



REPUBLIC OF KENYA



**Muiruri & another v Munyithya (Civil Appeal E119 of 2021)
[2022] KEHC 13062 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13062 (KLR)

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

**CIVIL
CIVIL APPEAL E119 OF 2021**

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

BETWEEN

JAMES MUTHAKA MUIRURI 1ST APPELLANT

ANDREW NDEGWA 2ND APPELLANT

AND

CATHERINE MUTHINI MUNYITHYA RESPONDENT

RULING

1. Catherine Muthini Munyithya, the respondent/applicant herein, took out the notice of motion dated April 8, 2022 and sought for an order to the effect that the appellants'/ respondents' appeal be dismissed for want of prosecution with costs.
2. The motion is supported by the grounds presented on its face and the facts stated in the affidavit of the applicant's advocate, Musili Mbiti.
3. 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 8, 2022 and the facts deponed in the supporting affidavit.
4. At the time of writing this ruling, the respondent had not filed their response nor filed their submissions.
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, Musili Mbiti stated that the respondent has refused, neglected and /or otherwise failed to take the steps to prosecute the appeal for a period of over one year and that the delay was intentional, inordinate and inexcusable as they have not shown any reason for the delay.
7. The above averments were echoed in the submissions of the applicant, save to add that there has been delay on the respondent's part and find that the appeal is not made in good faith, this court has inherent powers to still dismiss it in the interest of justice. To support his argument, the applicant cited the case of *Protein & Fruits Processors Limited & Another v Diamond Trust Bank Kenya Limited (2015) eKLR, Civil Appeal 9 of 2007* where he held that;

As it is, the appeal is incomplete and the appellants have not furnished the court with the record of appeal. The only alternative the applicant is left with is under rule 35(2) which requires the deputy registrar to list the appeal for dismissal by a judge. In the current application the applicant is seeking an order that the deputy registrar be directed to list the appeal for dismissal before a judge in chamber. I have no reasons not to grant the prayer, the appeal hearing has been pending in court for six years and it is only fair if the matter can be finalised. In the circumstances of this matter I will not order the deputy registrar to place the file before a judge for dismissal;

instead I will dismiss the appeal. This court has the inherent discretion to do so under section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under article 159(2) b of the *Constitution* to do justice without any delay.

8. 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.'

9. The memorandum of appeal herein, has been pending since March 25, 2021 when it was filed. The appellants have not progressed the matter since then. The appellants have not complied with the relevant provisions of the law as cited herein. In particular, the appeal has not been listed for directions as required under order 42 rule 13 (1) of the *Civil Procedure Rules, 2010*. In that case, the provisions of order 42 rule 35 (2) Civil Procedure Rules, 2010 comes into play.
10. Despite the fact that the application is unopposed, the provisions of order 42 rule 13 are clear that the applicant cannot move the court to dismiss the appeal for want of prosecution before directions have been given by the court. The second scenario under the rule is available to the applicant. The procedure he ought to have followed is to write to the registrar to request him to list the appeal before a judge in chambers for dismissal as was held in the case of *Adnan Karama Petroleum Limited (T/A Ak Filling Station) Vs National Environment Management Authority [2007] eKLR*.
11. The Applicant has failed to comply with the provisions of order 42 rule 35(2) and the application must therefore fail.



12. In the premises, I find the motion to be premature and the same is ordered struck out with each party bearing their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

.....

JK SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent

