



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Muthee & 2 others v Kimani (Civil Appeal E1 of 2020)  
[2022] KEELC 3006 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
CIVIL APPEAL E1 OF 2020  
EC CHERONO, J  
MAY 13, 2022**

**BETWEEN**

**JAMES MUTHEE ..... 1<sup>ST</sup> APPELLANT**

**JOHN MARAKA ..... 2<sup>ND</sup> APPELLANT**

**PETER KARIUKI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOSEPH MBURU KIMANI ..... RESPONDENT**

**RULING**

1. The Applicant filed the notice of motion dated November 1, 2021 in which he seeks the following orders: -
  - a. The appeal be struck out for lack of merit and non-prosecution.
  - b. Costs be provided for.
2. The said application is premised on the grounds set out on the face of the application supported by the affidavit of the applicant sworn on November 1, 2021.
3. The application is opposed by the 2<sup>nd</sup> appellant who filed a replying affidavit sworn on November 17, 2021.
4. When the application came up for hearing on December 6, 2021, the parties agreed to dispose of the application by way of written submissions. The applicant filed his submissions on December 10, 2021 while the Respondent filed his on January 20, 2022.



### **Applicants Case and Submissions**

5. The applicant stated that he was served with a memorandum of appeal. However, the same did not disclose who the respondents were hence it is defective and beckons rejection and dismissal by this court.
6. He stated that the appeal having been filed on October 23, 2020, the appellants have not endeavored to fix it for either directions or hearing.
7. He stated that the appellants have not even compiled the record of appeal as required by law and that the appeal lacks merit ought to be struck out or even dismissed.
8. He submitted that order 42 rule 11 of the *Civil Procedure Rules* requires that the appellant should set the matter for directions within 30 days and further that the matter has not been listed for directions within the required 21 days under rule 13 (1).
9. He submitted the grounds of appeal as set out by the appellants are not substantive of the appeal and that the appellants are guilty of laches as they have come to court with unclean hands.
10. He prayed that the appeal be dismissed for want of prosecution and in the interests of justice.

### **Respondents' Case and Submissions**

11. The respondent stated that the applicant is the respondent as the appeal is derived from the lower court Kerugoya Chief Magistrates ELC No. 23 of 2018 in which he was the defendant.
12. He stated that the delay to file the record of appeal is caused by the courts registry failure to prepare the proceedings within the limited time threshold.
13. He stated that the pressure to retrieve the proceedings is proven by the number of times he has been in court and therefore prayed for more time to retrieve the proceedings backed by a certificate of delay.
14. He stated that he has a real and merited case with high chances of success and that matters of land as a factor of production means of livelihoods should be heard with expedience.
15. He submitted that the delay occasioned is beyond his control and prayed that the application be dismissed with costs.

### **Analysis**

16. I have looked at the application, affidavit in support, replying affidavit, rival submissions as well as the applicable law.
17. Dismissal of appeal is provided for under order 42 rule 35 of the Civil Procedure Rules which provides that: -
  - (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."
18. From the above provision of the law, it is evident that the respondent can only move the court to have an appeal dismissed after directions have been given.
19. In this appeal however, directions have not yet been issued.



20. The applicant has complained of the appellant's failure to compile a record of appeal. However, I find that the explanation offered by the respondent that the proceedings are not ready is a compelling ground.
21. I have also considered the averments that the memorandum of appeal does not say who the respondent in the matter is. I find that the same is not fatal as it can be rectified by way of amendment.
22. On the issue of merits or otherwise of the appeal, the same can only be determined upon hearing of the appeal. However, I have looked at the memorandum of appeal and I find nothing to suggest that it is not arguable to a point of striking it out.

### **Conclusion**

23. In the circumstances, it is my finding that the notice of motion dated November 1, 2021 is without merit and the same is hereby dismissed. I order each party to bear their own costs.

**RULING READ AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 13<sup>TH</sup> MAY, 2022.**

.....

**HON. E.C. CHERON**

**ELC JUDGE**

In the presence of;

- 1) Applicant in person----present
- 2) 1<sup>st</sup> Respondent---present
- 3) 2<sup>nd</sup> Respondent—present
- 4) 3<sup>rd</sup> Respondent---absent
- 5) Kabuta---C/A.

