



**Benjo (K) Limited v Gatiba (suing in his capacity as the administrator
of the estate of Geoffrey Katiba Kimani) (Civil Appeal 285 of 2018)
[2022] KEHC 3360 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3360 (KLR)

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

CIVIL

CIVIL APPEAL 285 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

BENJO (K) LIMITED APPELLANT

AND

JAMES KIMANI GATIBA RESPONDENT

**SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF
GEOFFREY KATIBA KIMANI**

RULING

1. The respondent/applicant herein, took out the Notice of Motion dated 15th November, 2021 and sought for an order to the effect that the appellants/respondent's appeal be dismissed for want of prosecution with costs and an order that half of the decretal money to be deposited by the appellant in a joint account to be released to M/s Wanyonyi & Muhia advocates and that the respondent be paid the outstanding balance of the decretal sum and any other accumulated interests from the time the suit was filed.
2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of the applicant's advocate, Salome M. Beacco
3. To resist the Motion, advocate Joyce Chichi swore a replying affidavit on 3rd March, 2022 on behalf of the respondent.
4. When the Motion came up for interparties hearing before the court on 1st March, 2022 the parties were directed to file and exchange written submissions but at the time of writing this application the parties had not filed their submissions.



5. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion.
6. The sole issue for determination before me is whether the appeal filed by the respondents is ripe for dismissal.
7. In her supporting affidavit, advocate Salome M Beacco stated that since lodging the appeal on 25th June, 2018 the respondents have not taken any steps in prosecuting the appeal for over a year and hence the same ought to be dismissed in the interest of justice.
8. She avers that the respondent filed an application to dismiss the appeal on 18th October 2019 and the court issued a ruling dismissing the said application but the appellant has not taken any steps to set the appeal down for hearing since 6th November 2020.
9. She stated that the failure to prosecute the appeal has greatly prejudiced the respondent as he cannot enjoy the fruits of the judgment and unless the court dismisses the suit the respondent shall continue to suffer prejudice in the face of the appellant's indolence.
10. In response, Joyce Chichi stated inter alia, stated that upon filing the memorandum of appeal, the respondents through their advocate wrote to the Executive Officer to request for certified copies of the typed proceedings, judgment and decree to enable them compile, file and serve the record of appeal, to no avail. The deponent is therefore of the view that neither the respondents nor their advocate are to blame for the delay in prosecuting the appeal.
11. The deponent further stated that the appeal is not ripe for dismissal since it is yet to be admitted pursuant to the provisions of Section 79B of the *Civil Procedure Act* which provides that an appeal ought to be admitted for it to be set down for hearing upon directions on the same.
12. It was the assertion of the deponent that moreover, the lower court file had not been availed to the High Court to enable it determine whether the appeal should be admitted or not, and that the respondent has an arguable appeal which ought to be determined on merit.
13. The deponent avers that the respondent is keen on prosecuting their appeal and seek the indulgence of this court not to be ousted from the seat of justice.
14. Order 42, Rule 35 of the *Civil Procedure Rules*, 2010 provides for the circumstances and manner of dismissal of an appeal as follows:
 - “(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 summons 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.”
15. From the record, it is apparent that the respondents filed their memorandum of appeal on 23rd June, 2018.
16. The record shows that on 23rd September 2021, the Deputy Registrar-Civil received the original case file and two certified copies of proceedings, ruling and judgment to enable the respondent to file their record of appeal.



17. The respondent avers that on October 15, 2021 they received a letter from the court notifying them to file their record of appeal and that they have filed their record of appeal and are requesting for the court's directions on appeal to enable them proceed with the appeal.
18. Following from the foregoing, it is apparent that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of Order 42, Rule 35(1) (supra).
19. There is also nothing to indicate that the Deputy Registrar has since listed the appeal before a judge for dismissal pursuant to the provisions of Order 42, Rule 35(2) (supra).
20. In the premises, I find the Motion to be premature and the same is struck out and each party shall bear his own costs of the application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
31ST DAY OF MAY, 2022.**

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent

