



REPUBLIC OF KENYA



CIC General Insurance Ltd v Chuka Farmline Stores Ltd & 2 others (Civil Appeal 95 of 2019) [2022] KEHC 12102 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 95 OF 2019
RM MWONGO, J
JUNE 27, 2022**

BETWEEN

CIC GENERAL INSURANCE LTD APPELLANT

AND

CHUKA FARMLINE STORES LTD 1ST RESPONDENT

COOPERATIVE BANK OF KENYA LTD 2ND RESPONDENT

TRACK & TRACE LTD 3RD RESPONDENT

RULING

Background and Parties' Positions

1. Through an application dated April 9, 2021, the applicant seeks an order under Order 42 Rule 13 and section 1A, 1B and 3A of the [Civil Procedure Rules, 2010](#) for dismissal of the Appeal No 95 of 2019 for want of prosecution.
2. The grounds are that:
 1. The appellant herein filed a memorandum of appeal on or about, 2019.
 2. To date the 1st respondent/ applicant is yet to be served with a record of appeal and probably none has been filed.
 3. This is despite the proceedings having been typed and ready since the November 14, 2019.
 4. It is now more than one (1) year since the appeal was filed and neither directions have been taken on how the appeal is to be heard nor any application made seeking to file the appeal out of time.



5. As it stands the appellant has run out time to file the appeal and the memorandum of appeal filed should be struck out.
3. The application is supported by a supporting affidavit of John Wahome Gitonga, wherein he avers, among other things that: the appellant filed the memorandum of appeal in 2019; since that time the appellant has not moved to prosecute the appeal and is yet to file the record of appeal; it is clear the appellant has no intention of prosecuting the appeal and want to continue enjoy stay orders; the appeal is already out of time a period of more than one (1) year having lapsed.
4. The appellant/respondent opposes the application, and filed a replying affidavit dated November 3, 2021.
5. In essence it avers that: its counsel wrote several letters and emails to the Executive Officer to be furnished with copies of proceedings and judgment to enable it file an appeal; that the same never elicited any acknowledgment or response and they could not file the record of appeal; that the reason for delay is that the lower court file was not available at the Registry for typing as it awaited ruling of the plaintiff's bid of cost which was finally taxed on March 25, 2021; the appellant had exhibited good faith by paying Kshs 3,464,444.90 to the respondent as ordered by court for due performance of stay of execution.
6. Further, the respondent asserts that the applicant/respondent can only seek to dismiss the appeal for want of prosecution after directions herein had been given; and that if the application is allowed, the appellant shall be denied access to justice which is contrary to their constitutional rights under article 50 of the *Constitution*. To this end, the respondent exhibited documents showing the communications with the registry since January 2021 requesting for proceedings.
7. The parties submissions more or less replicated the assertions in their respective affidavits

Issues

8. The only issue for determination is whether an appeal can be dismissed for want of prosecution under order 42 rule 13 and 35 *CPR*.

Analysis And Determination

9. 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 the giving of directions by a judge in chambers.
 - 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
 - 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which 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."
10. This provision concerns the listing of an appeal for directions, objections to the jurisdiction of the court before the issuance of directions; and issuance of directions concerning the appeal before hearing. Order 35 gives no room for an application for dismissal of an appeal for want of prosecution, and cannot be invoked for that purpose.
11. The provision that allows such dismissal is order 42 rule 35 (2) [CPR](#). It provides:
- “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”
12. Even if this provision had been invoked, the applicant would still have had no succour. The reason is that respondent covered the point in submitting that the appeal had not been fixed for hearing by the court. Hence, that the application to dismiss the appeal was premature as court directions on appeal had not been given. That failure by the Registrar to list the Appeal for directions was not within the appellant’s/respondent’s control.
13. Many applicants weary of delay opt to file applications for dismissal for want of prosecution when the fault cannot be attributed to the appellant. Such applications are doomed to fail. In [Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi \(as the Legal Administrator of the Estate of James Nyanga Muchangi\)](#) [2020] eKLR. The issue was well explained by Kamau, J when she stated that:
- “The appellant does not seem to have any role in fixing the appeal for directions as contemplated under order 42 rule 11 of [Civil Procedure Rules](#) and order 42 rule 13 (1) of the [Civil Procedure Rules](#). It is important to point out that under order 42 rule 13 (4) of the [Civil Procedure Rules](#), the judge shall not allow a matter to proceed for hearing unless the record of appeal is duly filed...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](#).”

Disposition

14. Enough has been said concerning the fact that the provision invoked by the applicant is inapplicable, and the fact that until a memorandum of appeal is filed, an application for dismissal for want of prosecution cannot lie. Here the appellant/ respondent has not delayed in filing the record of appeal nor has it frustrated the disposal of the same as the applicants claim.



15. The application is therefore hereby dismissed with costs to the respondent.

DELIVERED AT KERUGOYA ON THIS 27TH DAY OF JUNE, 2022.

R MWONGO

JUDGE

Delivered in the presence of:

Githaiga holding brief for Irungu for the applicants.

Jayo for the respondent.

Murage Court Assistant.

