



REPUBLIC OF KENYA



**Nderitu v Muruga & another (Environment and Land Appeal  
6 of 2020) [2023] KEELC 19905 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 6 OF 2020  
JO OLOLA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**IBRAHIM KING'ORI NDERITU ..... APPELLANT**

**AND**

**ELISHIBA NYAKIRANGI MURUGA ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND CONTROL BOARD – OTHAYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated November 26, 2022 Elishiba Nyakirangi Muruga (the Respondent) prays for an order that the Memorandum of Appeal filed herein be struck out and the Appeal be dismissed for want of prosecution.
2. The application is supported by an Affidavit sworn by the Respondent's Advocate on record Juliana W. King'ori and is premised on the following grounds:
  - (i) That the Appellant has inordinately delayed/failed to prosecute the Appeal within reasonable time;
  - (ii) That owing to the delay, the Respondent continues to suffer psychological anxiety of being subjected to indefinite waiting;
  - (iii) That it is in the interest of justice to bring this litigation to an end; and
  - (iv) That it is mete and just to grant the orders sought.
3. Ibrahim King'ori Nderitu (the Appellant) is however opposed to the grant of the said orders. In his Replying Affidavit sworn on 25<sup>th</sup> January 2023 as filed herein on January 27, 2023, the Appellant avers that the delay in prosecuting the Appeal was purely occasioned by his former Advocates on record.



4. The Appellant avers further that he only came to learn of the current application upon change of representation when they perused the Court record. It is the Appellant's case that he has since requested for certified copies of the Judgment and proceedings which is an indication that he is desirous of prosecuting the Appeal to its logical conclusion.
5. I have carefully perused and considered both the application and the response thereto. I have similarly perused and considered the written submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.
6. By her application before the Court, the Respondent urges the Court to be pleased to strike out the Memorandum of Appeal filed herein and to have the Appeal dismissed for want of prosecution. It is the Respondent's case that the Appellant filed the Memorandum of Appeal on February 19, 2020 and that despite the Appeal being admitted on June 30, 2020, the Appellant has failed to file a Record of Appeal and to list the Appeal for hearing.
7. The Respondent asserts that owing to the reluctance by the Appellant to prosecute the Appeal, she continues to suffer the psychological anxiety of indefinitely waiting for the same and hence the orders sought herein.
8. The application before me is said to have been instituted pursuant to the provisions of Order 42 Rule 35 of the Civil Procedure Rules. The said Rule provides as follows:

“ 35.

- (1) unless within three months after the giving of directions rule 13 the appeal shall have been set down for hearing by the appellant, the respondents 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. My understanding of the above provisions is that Order 42 Rule 35 of the Civil Procedure Rules 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. The second scenario is that if after service of the Memorandum of Appeal, the Appeal would not have been set down for hearing within one year, the Registrar shall list the Appeal before the Judge for dismissal with notice to the Parties.
10. A clear and exhaustive reading of Order 42 of the Civil Procedure Rules however reveals that the two provisions under Rule 35 are not to be read in isolation to the other Rules thereunder. In particular, Order 42 Rule 13 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.

Provided that –

- (i) a translation into English shall be provided of any document not in that language;
  - (ii) the Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in Paragraphs (a), (b) and (f).”
11. From the material placed before me, it was apparent that in compliance with Section 79(b) of the *Civil Procedure Act*, the Appeal herein was admitted to hearing by the Honourable Lady Justice M. C. Oundo on July 8, 2020. However while the Respondent asserts that the Appeal was certified as ready for hearing on July 14, 2020 and that it was subsequently listed for hearing on September 4, 2020, I was unable to understand how that came to be.
  12. From the perusal of the record herein, on the said 14<sup>th</sup> day of July 2020, the Honourable the Deputy Registrar of this Court merely wrote to the Appellant’s Advocates notifying them that the Appeal had been admitted to hearing. The said letter concluded by requiring the Appellant’s then counsel to proceed and comply with Order 42 Rule 12 of the *Civil Procedure Rules* as soon as possible to enable an early disposal of the Appeal.
  13. Under the provisions of the said Order 42 Rule 12, the Appellant was then required to serve the Memorandum of Appeal upon the Respondent within seven (7) days of the notice after which the provisions of Order 42 Rule 13 of the *Civil Procedure Rules* cited herein above would then set in.



14. While this Appeal was said to have been fixed for hearing on September 14, 2020, it was apparent to me that by then, the matter had not been placed before the Judge and that no directions had therefore been given on the hearing of the Appeal as contemplated under Order 42 Rule 13 aforesaid. I say so because todate, no Record of Appeal has been filed in this matter. Under the provisions of 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 was duly filed.
15. From my reading of the stipulations of Order 42 of the Civil Procedure Rules, it was clear to me that an Appeal cannot be dismissed for want of prosecution before the directions contemplated under Rule 13 thereof are granted by the Judge. It was also clear to me that the Appellant does not appear to have any role to play in fixing the Appeal for directions as the Rule specifically puts that obligation under the Deputy Registrar of the Court.
16. That is the reason it is provided under Order 42 Rule 35(1) of the Civil Procedure Rules that after directions are given under Order 42 Rule 13 of the 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, or the Registrar lists the Appeal before the Judge for dismissal as provided under Rule 13(2).
17. Thus while the Appellant's attempt to explain the delay on the conduct of his former Advocates appeared to me to be lacking in substance, it was apparent to me that in law, there was no basis upon which his Appeal can be dismissed at this stage.
18. It follows that I was not persuaded that there was merit in the Respondent's Motion dated November 26, 2022. I dismiss the same and make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

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**J. O. OLOLA**  
**JUDGE**

