



REPUBLIC OF KENYA



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**M'Arithi v M'Arithi (Environment and Land Appeal 52 of 2021)
[2022] KEELC 3865 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 52 OF 2021**

CK NZILI, J

JULY 25, 2022

BETWEEN

FESTUS RIUNGU M'ARITHI APPELLANT

AND

JULIUS MWIRIGI M'ARITHI RESPONDENT

JUDGMENT

1. The court is asked to dismiss the appeal for non-prosecution. The reasons are contained in the supporting affidavit sworn by Charles Omari advocate on June 24, 2022. It is averred the appeal was filed on April 15, 2021 and no action has been taken since then by the appellant.
2. The appellant filed the appeal alongside a certificate of urgency dated April 13, 2021 seeking for stay orders. The court certified the application dated April 15, 2021 urgent and granted conditional stay order that the applicant deposits Kshs.200,000/= within 30 days in default the stay order to lapse. Interpartes hearing was scheduled for July 8, 2021.
3. A consent was said to be in the offing on the said date and parties were given up to November 11, 2021. None came up and the court through a ruling dated December 20, 2021 dismissed the application with costs.
4. The respondent urged the court to find that the appellant has lost interest in the prosecution of the appeal and dismiss the appeal under Order 42 Rule 35 (1) & (2) Civil Procedure Rules for want of prosecution.
5. Order 42 as read together with *Environment and Land Court Practice Rules* and Section 79 of *Civil Procedure Act* requires an appellant to act upon the filing of the appeal to ensure the appeal is fast tracked.



6. The applicant has based his application on Order 42 Rule 35 Civil Procedure Rules. Under the said rule, it talks of three months lapse after directions have been given under Rule 13 and one year after service of the memorandum of appeal.
7. In this instance, the appeal is yet to be admitted for hearing let alone direction under Rule 13 Civil Procedure Rules. Be that as it may, one year period and about three months is over since the appeal was filed.
8. The principles to guide the Court in applying Order 42 Rule 35 Civil Procedure Rules were considered in *Ivita v Kyumbu* (1984) KLR 441. The court held the test is whether the delay is prolonged and inexcusable so as to lead to injustice to the opposite party.
9. In *Abraham Mukhola Asista v Silber Style investment co. ltd* (2020) eKLR the court held Order 42 Rule 35 (2) gives effect to the overriding objective which is the just, expeditious, proportionate and affordable resolution of disputes and avenues in which idle litigation is weeded out of the court system. The court cited with approval *Pinpoint Solutions Ltd & another v Lucy Waithegeni Wanderi* (2020) eKLR in which the court held directions must be given before an appeal can be dismissed.
10. The court however held that there would be no justification for a party to file an appeal, go to sleep and leave the appeal parked at the registry for time on end without any action being taken and hide under the order.
11. The court also held that there was no need to keep the respondent waiting, cause backlog, populate the registry and or clog the system of justice.
12. The court went on to dismiss the appeal. See also *Protein & Fruits Processors Ltd & another v Trust Bank (K) Ltd* (2015) eKLR.
13. In *China Road & Bridge Corporation v John Kimenyi Muteti* (2019) eKLR, the court held the responsibility to trigger the process of the giving of directions rests with the appellant and if he sits on his laurels, he must face censure from the court.
14. The court held, under Section 3A Civil Procedure Act and Article 159 (2) (b) of the Constitution it has inherent powers to meet the end of justice or prevent abuse of the court process without undue delay notwithstanding the giving of direction.
15. In *Peter Kipkurui Chemoiwo v Richard Chepsergon* (2021) eKLR the Court of Appeal held the principles to consider include whether the delay is prolonged and inexcusable and if justice can still be done. The respondent was duly served with this application and has not offered any explanation for the delay.
16. In absence of any explanation and given over a year has elapsed without any action by the appellant to expedite the issuance of directions, I find the application with merits. The same is allowed and the appeal dated April 15, 2021 is dismissed for non-prosecution with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Omari for respondent



HON. C.K. NZILI

ELC JUDGE

