delivered its ruling on 7/10/2021 whereby an interim order of injunction was issued restraining the Respondents from interfering with the running of A.I.P.C.A Kangui Local Church till the Appeal is disposed of.
 - iv. That since the filing of the Appeal on 30/4/2021, the Appellants have failed, refused and/or neglected to list the Appeal before the judge for directions as required under Order 42 Rule 11 as well as Order 42 Rule 13 (1) *Civil Procedure Rules* or at all.
 - v. That since the time this Appeal was lodged, the Appellants have failed, refused and/or neglected to compile, prepare and file the record of Appeal in preparation of prosecution of the appeal contrary to Order 42 Rule 13 (3) and (4) *Civil Procedure Rules*.
 - vi. That this Appeal has remained unprosecuted for almost 1 ½ years.
 - vii. That the delay in prosecuting this Appeal is inordinate, unreasonable, unconscionable, prejudicial to the Respondents and totally unjustified in law and policy which dictates that cases be disposed of expeditiously and disputes must have a finality.
 - viii. That the Appellants have for all that time been enjoying interim orders of injunction while ensuring that this Appeal drags on as much as possible.
 - ix. The Appeal herein is technically incapable of succeeding because the suit before the trial court from where the Appeal has been preferred was withdrawn by the Appellants themselves hence there is no substratum upon which the interim orders or any other orders can rest.
 - x. That subsistence or maintenance of this Appeal does not serve any logical/or legal purpose and it is in the interest of justice for this Appeal to be dismissed for want of prosecution.
- iv. Consequently, the Appellants filed a replying affidavit dated 27 February 2023 deponed by Charles Gakuhi Chege stating that:-
- i. That this Appeal arises from a leadership dispute that engulfed A.I.P.C.A. Kangui Local Church on account of two different factions affiliated to Archbishop Fredrick Wang'ombe and Julius Njoroge respectively which affected the running of the whole church.



- ii. That the said dispute was resolved inter-alia during the pendency of this Appeal through the intervention of the Registrar of Societies and a written agreement executed by all the parties involved.
 - iii. That the said agreement resolved all pending leadership disputes in the whole of A.I.P.C.A. Society including the one between the parties herein and any dismissal of this case sought by the Respondents will only foment a new dispute over the leadership of A.I.P.C.A., Kangui Local Church which has experienced peace ever since the ruling of this court delivered on 7 October 2021.
 - iv. That in the circumstances, this matter ought to be marked as settled in terms of annexure "CGC1" above as any dismissal thereof shall only cause instability in the church.
 - v. That in any event this Appeal is yet to be admitted to hearing and directions have not been taken and as such, it is not liable for dismissal under Order 42 Rule 35 (1) of the *Civil Procedure Rules*, 2010.
2. In response, the Respondents filed a supplementary affidavit dated 3 March 2023 sworn by Teresiah Wanjiru Kinuthia.

3. Appellants' Submissions

- 4. The Appellants reiterated that the leadership dispute herein was resolved inter alia during the pendency of this Appeal through the Registrar of Societies and a written agreement executed by all the parties. In the circumstances, the matter ought to be marked as settled in terms of annexure "C.G.C. 1" as any dismissal thereof shall only cause instability in A.I.P.C.A. Kangui Local Church.
- 5. In any event, the Appellants argued that the Appeal is yet to be admitted to hearing and directions have not been taken and as such, it is not liable for dismissal under Order 42 Rule 35 (1) of the *Civil Procedure Rules*, 2010. Reliance was placed on Nyahururu E.L.C.A. no. E016 of 2021 *Sarah Njeri Mwangi v Komito Leshomo* (unreported)
- 6. As regards costs, the Appellants stated that the same is at this court's discretion and given the fact that the instant dispute was a ripple effect of the then ongoing church leadership wrangles at the national level which were resolved in the pendency of this Appeal, they urged the court to order each party to meet its own costs of the Appeal and in the subordinate court case.

7. Respondents' Submissions

- 8. The Respondents averred that when the Appellants of their own volition withdrew their case before the Chief Magistrates Court, there was nothing that remained for which they would benefit from. Upon the withdrawal, all interim orders lapsed/collapsed and the Appellants technically had no orders in favour against the Respondents.
- 9. It was stated that upon the withdrawal of their suit the Appellants were not entitled to any relief in the form of injunctive or compulsive or restraining orders against the Respondents even in the Appeal. The reasoning is that the suit or substratum in the lower court having been withdrawn, there is no foundation or bedrock upon which the orders could stand.
- 10. That this includes orders in the appeal court which would require to stand on a case and since the original suit was dead on withdrawal there could not be interlocutory orders in the appellate court. It was argued that the Appellants are under a statutory duty to ensure that upon filing an appeal, they



will take all steps necessary to ascertain expectations prosecution or disposal of the Appeal as required by Article 47 (1) of the [Constitution](#) and Order 42 Rule 11 [Civil Procedure Rules](#).

11. The Respondents stated that the Appellant's replying affidavit does not give a satisfactory reason for the delay or failure to prosecute or dispose the Appeal. It was stated that under Order 42 Rule 13 of the [Civil Procedure Rules](#), the Appellants are mandated again to ensure that the Appeal filed is placed before the judge after issuance of not less than 21 days' notice for purposes of dealing with preliminary issues of objections and matters outlined in Order 42 Rule 13 (2) (4) [Civil Procedure Rules](#).
12. It was contended that the Appellants filed this Appeal and after getting favourable orders abandoned the same altogether. Further, that under Order 42 Rule 35 (1) [Civil Procedure Rules](#) the Respondent can apply for dismissal of an appeal if no action is taken within 3 months from the date of directions. The Appellants are obviously guilty of the provision and cannot hide under the cloak that directions have not been taken because under Order 42 Rule 11 and 13 [Civil Procedure Rules](#), they ought to have moved the court to take those directions.
13. On the assertion by the Appellants that parties had had agreed out of court on the dispute, the Respondents stated as follows
14. That there is no out of court agreement that was reached and no evidence of such agreement has been attached. The document annexed "CGC1" has no relation with this Appeal whatsoever.
15. That if indeed the out of court agreement was reached, it is not explained why the same was never filed in court to conclude or dispose this Appeal as is the practice.
16. An alleged out of court agreement to terminate the Appeal which does not involve the parties, their advocates and the court and which only creeps out of the cupboard upon filing of the Respondents' application herein is in truth not an agreement.
17. If indeed there was the out of court agreement to finalize the dispute between the parties as alleged, then why did the Appellants file the Appeal herein on 31/5/2021 when the alleged agreement appears to have been signed in 2021?
18. And assuming for arguments sake that the alleged out of court agreement is alive and valid, is the Appeal going to remain in court forever without disposal?
19. The Respondents objected the fact that the Appeal has been settled and stated that they had no objection if the Appellants were to withdraw their Appeal as they withdrew their case before the chief magistrate. They urged the court to find that indeed the Appeal has not been prosecuted and there is no candid reason for failure, and there has never been any settlement of the Appeal.

20. Analysis and Determination

21. I have considered the application, affidavits, and submissions filed. The issue for determination is whether the Appeal should be dismissed for want of prosecution,
22. Order 42 Rule 35 of the [Civil Procedure Rules](#), 2010 envisages two (2) scenarios for dismissing an appeal for want of prosecution. The first scenario is when an Appellant fail to cause the matter to be listed for directions under Section 79B of the [Civil Procedure Act](#) as is envisaged in Order 42 Rule 11 of the [Civil Procedure Rules](#).
23. The second scenario is that if after service of Memorandum of Appeal, the Appeal would not have been set down for hearing, the registrar shall on notice to the parties list the Appeal before the judge for dismissal.



24. Section 79B of the *Civil Procedure Act* provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

25. Order 42 Rule 13 of *Civil Procedure Rules* provides as follows: -

- “1) 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 giving directions by a judge in chambers.
- 2) Any objection to the appellate court's jurisdiction shall be raised before the judge gives directions under this rule.
- 3) The judge in chambers may give directions concerning the Appeal generally and in particular directions as to how the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- 4) Before allowing the Appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a) the memorandum of Appeal;
 - b) the pleadings;
 - c) the notes of the trial magistrate made at the hearing;
 - d) the transcript of any official shorthand, typist notes, electronic recording, or palantypist notes made at the hearing;
 - e) all affidavits, maps, and other documents whatsoever put in evidence before the magistrate;
 - f) the judgment, order, or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;
 - g) Provided that—

a translation into English shall be provided of any document, not in that language; the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

26. Moreover, once directions are given under Order 42 Rule 13 of *Civil Procedure Rules* and the Appellant fails to fix the Appeal for hearing, the Respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the *Civil Procedure Rules* or the registrar lists the Appeal before a judge for dismissal under Order 42 Rule 35 (2) of *Civil Procedure Rules*.



27. Order 42 Rule 35 (1) of the *Civil Procedure Rules* stipulates as follows:-

“Unless within three months after giving directions under rule 13, the Appellant 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”.

28. Further, Order 42 Rule 35 (2) of the *Civil Procedure Rules* stipulates as follows:

“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.”

29. 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.

30. Accordingly, in the instant matter, the Appellants argued that the dispute herein had already been settled out of court in the pendency of the Appeal and that the matter should be marked settled in terms of annexure "C.G.C. 1". However, I fully agree with the Respondents' assertions on this issue. Why didn't the parties file the same within the court to mark the matter as settled if such agreement was arrived at? Further, the document marked as "CGC1" seems to have been drafted in 2020, in any case before 27 November 2020, while the Appeal herein was filed on 31 May 2021, meaning that the Appellants appear to have been economical with the truth in stating that the matter settled in the pendency of the Appeal.

31. It goes without saying, and a fact that I expect the Appellants' advocate to know that settlements are arrived at between two mutually consenting parties. If the agreement herein was made in relation to A.I.P.C.A. church, including the A.I.P.C.A. Kangui Local Church, then the terms thereof should have been discussed herein, and all the parties should have been aware that the matter was indeed settled out of court, but the Respondents seem to be unaware of that position. In any case, the Appellant did not bring to the court's attention the said settlement negotiations, nor did they file the said agreement to conclude or dispose of this Appeal as is the practice. Both parties have to aid the court in meeting its overring objective.

32. Further, the interim orders issued by this court on 7th October 2021 were meant to be just that interim. They were temporary orders and not final, pending the hearing and determination of this Appeal. As it stands, the same was not done, and the Appellants' have not bothered to prosecute the Appeal after issuing those orders, and they are now asking the court to mark this matter as settled out of the blue. It appears that all the Appellants interested in were the interim orders and had been indolent in prosecuting the Appeal. Courts have previously held that they should be reluctant to give audiences to non-committed litigants and that litigation must end.

33. Notwithstanding, this court takes the view that an appeal cannot be dismissed before directions have been given. As there was no indication that directions had been given herein, the Appeal herein cannot be dismissed under Order 42 Rule 35 (1) of the *Civil Procedure Rules*. In any event, Article 50 (1) of the *Constitution* mandates the court to ensure that every party to a dispute receives a fair trial. Therefore, 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.



34. In the same breathe, I agree with the holding of the court in the case of *Pius Wanjala v Permanent Secretary, Ministry of Medical Services & 4 Others* [2021] eKLR, where the learned judge cited decision in the case of *Ivita v Kyumbu* [1975] eKLR that: -

“Justice is justice to both the plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is not an easy task for the documents, and, or witnesses may be missing, and evidence is weak due to the disappearance of human memory resulting from the lapse of time”

35. In view of the foregoing, and without condoning the Appellants' behaviour, I will give the Appellants a final chance to prosecute this Appeal, and in doing so, I make the following orders:-

- (i) The Appellants are directed to file and serve their record of Appeal within twenty-one (21) days from the date of this ruling. In the event that they fail to do so, the Appeal herein shall stand as automatically dismissed.
- (ii) The Appellants should cause the admission of the Appeal within twenty-one (21) days after filing the record of Appeal and thereafter cause the taking of directions.
- (iii) The Appellants shall meet the costs of this application assessed at ksh 7000 payable within 30days from dates herein and default execution to issue.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DAY OF DECEMBER 2023.

C KARIUKI

JUDGE

