



**Blessed Shelters Holding Limited v Maina (Environment and Land  
Appeal 68B of 2019) [2022] KEELC 3827 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3827 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 68B OF 2019**

**JG KEMEI, J  
JUNE 16, 2022**

**BETWEEN**

**BLESSED SHELTERS HOLDING LIMITED ..... APPELLANT**

**AND**

**GRACE WARUGURU MAINA ..... RESPONDENT**

**RULING**

1. Before court is the respondent's chamber summons dated February 19, 2021 seeking orders that;
  - i. The memorandum of appeal dated the December 2, 2019 and filed in the superior court on the December 4, 2019 be dismissed for want of prosecution and/or be deemed as withdrawn.
  - ii. The costs of this application be provided for.
2. The chamber summons is supported by the grounds on the face of it that are echoed in the supporting affidavit of even date sworn by Dennis Kimakia, the respondent's counsel. He deponed that the trial court judgement was deliver in favour of the respondent herein on November 29, 2019. That dissatisfied with that Judgment, on December 4, 2019 the appellant filed its memorandum of appeal dated December 2, 2019 and never served it on the respondent. That the respondent learnt about the instant appeal *vide* this court's letter dated January 13, 2020. That the despite the court letters to the appellant DK1 & DK2 to file the Record of appeal, the appellant has inordinately delayed to prosecute his appeal and thus denying the respondent a chance to enjoy the fruits of her judgment.
3. On November 24, 2021 and in presence of both parties, directions were taken to prosecute the chamber summons orally on February 24, 2022. The appellant was granted 14 days to file its replying affidavit but none was filed.
4. On the hearing date, the respondent's learned counsel Mr Kimakia relied on the grounds in its chamber summons and supporting affidavit and argued that despite court prompts to the appellant, no record



of appeal has been filed herein and the inordinate delay thereof is inexcusable. That the instant appeal is an abuse of court process and meant to hold the respondent at ransom by denying her the fruits of her judgment. Reliance was placed on the cases of *Rozavie EPZ Ltd v Stanlex Mbiti James* [2015] eKLR, *Eunice Akeyo v Maridadi Flowers Ltd* [2017] eKLR and *Abraham Mukhola Asita v Sliverstyle Investment Co.Ltd* [2020] eKLR in urging the court to dismiss the appeal. Counsel beseeched the court to order the appellant to deposit security for costs being the full decretal amount in court in the event that their motion is denied.

5. On the other hand, the appellant's counsel Mr Kurauka submitted that the court is empowered to give directions and indulge any party in line with Articles 159, 162 *Constitution* of Kenya as read with the *Environment and Land Court Act* and sections 3A and 3 of the *Civil Procedure Act*. He prayed for discretion to file his record of appeal within 14 days failing which the appeal may be dismissed. He blamed the covid pandemic for the delay; that the application does not lie under Order 42 rule 1 *Civil Procedure Rules* since directions have not yet been taken and that there is no timeline for filing of the record of appeal. On the prayer for security of costs, learned counsel objected to the same stating that it cannot be granted orally in court and urged the court to dismiss the motion.
6. The main issue for determination is whether the chamber summons is merited.
7. It is expressed under sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 rule 35 of the *Civil Procedure Rules* which provides;
  - “ 35. Dismissal for want of prosecution [Order 42, rule 35.]
    - (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.”
8. The provision of Order 42 rule 35(1) allows the respondent to set down the appeal or apply for its dismissal for want of prosecution subject to directions having been taken for hearing of the appeal. The provision is couched in mandatory terms and gives timeline of at least three months. Sub-rule 2 above mandates the registrar to list the appeal for dismissal if the appeal is not set down for hearing within one year of filing the memorandum of appeal.
9. Undoubtedly the memorandum of appeal dated December 4, 2019 herein was filed on even date and a period of over two and half years on, the appeal has not been set down for hearing. The Appellant was notified by a letter dated August 13, 2020 of the receipt of the trial court file and request for his record of appeal. The appellant did not heed to the contents of the letter instead attributed the delay in filing the record of appeal to covid. This argument is untenable because despite the covid pandemic, there is evidence that the trial file has been in this court for almost two years now. The appellant also submitted that no directions have been taken yet as envisaged under Order 42 rule 1. This provision is inapplicable as it deals with the form of appeal and the drawing of a memorandum of appeal.
10. Directions under section 79B of the *Civil Procedure Act* as augmented by Order 42, rule 11 *Civil Procedure Rules* that a judge of the High Court shall, within thirty days of the filing of an appeal under



section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act. Indeed, directions have not been taken herein and it would be premature to dismiss the appeal at this point. Certainly, in the case of Rosavie supra cited by the respondent Mabeya J declined to dismiss a similar application as directions for hearing the appeal had not yet been taken. The case of Eunice Akeyo supra relied by the respondent is distinguished as Korir J dismissed an appeal for want of prosecution pursuant to notice to show cause issued by the court registrar in line with Sub-rule 2 above.

11. Consequently, and in the interests of justice and for the reasons given above, I am inclined to give the appellant the chance to prosecute the appeal.
12. Final orders and disposal
  - a. The application is dismissed
  - b. The appellant/applicant is directed to file and serve its record of appeal in the next 15 days failing which the appeal shall stand dismissed with costs without any further orders from this court.
  - c. I order costs of this application in favour of the applicant.
13. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 16<sup>TH</sup> DAY OF JUNE 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kurauka for Appellant/Respondent

Kimakia for Respondent/Applicant

Court Assistant – Phyllis Mwangi

