



**Lebanguti v Maina (Civil Appeal 27 of 2018)
[2022] KEHC 14174 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL 27 OF 2018
MN MWANGI, J
SEPTEMBER 21, 2022**

BETWEEN

PETER LEBANGUTI APPELLANT

AND

MUCHEMBE MAINA RESPONDENT

RULING

1. Through a notice of motion dated June 2, 2021, brought under sections 1A, and 3A of the *Civil Procedure Act*, order 42 rule 35 of the *Civil Procedure Rules, 2010*, the applicant seeks the following orders-
 - (i) That the memorandum of appeal be struck out and the appeal be dismissed for want of prosecution;
 - (ii) That and in the alternative, the appeal herein be dismissed for being for being frivolous, vexatious and an abuse of the court process;
 - (iii) That the honourable court be pleased to grant such and/or further orders as it deems fit in the interest of justice; and
 - (iv) That the appellant bears the costs of this application and of the appeal.
2. The application is premised on the grounds set out on the face of the application and an affidavit sworn on June 2, 2021 by the Muchembe Maina, the respondent herein.
3. He deposed that since the appellant's memorandum of appeal was filed on December 20, 2018, and served upon him, the appellant had not taken any step to prosecute the same. He averred that the inaction by the appellant was doing injustice to the him and was an abuse of the court process. He stated that it was only fair and just for the appeal to be dismissed as provided by the law.



5. The application was opposed by Peter Lebanguti, the respondent herein by way of his replying affidavit sworn on July 9, 2021. He deposed that the appeal has been active in court and that the same was fixed for directions on October 3, 2019, but the court was not sitting on that day. He also deposed that further mention dates have since been fixed for January 23, 2020, February 27, 2020 and March 23, 2020, but still the court did not sit on those occasions.
6. The deponent averred that subsequently, the court closed down in March, 2020 due to the Covid-19 pandemic and the resident judge was in the process transferred bringing operations of the court to a standstill. He further averred that since then, it has been impossible to fix the appeal for hearing before the directions from court are taken and that all efforts to fix the appeal for directions have so far been in vain, since all visits to the court registry have been met with answers of the unavailability of dates and that the court would itself fix the appeal for directions at its convenience. The appellant stated that the delay in prosecuting the appeal cannot be attributed to him since all along, he has been desirous of proceeding with the appeal.
7. The application was canvassed by way of written submissions. In support of his application for dismissal of the appeal, the respondent filed his submission on October 7, 2021. The appellant did not file any written submissions.
8. In his submissions, the respondent argued that since the filing of the appeal, the appellant has never taken any step, leaving the appeal to hang over his head endlessly. He contended that the appellant had slept on his rights, as a consequence of which, the instant appeal ought to be dismissed with costs. He relied on the case of *Kenya Nut Company Limited v Justine Musyoka Nkabi [2018] eKLR*, where the Employment and Labour Relations Court (ELRC) dismissed an appeal that had not been prosecuted for a period of eight (8) years.

Determination

9. The only issue for determination is whether the present appeal ought to be dismissed for want of prosecution. 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. It is evident from the provisions of section 79B of *Civil Procedure Act* that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in order 42 rule 11 of the *Civil Procedure Rules* that states as follows:
- “Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the act”.
11. Order 42 rule 35 (1) of the *Civil Procedure Rules* gives the respondent the power to move the court after directions have been given to safeguard her interests in the following terms-
- “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”.
12. Order 42 rule 35 (2) of the *Civil Procedure Rules* empowers the registrar to deal with inactive appeals through dismissals as follows-
- “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”
13. Therefore, order 42 rule 35 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under section 79B of the *Civil Procedure Act* as is envisaged in order 42 rule 11 of the *Civil Procedure Rules*. The second scenario is that if after service of the memorandum of appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.
14. 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.
15. 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*.
16. I am persuaded with the principle enunciated in the case of *Pinpoint Solutions Limited & Another v Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi)*



[\[2020\] eKLR](#), where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution. It held thus-

“The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per order 42 rule 11 and rule 13 of the [Civil Procedure Rules, 2010](#).

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the appeal herein could not be dismissed under order 42 rule 35(1) of the [Civil Procedure Rules](#). In any event, there was also no evidence that the registrar had issued a notice under order 42 Rule 12 of the [Civil Procedure Rules](#).”

17. In analyzing the instant case, the matter was concluded before the trial court on November 14, 2018. The respondent filed the memorandum of appeal on December 13, 2018. A mention notice was issued by the court on the July 9, 2019 for directions on October 3, 2019. The court did not sit on the October 3, 2019 and on all the subsequent dates fixed for directions being on January 23, 2020, February 27, 2020 and March 23, 2020. From the mention notices annexed by the appellant to his replying affidavit, it is evident that the appellant has been keen in prosecuting his appeal.
18. In the end, it is my finding that the instant appeal is not ripe for dismissal or striking out for want of prosecution. The application dated June 2, 2021 is hereby dismissed. Costs are awarded to the appellant.
19. To ensure that the matter moves forward to hearing, the appellant will file and serve a complete record of appeal within 45 days from the date of this ruling. In default, the deputy registrar shall issue a notice to show cause to the appellant for dismissal of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT VOI ON THIS 21ST DAY OF SEPTEMBER, 2022.
RULING DELIVERED VIRTUALLY.**

NJOKI MWANGI

JUDGE

In the presence of:

Appellant absent

Respondent present in person

Mr Otolo – Court Assistant.

NJOKI MWANGI, J

