



Mwirichia & another (Civil Appeal 55 of 2020) [2022] KEHC 600 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 600 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU**

CIVIL APPEAL 55 OF 2020

JM NGUGI, J

MAY 26, 2022

IN THE MATTER OF

JORAM MARANGU MWIRICHIA APPELLANT

AND

JOSHUA NYAGESERO KARATA APPLICANT

RULING

1. On 12/03/2020, I granted the Appellant leave to file his Appeal out of time and directed that the Appeal be filed within 7 days from 12/03/2020. I also declined to grant a stay of execution of the judgment by the Lower Court and ordered that the Appellant pay the entire decretal sum within 30 days. The Appellant filed his Memorandum of Appeal on 20/03/2020. The Appellant subsequently filed another application dated 24/06/2020 seeking extension of time to deposit the decretal amount. I dismissed the application in my Ruling of 01/07/2021.
2. The Applicant, who is the Respondent in the Appeal, has now brought the present application dated 19/11/2021. The Applicant is seeking the following orders:
 - a. That the Appeal herein be dismissed for want of prosecution.
 - b. That the costs of this application and of the entire appeal be awarded to the Respondent.
3. The reasons for seeking dismissal of the Appeal are contained in the grounds on the face of the Application and the Affidavit of Martha Wambui Waweru- Advocate dated 19/11/2021. She depones that despite the explicit orders of this Court issued on 12/03/2020, the Appellant failed to file an appeal within the stipulated 7 days and only filed its Memorandum of Appeal on 20/03/2022, nine days after the said order. She also depones that the Appellant had the Memorandum of Appeal since 06/11/2019 and as such had sufficient opportunity to file the appeal if he needed to. To her, the Appellant vitiated his right to appeal when he disobeyed a Court Order and as such has no right in



- equity. She acknowledges that after Ruling of the Court dated 01/07/2021 the entire decretal sum was paid
4. She depones further that in addition to the Memorandum of Appeal, the Appellant also filed the Record of Appeal on 09/07/2020 and served upon the Applicant on 27/07/2020, 4 months after (the Order of the Court). She faults the Appellant for being indolent and says that it has taken the Applicant's initiative to revive the proceedings by seeking directions for the appeal and making an application for taxation in Miscellaneous Applications 115 of 2021 and 116 of 2021.
 5. The Appellant opposed the Application vide the Affidavit dated 10/12/2021. He deposes that he is desirous of pursuing the appeal and having it be determined on its merits. The Appellant says that the reason for not filing the appeal was because of the downscaling of Court operations in March 2020 due to the Covid Pandemic. He however says that the Memorandum of Appeal was filed within 7 days of the ruling, after which efforts to obtain typed proceedings were hampered by the downscaling of Court activities.
 6. The Appellant contends that it is not mandatory for the Memorandum of Appeal to be filed together with the Record of Appeal and that the latter can always be filed later after the Memorandum of Appeal has been served and before the appeal is listed for directions under Order 42 Rule 13 of the [Civil Procedure Rules](#).
 7. The Appellant deposes further that the appeal could not be listed before the Judge for directions and his advocates filed the application dated 24/07/2020 seeking extension of time to comply with the directions of 12/03/2020, to which the Applicant filed a Notice of Preliminary Objection dated 28/06/2020. When the application came up on 10/07/2020, the Trial Judge indicated that she could not proceed because she did not have the physical file and instead gave a hearing date for 30/09/2020.
 8. The Appellant says that when the matter came up on 30/09/2020, parties took directions to the effect that the Preliminary Objection be heard first. He says that Ngetich J also directed that the matter be placed before the Presiding Judge, who had conduct of the matter. The matter was then placed before the Deputy Registrar on 19/10/2020 who gave a mention date of 14/12/2020 before the Judge, who then gave a hearing for 09/12/2021.
 9. According to the Applicant, after his application was dismissed on 01/07/2021, his advocates immediately wrote to the Deputy Registrar requesting for the matter to be placed before the Judge for directions after which the matter was fixed for directions on 17/11/2021.
 10. The Appellant contends that the Lower Court file is yet to be forwarded to this Court and that the application is therefore, frivolous, vexatious and premature since directions are yet to be taken, owing to numerous applications by the Applicant. He contends further that the appeal is arguable and has high chances of success and he stands to suffer prejudice since he has already settled the decretal sum.
 11. The single issue for determination is whether the appeal should be dismissed for want of prosecution. However, I will, first, I will address the issue of the Memorandum of Appeal being filed out of time raised by the Applicant. The Memorandum of Appeal was filed on 20/03/2020, nine days after the Ruling of 12/03/2020. It is true that the Court's Ruling required the Appellant to file the Memorandum of Appeal within 7 days. However, a delay of 2 days cannot be said to be inordinate. In the present case, the situation is more understandable because the Court downscaled its activities after 13/03/2020 due to COVID-19. During this time, the Court was offering very limited services. Additionally, the Appellant has already filed his Record of appeal and served the same upon the Applicant. In the circumstances of this case, it would be cruel in the extreme to dismiss the appeal because of a two-day delay in filing.



12. Dismissal for want of prosecution for appeals to the High Court is provided for under Order 42, Rule 35 of the [Civil Procedure Rules](#). It provides 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.
13. Over time, the applicable test for dismissal for want of prosecution has been that established in *Ivita v Kyumba* [1984] KLR 441, that is, whether the delay is prolonged and inexcusable, and if it is, whether the delay can be excused, and justice can be done despite the delay.
14. In the Instant case, the Appellant’s explanation in filing the record of appeal is that the same was occasioned by the inability to get the Lower Court proceedings in time due to the downscaling of court operations occasioned by the Covid 19 Pandemic. There have also been further proceedings in the matter between the parties in the period after the filing of the Memorandum of Appeal including a Preliminary objection by the Applicant. In my view, the explanation offered by the Appellant is plausible. Lastly, The Applicant does not stand to suffer any loss being that the entire decretal sum has already been paid out to him.
15. There is another reason to dismiss warranting the dismissal of this Application as premature – at least to the extent is predicated on Order 42, Rule 35. 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](#). See, for example, [Pinpoint Solutions Limited and another v Lucy Waithegeni Wanderi \(as the Legal Administrator of the Estate of James Nyanga Muchangi\)](#) [2020] eKLR. In that case, Kamau J. explained:
 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...
16. Similarly, in the present case, directions as required under Order 42 Rule 11 and also under Order 42 Rule 13 of the [Civil Procedure Rules 2010](#) have not been made yet. Under Order 42 Rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the Appellant. Consequently, the Application here is premature.



17. From the totality of the circumstances therefore, this Court is inclined to exercise its discretion and allow appeal to be heard on its merits.
18. From the foregoing, I make the following orders:
 - i. The application dated 19/11/2021 is hereby dismissed.
 - ii. The Court shall give directions on the hearing of the appeal.
 - iii. Costs shall be in the appeal.
19. Orders Accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY 2022

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JOEL NGUGI

JUDGE

