



**Municipal Council of Nyeri v Kihoro & 5 others (Civil Appeal  
1 of 2019) [2022] KEHC 3174 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 1 OF 2019  
FN MUCHEMI, J  
JUNE 30, 2022**

**BETWEEN**

**MUNICIPAL COUNCIL OF NYERI ..... APPELLANT**

**AND**

**WANYIRI KIHORO ..... 1<sup>ST</sup> RESPONDENT**

**JAMES GATAMA ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES MAINA MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH GITONGA KIMANI ..... 4<sup>TH</sup> RESPONDENT**

**GEORGE MAINA NJIRAINI ..... 5<sup>TH</sup> RESPONDENT**

**JOHNSON MUCHEMI ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a ruling on an application dated September 16, 2021 seeking for orders for dismissal of this appeal for failure to comply with the provisions regarding prosecution of appeals. It is brought under Order 17 Rule 2, Order 43 rule 2,10,12,13(1) (4) of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* as well as Article 165 (3) of *the Constitution*.
2. The grounds supporting the application are contained on the face of the application and in the supporting affidavit of the 1<sup>st</sup> respondent and advocate for the respondents Wanyiri Kihoro. Firstly, the applicant states that the appeal was filed without leave of the court which passed the judgement and that no stay of execution was granted by the magistrates court.
3. Secondly, the applicants state that the appeal was served on them until two years after filing whereas the respondents obtained a decree and proceeded to serve on the appellants that they were informed that an appeal had been filed.



4. Thirdly, that the Attorney general who was a party in the magistrates case Nyeri CMCC No 404 of 2008 was not joined in this appeal as a party
5. Fourthly, the applicants contend that several rules under 43 of Order 43 were flouted by the appellants/ respondents herein.
6. Finally, the applicants contend that had they known that this appeal had been filed and remained unattended to, they would have applied for dismissal for want of prosecution under Order 17 Rule 2.
7. The application was opposed by the respondents/appellants relying on grounds of opposition and a replying affidavit on 21/09/2021 and March 1, 2022 respectively.
8. The respondents argued that this application is bad in law and an abuse of the court process, it is incompetent, misconceived, frivolous and vexatious.
9. It is further argued that the application is brought under the wrong provisions of the law which do not relate or govern appeals. Further, that since this appeal has never been admitted, it is incapable of being dismissed for want of prosecution without admitting an appeal. The court cannot set other processes in motion, specifically dismissal. This appeal was never taken to the judge in chambers for admission and in the manner the applicant wants done would be premature and unprocedural.
10. Having heard the counsels for parties in orally in court and considering their pleadings as well as the law, I make a few observations relating to the arguments raised.
11. In regard to the law under which this application is brought, I note that the applicants relied on Order 43 of the Civil Procedure rules where several rules numbers 2,10,12 and 13(1) and 4 were cited among other provisions. A close look of Order 43 shows that it deals with appeals from orders while Order 42 deals with appeals from cases. Any appeals from orders as stipulated under Order 43 requires leave of the court which passed the orders appealed against. As for Order 42, no leave to appeal against a full judgement like in the case before me is required. The case that relates to this appeal was one of malicious prosecution which was fully heard by the Chief Magistrate and judgement rendered. As such no leave to appeal was required to be obtained in filing this appeal as intimated by the applicants.
12. From the above analysis, the applicants may have mixed up Orders 42 and 43. Order 43 is not relevant to the appeal herein and neither is any of the rules cited under it relevant herein.
13. Order 17 Rule 2 was cited in regard to want of prosecution for this appeal. However, Order 17 relates to prosecution of suit and not appeals. Section 66-79, 79A,79B,79C, 79D,79E of the Act and Order 42 of the Procedure Rules is the regime that governs appeals in the High Court.
14. Article 165(3) of *the Constitution* provides for the jurisdiction of the High Court, that is original jurisdiction in Criminal and Civil cases, on the Bill of Rights, as well as appellate jurisdiction among others. The issue of jurisdiction is not an issue in this application for such jurisdiction is well covered under *the Constitution* and statute law.
15. However, as for the main provisions under which this application is brought, I find that Order 17 and Order 43 are the wrong provisions herein.
16. The applicant asked the court to rely on Article 159 of *the Constitution* on expeditious disposal of cases. In this regard Order 42 is the regime that provides for filing and dealing with civil appeals which coupled with Section 34 and 3B of the *Civil Procedure Act* is the Statutory law established under the principles in *the Constitution* regarding expeditious disposal of case as well as disregard to technicalities by courts in hearing cases.



17. In this regard, I will conclude this issue by stating, that this application should not be struck out or dismissed on the mere ground that it is brought under the wrong provisions of the law. It is trite law that courts must be slow to strike out cases or pleadings due to technicalities.
18. I proceed to determine the merits of the application.
19. The respondents argued that this application disregarded the provisions of Rule 35 of Order 42 that governs the admission and the dismissal of appeals. The respondent argued that an appeal cannot be dismissed before the Deputy Registrar forwards the file to a judge in chambers for summary dismissal or for admission as the case may be. The respondent for these reasons said this application was defective and incompetent.
20. Perusal of Order 42 Rules 12 and 13 calls for admission of an appeal which is followed by directions to be given by the judge in chambers. The judge gives directions on the filing of the record of appeal that contains all the necessary documents as listed under Rule 13(4). Rules 20 and 35 provide for dismissal of an appeal for various reasons. Rule 35 which is relevant herein provides that the respondent shall be at liberty to apply for dismissal if the appeal has not been set down for hearing within three (3) months after taking directions.
21. The respondent relied in the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR where the court held in an application of this nature that :-
  11. It was a further averment that the Appeal had not yet been admitted in accordance with Section 79B of *Civil Procedure Act* and hence, no further steps could be taken. She added that an appeal had to be admitted before it could be listed for hearing.
  12. She asserted that the Respondent could only seek to dismiss the Appeal herein for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules after the directions herein had been given.
22. In my considered view the respondent brought this application prematurely before the steps set out under Order 42 were taken by the court. It was the duty of the court to first admit or reject the appeal summarily under rule 13 and take directions calling for the filing of the record of appeal within the stipulated time.
23. I therefore find the Njai Stephen case relevant and applicable herein despite the fact that this court is not bound by it. However the honourable judge cited and applied the provisions of Order 42 squarely. I have no reason to differ with the decision.
24. However, the sentiments of the applicant are noted in that the appellant is guilty of delay especially in serving it upon the opposite party. The appeal having been filed on 7<sup>th</sup> January 2019 was never served on the applicants until they proceeded to commence execution on 10/09/2021 that they were informed that the decree could not be settled because there was a pending appeal in the High Court. Although this matter was brought up in the application, the respondent did not explain the delay in serving the respondent. Had the applicants known there was an appeal in existence, they would have followed it up with the appellants. For this reason, the appellants who hid their cards under the table were in my view not keen in following up their appeal for admission.
25. The appellant, in my view, has a right to be heard but must also play his part in ensuring that the overriding objective is achieved especially in expeditious disposal of the appeal. I do not agree with the respondents entirely that they have no role to play until the Deputy Registrar moves the court to admit the appeal. For the court to admit the appeal, the lower court file and typed proceedings must have



been forwarded and placed in the appeal. In as much as the Deputy Registrar is obligated to play this role, it would be lack of due diligence for a party to file an appeal and go to sleep for three (3) years, not even effecting service of the memorandum of appeal.

26. In conclusion, I find this application not merited and dismiss it accordingly with an order that each party meets their own costs of this application.

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 30TH DAY OF JUNE, 2022.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 30TH DAY OF JUNE 2022.**

