



National Environment Management Authority v Kinuthia & another (Civil Appeal E058 of 2021) [2022] KEHC 13003 (KLR) (Civ) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13003 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E058 OF 2021**

**JK SERGON, J
SEPTEMBER 23, 2022**

BETWEEN

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY APPLICANT

AND

RUMBA KINUTHIA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The 1st respondent/applicant in this instance has brought the notice of motion dated April 20, 2022 which is supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for an order to the effect that the appellant's/respondent's appeal be dismissed for or alternatively the appellant be compelled to prosecute this appeal within a period of ninety (90) days.
2. In opposing the said motion, the respondent filed the replying affidavit of advocate Mamo B Mamo, to which Rumba Kinuthia rejoined with her supplementary affidavit sworn on June 28, 2022.
3. The 2nd respondent filed also opposed the application by filling grounds of opposition dated May 30, 2022.
4. When the motion came up for interparties hearing before the court on July 12, 2022 the parties were directed to file and exchange written submissions. I have considered the grounds set out on the face of the motion dated April 20, 2022 and the facts deponed in the rival affidavits.
5. The sole issue for determination before this court is whether the appeal filed by the appellants is ripe for dismissal.



6. In his supporting affidavit, Rumba Kinuthia stated that the appeal before this court ought to have been filed by the 11th of February 2021 but was filed on February 12, 2021 contrary to the orders of the court.
7. The above averments were echoed in their submissions that it is also not in dispute that the petitioner failed to ask the court for permission before filing the appeal after the deadline had passed. Furthermore, no explanation for the alleged delay was provided in their response. Additionally, despite the court's instruction, the appellant did not pay the full decree amount before submitting the appeal.
8. The applicant further submitted that the court does not provide orders in vain. Court orders are intended to be scrupulously adhered to in order to maintain fairness in the conduct of the court and order in the court's proceedings. On this the applicant relied on the case of *B vs Attorney General* (2004) eKLR where the court stated thus; "The court does not, and ought not to be seen to, make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people"
9. The applicant made several applications for this matter to be set down for hearing but the matter could not proceed as the lower court file had not been availed to the High court.
10. The applicant was informed that the file had not been dispatched to the High court, as no request had been made by the appellant and that the appellant has never requested for certified copies of the proceedings, decree or judgment from the trial court to prepare the record of appeal.
11. In response, the 1st respondent submitted that this honorable court lacks jurisdiction because the same parties are involved in an existing application dated April 23, 2021, that is currently pending hearing and determination before this very court, and because the applicant/prayers are similar to those in the application dated April 20, 2022. Therefore, the application dated April 20, 2022 below is considerably sub-judice the application dated April 23, 2021 in the High Court of Kenya.
12. The 1st respondent relied on the *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Interested Parties [2020] eKLR) the Supreme Court of Kenya stated as follows:

"The term 'sub-judice' is defined in *Black's Law Dictionary* 9th Edition as: "Before the court or judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."
13. The 2nd respondent in its ground of opposition stated that the appeal is merited and has a high chance of success in that the trial court erred in law and in fact in disregarding the evidence of the 1st respondent witness and the 2nd respondent.



14. The 2nd respondent further stated that the issues raised in the instant application had already been determined in a previous case which involved same parties and the same subject matter resulting to the same being *res judicata* and thus stand dismissed on that point.
15. The 2nd respondent contends that the applicant is alleging delay on the part of the appellant in availing the trial file from the lower court to the high court, as such the appellant can only do much as it is not within his mandate to push for the same and that the executive officer and the Deputy Registrar are tasked with the job which they should not serve as a ground to dismiss the appeal.
16. Order 42, Rule 35 of the [Civil Procedure Rules](#), 2010 provides for the circumstances and manner of dismissal of an appeal 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.”
17. The appellant/1st respondent in this case obediently followed the orders of this honorable court and deposited the stipulated sum. Following that, she wrote to this honorable court to request clarification and more instructions in accordance with order 42 rule 11, but unhappily she hasn't received a response.
18. It is apparent that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of order 42, rule 35 (1).
19. There is also nothing to indicate that the Deputy Registrar has since listed the appeal before a judge for dismissal pursuant to the provisions of order 42, rule 35(2) (*supra*).
20. The 1st respondent/applicant approached this honorable court with dirty hands, which is against the maxim in equity that states that he who comes to equity must do so with clean hands. The 1st respondent/application applicant's dated April 20, 2022 is sub-judice the application dated April 23, 2021 before this very court. I am convinced to consider it appropriate to strike out the application on grounds that it is an obvious misuse of the court process and that the application dated April 20, 2022 and the entire matter herein are vexatious and malicious.
21. In the premises, I find the motion to be without merit. However, the appellant should prosecute the appeal within 90 days from today's date failure to which the appeal shall automatically stand dismissed. Costs to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 23rd day of September, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant



.....for the 1st Respondent

.....for the 2nd Respondent

