



**Njambi v Karah & 3 others (Environment and Land Appeal
E029 of 2022) [2023] KEELC 17579 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E029 OF 2022**

MD MWANGI, J

MAY 25, 2023

BETWEEN

PETER NDAMBIRI NJAMBI APPELLANT

AND

QASIM HIRSI KARAH 1ST RESPONDENT

FARAH HASSAN ABDULLAHI 2ND RESPONDENT

AMINA ABDULLAHI 3RD RESPONDENT

MAHAMED ABUBAKAR MOHAMED 4TH RESPONDENT

*(Being an appeal against the Ruling and the orders of the Honourable Principal
Magistrate Mr E M Kagoni made on March 30, 2021 in Nairobi CMCC No 3073 of 2010)*

RULING

(In respect of the 1st and 2nd Respondent's application dated February 23, 2023 seeking that the appeal herein be marked as withdrawn.)

Background

1. This ruling is in respect of the 1st and 2nd Respondent/Applicants' application dated February 23, 2022. The application is brought under the provisions of Section 63 of the [Civil Procedure Act](#) and Order 42 Rule 11 and Rule 13 of the [Civil Procedure Rules 2010](#) seeks for orders;
 - a. That the Memorandum of Appeal dated April 7, 2022 be marked as withdrawn.
 - b. That the cost of this application and of the appeal be awarded to the Respondents.
2. The application is premised on the grounds on the face of the application. The supporting affidavit is sworn by Bryan Khaemba, Advocate for the Applicants who deposes *inter alia* that the Appellant



sought leave to file and/or lodge the appeal out of time against the decision of the lower court. The Appellant further sought stay of execution of the said orders pending the hearing and determination of the appeal. The said orders were granted vide the ruling on March 24, 2022 by the Hon Magistrate's Court. Upon filing the appeal on April 7, 2022, the Appellant has never caused the appeal to be listed for directions in contravention of the provisions of Order 42 Rule 11 of the Civil Procedure Rules. The 1st and 2nd Respondents therefore pray that the Memorandum of Appeal filed by the Appellant herein be deemed to have been withdrawn.

3. The 1st and 2nd Respondents aver that it is now more than nine months since any step was taken in this appeal leading to serious miscarriage of justice. The Respondents have been kept away from the suit property by the Appellant. No justifiable grounds have been advanced for the delay, refusal and/or neglect by the Appellant to cause the matter to be listed before a Judge for directions. They assert that the Appellant engaged in judicial lottery by obtaining the stay orders then proceeded to slumberland, to the detriment of the Respondents.
4. Both the prayers and the grounds upon which the application is brought seek to have the appeal marked withdrawn. The presumption from the reading of the application is that the order sought is one for dismissal for want of prosecution as a Respondent in an appeal cannot seek to withdraw the Appellant's appeal; he can only seek to have it dismissed for want of prosecution.
5. The application is opposed by the Appellant through the Replying Affidavit sworn on 1st March, 2023 by Patrick Kerongo, the Appellant's Advocate.

Replying Affidavit

6. The deponent deposes that the Appellant filed the present appeal pursuant to leave of the court but is yet to file a record of appeal and will file the said record as soon as certified proceedings are made available by the subordinate court. He avers that the application is incompetent and an abuse of the court process in as much as it purports to have an appeal marked as withdrawn when indeed it is not the Applicants' appeal and there is no provision in law for making such an application. The process of filing appeals as provided for under the *Civil Procedure Act* and the Civil Procedure Rules does not have provision for dismissal or withdrawal of an appeal which has not been admitted.

Court's Directions

7. The Court's directions were that the application be canvassed by way of written submissions. Both parties complied and the court has had the opportunity to read the submissions.

1st and 2nd Respondents' submissions

8. The Applicants in their submissions dated March 31, 2023 submit that the only issue for determination is whether the Appellant's Memorandum of Appeal should be marked as withdrawn. Counsel cites the provisions of Order 42 Rule 11 of the Civil Procedure Rules. He argues that the Appellant herein has a duty and an obligation to cause this matter to be listed before a Judge for directions, upon filing of the appeal. He relies on the case of *Bruce Mutie Mutuku T/A Diani Tour and Travel Center v Equity Bank Limited* [2014] eKLR, where the court expounded on the role of the Appellant to cause the Registrar to issue notices and fix the appeal for directions before a Judge.
9. Counsel submits that the Appellant has been indolent in prosecuting the appeal much to the prejudice of the Respondents. After filing the Memorandum of Appeal, he never bothered to cause the matter to be listed for directions. The lower court matter, whose orders were stayed, is in relation to a piece of land and in effect, the Applicants herein have been denied access to their land during the pendency



of the appeal. The Appellant is therefore enjoying the stay orders indefinitely by failing to prosecute the appeal.

10. Counsel urges the court not to aid the Appellant in derailing the just and expeditious disposal of the dispute between the parties. The assertion that the Appellant was waiting for typed and certified copies of proceedings of the lower court has not been substantiated. He urges the court to allow the application as prayed.

Appellant's Submissions

11. The Appellant on the other hand, in his submissions dated April 15, 2023 submits that the application is not only premature but the same is aimed at shutting him from the seat of justice. He avers that the Respondents have jumped the gun in filling the present application. The process provided for under the Civil Procedure Rules mandates the Deputy Registrar to issue a notice for compliance and for the parties to appear before the Judge for directions.
12. He cites the case of *Kinge Simon & 2 Others v Lucy Njoki Kamau* [2021] eKLR in which the court discussed the procedure and the Appellant's role before the appeal is fixed for directions. The responsibility lies with the Registrar to issue notices for directions and admission as provided for under Order 42 Rule 11 of the Civil Procedure Rules. It is only after directions have been issued and the Appellant fails to fix the appeal for hearing that the Respondent may fix the appeal for hearing or seek a dismissal of the same for want of prosecution. The Registrar can as well list the appeal before the judge for dismissal under Order 42 Rule 35(2) of the *Civil Procedure Rules*.
13. The delay in filing of the record of appeal and fixing of the appeal for hearing in any event is not the Appellant's making. The matter had in fact been fixed for Mention on April 11, 2023 before the Deputy Registrar but in view of the instant application, the Deputy Registrar could not issue directions. The Appellant therefore prays that the application be dismissed with costs.

Issues for Determination

14. Considering the application, the response by the Appellant and the submissions filed by the parties, the court is of the considered opinion that the only issue for determination in this matter is whether the Applicants have established the grounds to warrant the dismissal of the appeal for want of prosecution.

Analysis and Determination

15. Order 42, Rule 13(1) of the Civil Procedure Rules under which the application has been brought provides that: -
 1. Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
16. Rule 35(1) and (2) of the same Order provides that: -

35 (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 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.
17. From the foregoing, it is clear that there are two scenarios when an appeal may be dismissed for want of prosecution. The first scenario is where the appeal has not been listed for hearing within three months after directions have been made under Order 42 Rule 13 and; secondly, if after one year since the service of Memorandum of Appeal, the appeal has not been listed for hearing, the registrar shall issue a notice for dismissal.
18. In the case of *Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another* [2014] eKLR, the court laid down the test to be applied in dismissal of appeals;
- “The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can still 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 the discretion of the court.”
19. In this case, the Applicant have argued that after the filing of the memorandum of appeal, the Appellant/Respondent has not bothered to have the appeal listed before a judge for directions and that the delay has consequently prejudicing the Respondents. On the other hand, the Appellant has argued that the appeal had not been admitted and therefore they could not set it down for hearing. Further that he could not have proceeded with the appeal as the matter had not been listed for directions before the Honourable Judge.
20. It is clear from the reading of Order 42, Rule 35 that an Application for dismissal for want of prosecution should only be made by the Respondents after the court has admitted an Appeal, provided directions and if after three months, no action has been taken by the Appellants.
21. From the record, it is clear that there are no directions given so far in respect of the current Appeal and that the file went ‘cold’ after the delivery of the ruling for stay of execution pending Appeal. The Appellants in their response relied on Order 42, Rule 35 (2) which gives the Deputy Registrar the power to issue notice to the parties and list the matter before the Judge for directions noting that such an Application cannot be brought by the Respondent/Applicant. They also stated that the duty to list a matter for directions in accordance with Order 42 Rule 13 lies only with the Deputy Registrar therefore the same was not within their control.
22. It is true as stated by the Respondents that the duty to issue notice to the parties and of placing the file before the Judge for admission lies with the Registrar. However, it must be remembered that the appeal belongs to the Appellant. Where no action is taken, the Appellant cannot just sit there, he can prompt the Deputy Registrar to have the appeal listed for directions.
23. At the time of filing the instant application, only nine months have lapsed after filing of the Memorandum of Appeal. Directions have not been issued. Since directions, under rule 13 have not been given by the court, it follows therefore that this application for dismissal of the appeal for want of prosecution is premature. It cannot be sustained.
24. Additionally, and as I already pointed out above, the Application cannot be granted as framed.



25. I accordingly dismiss the Notice of Motion dated February 23, 2023 and hereby direct that the Appellant takes all necessary steps to set the appeal in motion forthwith. The costs of this applicant shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.

M D MWANGI

JUDGE

In the virtual presence of:

Mr Buloa holding brief for Mr Khaemba for the 1st & 2nd Respondents.

No appearance for the Appellant/Applicant.

No appearance for the 3rd & 4th Respondent.

Court Assistant – Yvette.

M D MWANGI

JUDGE

