



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gatuga v Robin Hurt Safaris (Civil Appeal 26 of 2019)  
[2022] KEHC 14529 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 26 OF 2019  
RB NGETICH, J  
OCTOBER 19, 2022**

**BETWEEN**

**JULIUS MUNORU GATUGA ..... APPELLANT**

**AND**

**ROBIN HURT SAFARIS ..... RESPONDENT**

*(Being an appeal from the part of the judgment of Hon. M. Wanjala  
(MR).Senior Resident Magistrate Thika Chief Magistrate Civil Case  
Number 795 of 2013 delivered at Thika on 22nd January, 2019)*

**RULING**

1. The Respondent/Applicant moved the court by way of Notice of Motion application dated 3<sup>rd</sup> December 2021 and filed on 23<sup>rd</sup> December 2021 seeking seeking orders to dismiss this appeal for want of prosecution.
2. The application is premised on the grounds that the appellant has not prosecuted the appeal for a period of two (2) years since the filing of a Memorandum of Appeal on 6<sup>th</sup> February 2019, the delay of over two (2) years is inordinate and or inexcusable. The applicant continues to suffer loss unnecessarily due to the delay in prosecuting the appeal.
3. The application is supported by the annexed affidavit of Julia Kariuki the advocate of the Respondent/Applicant sworn on 3<sup>rd</sup> December 2021. In which she deponed the appellant failed to prosecute the appeal for a period of over two (2) years at the detriment of the Respondent/ applicant.
4. In opposition to the said application, on 10<sup>th</sup> May 2022, the appellant's advocate Jessee Kariuki swore a Replying Affidavit. He argued the application is premature and the delay in filing the record of appeal is premised on the delay in getting the lower court proceedings and decree. The delay is not deliberate.



5. He pointed out that he has obtained the proceedings and a record of appeal filed on 10<sup>th</sup> March 2022 and the same has been served upon the Respondent.
6. The advocate did not wish to file written submissions.

### **Analysis and Determination**

7. I have considered the application before the court, the issue for determination is whether the application meets the threshold for dismissal of an appeal for want of prosecution.
8. Order 42 Rule 35 of the *Civil Procedure Rules* provides for the dismissal of appeals. Order 42 Rule 35(1) of the *Civil Procedure Rules* stipulates as follows:-

“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.”

9. Further Order 42 Rule 35(2) of the *Civil Procedure Rules* stipulates 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”.

10. From the record, the appeal as filed has not been admitted for hearing, the Appellant has pointed out that the delay in filing the appeal is based on the time taken to obtain the trial court proceedings as well as the decree. He has however pointed out that since the same has been obtained he filed a record of appeal which has been served upon the Respondent/ applicant.
11. The appellant further argue that no directions on the appeal have been issued and thus the application is premature.
12. The provision of Order 42 Rule 35 is so clear that an appeal cannot be dismissed for non-prosecution unless directions have been issued as provided for under Order 42 Rule 13 of the *Civil Procedure Rules*.
13. From the attachment adduced the advocate for the appellant by a letter dated 24<sup>th</sup> January 2019 sought to be furnished with copies of the proceedings as well as a copy of the judgment.
14. The appellant filed the Memorandum of Appeal on 6<sup>th</sup> February 2019. The delay in filing record of appeal has been attributed to delay in obtaining the proceedings. He however filed the record of appeal on 10<sup>th</sup> March 2022.
15. I am satisfied with the explanation given for delay and I am of the view that the delay is inordinate and excusable; the appellant had no control over the typing of the proceedings.
16. Further, the filing of the record of appeal by the appellant has demonstrated that the appellant is desirous of prosecuting the appeal. In this circumstance, the court shall not shut the appellant away from accessing justice.

### **Final Orders;**

1. The application dated 3<sup>rd</sup> December 2021 is hereby dismissed with no orders as to costs.
2. A date be fixed for directions on hearing of the appeal.



**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022**

.....

**RACHEL NGETICH**

**JUDGE**

**In the Presence of:**

Kinyua/Martin – Court Assistant

Mr. Kariuki for Appellant/Respondent

Ms. Wambui holding brief for Mrs. Kariuki for Respondent/Appellant

