



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimaiyo v Kimutai & another (Civil Appeal 4 of 2018)  
[2022] KEHC 13228 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 4 OF 2018  
EKO OGOLA, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**NICHOLAS KIPCHIRCHIR KIMAIYO ..... APPELLANT**

**AND**

**WILSON KIBET KIMUTAI ..... 1<sup>ST</sup> RESPONDENT**

**KABIANGA TEA FACTORY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an application dated March 2, 2022 the applicant seeks the dismissal of instant appeal for want of prosecution.
2. The application is premised on the grounds namely that a period of (4) years has lapsed since memorandum of appeal was filed with no action being taken or appeal being prosecuted.
3. The application is further supported by affidavit of Wilson Kibet Kimutai sworn on April 26, 2021 reiterating same grounds.
4. The application is opposed by the respondents who filed a notice of preliminary objection dated April 4, 2022 and also filed a replying affidavit dated April 5, 2022.
5. In the notice of preliminary objection, the respondent cited the following grounds;
  1. That the application is bad in law and gross abuse of court process.
  2. That no directions have been taken on the appeal to warrant such an application.
  3. That order 42 rule 35(2) is not open to the parties to this appeal but is a preserve of the Deputy Registrar.



6. The gist of the respondent's case is solely pegged on the issue of obtaining proceedings. The respondent averred that delay was due to the lack of certified copies of proceedings for appeal purposes. The respondent further contends that directions have not been given by the court and therefore the instant application is pre-mature in view of the provisions of order 42 rule 35 (2) of the Civil Procedure Rules and further that the provisions that are available to the parties are to be found under order 42 rule 35 (1) which can only be invoked (3) months after directions have been given on the appeal.
7. The application was argued orally in court.

### **Applicant's Submissions**

8. The applicant submitted that the appellant on January 18, 2018 filed this instant appeal and since then no record of appeal has been prepared and served. The applicant contends that it is more than (4) years since the appeal was filed. The applicant further submitted that the delay is unjustified and that the applicant has been greatly prejudiced. The applicant further submitted that no reason whatsoever has been given for the said delay. The applicant urged court to dismiss this instant appeal with costs and to further vacate the stay of execution orders that had been granted so as to able him enjoy the fruits of his judgment.

### **Respondent's Submissions**

9. The respondent submitted that the only provision available to the applicant is found under order 42 rule 35 (1) where the applicant can only move court if within (3) months if no action had been taken regarding the appeal.
10. The respondent prayed that this application be dismissed for being pre-mature.

### **Determination**

11. I have considered the application; the rival affidavits and submissions by the parties. The only issue in this application is whether there has been inordinate and inexcusable delay to warrant dismissal of the appeal for want of prosecution. But, before I delve into the merits of this application, I will first address the respondent's notice of preliminary objection dated April 4, 2022.
12. The law as to preliminary objections is well settled. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors* the Eastern Court of Appeal held at page 701 that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

At page 700 the court had stated that:-

“..... So far as I am aware a preliminary objection consists of a point of law which has been pleaded at which ..... by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit.” (Emphasis supplied)

13. I have looked at the points of law raised by the respondent's preliminary objection and the same touch on the competence of the applicant's application in view of order 42 rule 35 (2) of the Civil Procedure



- Rules 2010. These are indeed pure points of law and need not to be ascertained in order to determine the matter.
14. There are two scenarios when an appeal may be dismissed for want of prosecution. The first scenario is where the appeal has not been listed for hearing within three months after directions have been made under order 42 rule 13 and; secondly, if after one year since the service of memorandum of appeal, the appeal has not been listed for hearing.
  15. Order 42 rule 35 (1) and (2) of the Civil Procedure Rules 2010 provides: -
    - 35 (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.
  16. It is clear from the reading of order 42, rule 35 that an application for dismissal for want of prosecution should only be made by the respondents where the court has admitted an appeal, provided directions and if after three months, no action has been undertaken by the appellants. It is clear from the record that there are no directions in respect of the current appeal. The appeal can therefore not be dismissed under order 42 rule 35 (1) of the Civil Procedure Rules. Further, there was also no evidence that the Registrar had issued a notice under order 42 rule 12 of Civil Procedure Rules to warrant the dismissal of this instant appeal under order 42 rule 35(2) of the Civil Procedure Rules.
  17. It is therefore my considered opinion, that allowing the present application would be shutting out the appellant from accessing the court and this would be contrary to article 50 of the Constitution of Kenya.
  18. The upshot therefore is that the respondent's notice of preliminary objection dated April 4, 2022 hereby succeeds, and the application accordingly dismissed.
  19. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> OF SEPTEMBER 2022.**

**E. K. OGOLA**

**JUDGE**

