



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jeff Hamilton (K) Limited v Omollo & 4 others (Environment and Land  
Appeal 30 of 2020) [2023] KEELC 21737 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 30 OF 2020  
A NYUKURI, J  
NOVEMBER 22, 2023**

**BETWEEN**

**JEFF HAMILTON (K) LIMITED ..... APPELLANT**

**AND**

**OSCAR OMOLLO ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE MAGU ..... 2<sup>ND</sup> RESPONDENT**

**JUDITH SAINA ..... 3<sup>RD</sup> RESPONDENT**

**KAZIMIERZ ANTONI KORABIK ..... 4<sup>TH</sup> RESPONDENT**

**CAROLINE WANGARI KORABIK ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated March 16, 2022 filed by the 1<sup>st</sup> to 3<sup>rd</sup> respondents seeking the following orders;
  - a. That the Memorandum of Appeal dated August 6, 2020 and filed on the August 7, 2020 be dismissed with costs to the 1<sup>st</sup> – 3<sup>rd</sup> respondent/applicants for want of prosecution.
  - b. That the cost of this application be borne by the appellant/respondent.
2. The application is predicated on the supporting affidavit sworn on March 21, 2022 by Oscar Omollo the 1<sup>st</sup> respondent/applicant. It is the applicants' case that despite having filed the memorandum of appeal on August 7, 2020, the appellant never served the same on the applicants' advocates until March 2, 2022 which was 19 months since filing the appeal. That counsel for the applicants was only made aware of the existence of the appeal in February 2022 when a notice for directions was served on him by the court, which prompted him to write to the appellant's counsel *vide* letter dated February 18,



2022 seeking to be served with the Memorandum of Appeal. That this shows that the appellant is not interested in prosecuting the appeal herein as no step has been taken since August 2020 to date. Further that the delay in the prosecution of this matter is hampering the expeditious disposal of the suit filed by the applicants before the lower court. He attached copies of the Memorandum of Appeal, a notice and correspondence.

3. The application is opposed. Major (Rtd) Boke Kitangita, the Managing Director and Chief Executive Officer of the appellant swore a replying affidavit dated April 25, 2022. He stated that the lower court delivered its ruling on 24<sup>th</sup> July without notice to the appellant and that they lodged an appeal on August 2020. That on August 6, 2020, the appellant's counsel wrote to the lower court requesting for certified copies of the ruling and further wrote to court on May 25, 2021 to ascertain the position on the matter, to no avail. That when counsel for the applicants informed the appellant's counsel of being served with notice for directions, the later visited court but the file could not be traced prompting him to write to the applicants' counsel seeking a copy of the mention notice. He denied losing interest in the prosecution of the appeal and stated that they had taken reasonable steps to prosecute the matter. He stated that the appeal raises serious triable issues and dismissing it at this stage will be an infringement on the rights of the appellant. He attached letters dated February 18, 2022 and May 25, 2022.
4. In a rejoinder, the applicants filed a Supplementary Affidavit sworn on May 12, 2022 by Oscar Omollo. He stated that the lower court sent email on July 17, 2020 at 9:03 a.m to all parties in the suit giving notice to the parties that the ruling was to be delivered via email on July 24, 2020. Further that there is no letter presented by the respondents to show that they applied for a certified copy of the ruling and that the respondent's annexures have no court stamp to show that they were physically received in court. He deponed also that therefore the Replying Affidavit was misleading.
5. The application was canvassed by Written Submissions. On record are the applicants' Submissions dated May 12, 2022.

### **Applicants' submissions**

6. Counsel for the applicants relied on order 42 rules 10 and 11 of the *Civil Procedure Rules* and submitted that an appellant is obligated to fix an appeal for directions in 30 days after filing and that this is done before the record of appeal is compiled. Counsel argued that as the appellant failed to serve the appeal upon filing and failed to fix it for directions, they do not have interest in the prosecution of the appeal. Reliance was placed on the case of *Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & another* [2014] eKLR for the proposition that the test to be applied in an application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable and whether justice can still be done despite the delay.

### **Analysis and determination**

7. The court has considered the application, the response and submissions filed by the applicants. The only issue that arise for determination is whether this appeal ought to be dismissed for want of prosecution.
8. Order 42 rule 35 of the *Civil Procedure Rules 2010* provides for dismissal of appeal for want of prosecution 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. Therefore, for a respondent to succeed in an application for dismissal of an appeal for want of prosecution, they ought to demonstrate that directions for the hearing of the appeal have been given by the judge, and over three months have lapsed, yet the appellant has failed to fix the appeal for hearing. Alternatively, they may show that a year has lapsed since the Memorandum of Appeal was served and notice for dismissal for want of prosecution was served on all the parties by the registrar of the court.
10. In this matter, the record shows that when the instant application was filed on March 17, 2022, no directions on the hearing of the appeal had been given. Although the matter had been fixed for directions for the hearing of the appeal on March 22, 2022, no directions were given as counsel for the applicants informed court that he had filed the instant application, and therefore the court proceeded to make directions for the hearing of the instant application. As the application herein was made before directions for the hearing of the appeal were given, I find and hold that on the first limb of order 42 rule 35 of the *Civil Procedure Rules*, the instant application was prematurely filed. As regards the second limb of the aforesaid legal provisions, Under order 42 rule 35 (2) of the *Civil Procedure Rules*, an appeal can be listed for dismissal for want of prosecution, where service of the memorandum has been effected and one year later, the appellant has not fixed the appeal for hearing. In the instant application, it is not disputed that the memorandum of appeal was served on March 2, 2022, while the instant application was filed on March 17, 2022, that was merely 15 days after service of the Memorandum of Appeal. Since one year had not lapsed between the period of service of the Memorandum of Appeal and filing of the instant application, I find and hold that the instant application was prematurely filed.
11. For the above reasons, I find no merit in the application dated March 16, 2022 and the same is dismissed. As there is need for the expeditious disposal of this appeal which has been pending in court for three years, and since directions for the hearing thereof were already given on January 19, 2023, I therefore order the appellant to file and serve both the record of appeal and submissions in regard to the appeal in 30 days of this ruling. The respondents shall file and serve their Submissions in 30 days after service.
12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Wanyama holding brief for Mr. Ayieko for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Ms. Kariuki holding brief for Mr. Achach for appellant

Josephine - Court Assistant

