



REPUBLIC OF KENYA



KENYA LAW
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**Gakinya v Njambi (Civil Appeal E002 of 2021)
[2022] KEHC 11575 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E002 OF 2021
CM KARIUKI, J
JULY 28, 2022**

BETWEEN

RICHARD GITUKU GAKINYA APPELLANT

AND

JACKSON IKINU NJAMBI RESPONDENT

RULING

1. By a Motion dated 16/12/2021, the Applicant seeks the Order of 29/9/2021 to be set aside, and the Appeal be reinstated, among other things.
2. The same Application is based on the fact that the Applicant was unaware that the original Nakuru HCA 141/2016, now Nyahururu E002 of 2021, was transferred to Nyahururu from Nakuru and applicant came to know of it via a letter of 10/12/2021 when they were served with same notifying them of dismissal of the matter.
3. The Application is supported by an Affidavit of Sylvia Obura sworn 16/12/2021 reiterating the grounds in the application.
4. The Application is opposed by Affidavit of Nderitu Komu sworn on 8/2/2022.
5. The parties were directed to canvass the application via submission.

Applicant Case And Submissions

6. The background of the instant matter is that, in 2016, there was no High Court in Nyahururu necessitating the instant Appeal to be filed in Nakuru, as Nakuru HCA No. 141 of 2016.
7. The matter was eventually transferred to Nyahururu for hearing and determination without applicants being informed of the transfer aforesaid.



8. The Applicant was not aware that a new number had been issued in Nyahururu being Nyahururu HCA No. 2 of 2021, and only became aware of the same upon being served with a letter from the Respondent dated 10th December 2021 notifying him of the dismissal of his Appeal and accompanied by a decree.
9. The Applicant was never served with any dismissal notices from the Deputy Registrar, Nyahururu Law Court, and only notice to Show Cause was served upon him on 30th January 2020 and from Nakuru Law Courts, which was duly responded to.
10. Severally, letters were sent to the Executive officers both in Nakuru and Nyahururu requesting to know if the file had been transferred to Nyahururu and requesting to be supplied with typed proceedings and judgment for the Applicant to compile his Record of Appeal, but all in vain.
11. As evidenced in the Memorandum of Appeal filed on 13th October 2016, the particular Appeal was filed in Nakuru high Court and booked as HCA No. 140 of 2016.
12. The Applicant further submits that his efforts to visit the two registries bore no fruits since the response was always that the subordinate court file could not be traced and thus making it extremely difficult to compile the Record of Appeal.
13. The Applicant submits that now that he is aware of the new number given for this file, he is more than desirous and interested in prosecuting and pursuing the Appeal to its conclusion. Therefore, if given a chance, the Applicant undertakes to finalize compiling the Record of Appeal and have the same for hearing.
14. In view of the above, the Applicant submits that if the orders sought are not granted; he will suffer irreparable loss and damage.
15. It is submitted that from the explanation advanced in the Applicant replying affidavit and the submissions, there has been no inordinate delay to have the Appeal prosecuted. The same was inadvertent and had simply been caused by failure to trace the court file from both Nakuru and Nyahururu registries and also from the fact that the Applicant was never informed that the Appeal had been transferred and a new number issued in Nyahururu.
16. The Respondent herein has not shown any prejudice that is likely to be suffered if the Appeal is reinstated and set down for hearing. He relies on the cases of *Pan African Paper Mills Limited v Silvester Nyarango Obwocha* [2018] eKLR and *Joseph Kinyua v G O Ombachi* [2019] eKLR.

Respondent Case And Submissions

17. The Appellant filed an appeal against the said judgment in Nakuru HCCA No. 141 of 2016. On 15th November 2016, he applied for a stay of execution, and the same was allowed on 1st February 2017, and on 4/3/2017, part payment of the decretal sum was made.
18. The appellant filed the said Appeal on 9/11/2016, and despite having the opportunity to prosecute the same, he failed to take any action for almost five years, as a result of which the current Appeal was listed for notice to show cause why it should not be dismissed for want of prosecution. On 29/9/2021, the same was dismissed for want of prosecution.
19. By a letter dated 10/12/2021, the Respondent requested the appellant to settle the decretal sum as per decree and certificate of costs dated 10th December 2021. On 16th December, the Advocates for Appellant requested time to get further instructions from the appellant. It is on the same date that the appellant filed the current application.



20. On 29th September 2021, the court had a chance to peruse the file, and it observed an inordinate delay in the prosecution of the Appeal. The current Appeal was thus dismissed on account of want of prosecution. In making the said finding, the court was guided by the fact that litigation has to come to an end, and an indolent cannot keep the parties in court forever.
21. By filing the current application, the Applicant wants to revive an appeal that was graciously put to rest. The Applicant has not given any plausible reason for the delay in the prosecution of the Appeal.
22. In addition, nowhere has the Applicant given a plausible reason for failing to prosecute the Appeal for more than five (5) years after it was filed.
23. It is submitted that it is the primary duty of the appellant to take steps to progress their case since they are the ones who dragged the Respondent to court in this Appeal. Failure to do so for about five years amounted to an inordinate delay.
24. On the issue of the Applicant not being issued with a notice of intended dismissal of the Appeal for want of prosecution, it is submitted that the court issued the said notice, publishing the cause list on its website. The provisions of Order 42 Rules 35 (2) of the Civil Procedures Rules provide for the issuance of notice to the concerned parties by the court.
25. Both provisions under Order 42 Rules 35(2) of the *Civil Procedure Rules* and Order 17 Rule (2) of the Civil Procedure Rules deals with notices for dismissal of either a suit or Appeal on the want of prosecution. Cited are the cases of *Jim Rodgers Gitonga Njeru v AL-Husnain Motors Limited & 2 others* [2018] eKLR, *Fran Investments Limited v G4S Security Services Limited* [2015] EKLRL, *Kestem Company Ltd V Ndala Shop Limited & 2 others* [2018] eKLR, *Virginia Muchandi Muthengi v Elisha K Njagi* [2020] eKLR and *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] eKLR.

Issues, Analysis, And Determination

26. After going through the pleadings and submissions, I find the issue is whether the application is meritorious? And what is the order as to costs?
27. It is not contested that, in the year 2016, there was no High Court in Nyahururu; thus, parties were aggrieved by subordinate courts' decisions and were of necessity lodging appeals in the High court at Nakuru as in the instant Appeal where the Applicant filed in Nakuru, instant Appeal as Nakuru HCA No. 141 of 2016.
28. The matter was eventually transferred to Nyahururu for hearing and determination without applicants being informed of the transfer aforesaid.
29. It is not denied that the Applicant was not aware that a new number had been issued in Nyahururu being Nyahururu HCA No. 2 of 2021, and only became aware of the same upon being served with a letter from the Respondent dated 10th December 2021 notifying him of the dismissal of his Appeal and accompanied by a decree.
30. The Applicant was never served with any notice of transfer of Appeal to Nyahururu nor notified of the dismissal notices from the Deputy Registrar, Nyahururu Law Court, and only notice to Show Cause was served upon him on 30th January 2020 and from Nakuru Law Courts and which was duly responded to. Being only expectant of his Appeal to be listed in Nakuru as that was the last station his Appeal was lodged, it would be expecting too much of him to search listing his Appeal in Nyahururu cause list in the website as intimated by the Respondent.



31. It is not also rebutted that several letters were done by the Applicant to the Executive officers both in Nakuru and Nyahururu requesting to know if the file had been transferred to Nyahururu and also requesting to be supplied with typed proceedings and judgment for the Applicant to compile his Record of Appeal but all in vain.
32. In the case of *Pan African Paper Mills Limited v Silvester Nyarango Obwocha* [2018], eKLR stated as follows:
- “Dismissal of a case is, however, a draconian judicial act and should be done sparingly and employed only in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits, especially where justice would still be done, and a fair trial had, despite the delay”.
33. This court in agreement with that. Both provisions under Order 42 Rules 35(2) of the *Civil Procedure Rules* and Order 17 Rule (2) of the *Civil Procedure Rules deals* with notices for dismissal of either a suit or Appeal on the want of prosecution. Website listing would have been serviced as a notice if it was under Nakuru listing and in its Nakuru number. However, the same was done that the Applicant was condemned unheard. Therefore, the circumstances of this case dictate that the application be allowed.
34. Thus, the court makes the orders that;
- I. The impugned dismissal orders are hereby set aside, and the Appeal is reinstated.
 - II. The Respondent is to file and serve a record of appeal within 30 days and in default, the Appeal to stand dismissed.
 - III. Costs in the main cause.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.

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CHARLES KARIUKI
JUDGE

