



**Owino v Clara (Environment and Land Appeal 3 of 2017)
[2022] KEELC 12669 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 3 OF 2017
MAO ODENY, J
SEPTEMBER 27, 2022**

BETWEEN

CAROLINE ADHIAMBO OWINO APPELLANT

AND

GREGORC CLARA RESPONDENT

(Originating from Kilifi SRMCC No 358 of 2015)

RULING

1. This ruling is in respect of a notice of motion dated February 8, 2021 by the respondent/applicant seeking the following orders: -
 - a. That the appeal herein be dismissed for want of prosecution.
 - b. That the appellant to pay the costs arising from the appeal.
2. The application was supported by the affidavit of Gregorc Clara sworn on the February 8, 2021 whereby he deponed that the original suit was filed vide Kilifi SRMCC No 358 of 2015 on November 19, 2015 which was dismissed on January 17, 2017.
3. That on February 9, 2017 the plaintiff/appellant filed this appeal but has not taken any steps to have her said appeal listed for hearing. Further that on October 28, 2020, the court ordered the appellant to file the record of appeal and set the matter for hearing but the appellant failed to comply with the said orders.
4. In response the appellant/respondent filed a replying affidavit sworn on the February 23, 2022 and deponed that she is keen on prosecuting the appeal and that her advocate has written several letters requesting for the same to be fixed for hearing. That the last letter her advocate wrote was on February 10, 2022 requesting for a mention date before the trial judge for purpose of fixing this matter for hearing.



5. The appellant/ respondent deponed that her advocate was informed that the matter had already been fixed for hearing on March 1, 2022 for the hearing of the present application.
6. She urged the court to allow the appeal to be heard on merit.

Respondent/applicant's Submissions.

7. Counsel submitted that the appellant failed to comply with the court order dated October 28, 2020 to have the appeal set down for hearing and to have the appellant serve the record of appeal within 14 days. Counsel relied on order 42 rule 35 (1) and (2) of the Civil Procedure Rules which provides that; -
 - 35(1) "unless within three months after the giving of direction 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 chamber for dismissal."
8. Mr Asige relied on the cases of *Hyundai Motors (K) Ltd vs Farways Safaris Center Ltd* MSA HCCC No 333 of 1997, *Mr & Mrs Mathias Charo vs Frank Mutua Ngwato* MSA HCCC No 624 of 1989, *Salkas Contractors Limited vs Kenya Petroleum Refineries Limited* MSA Civil Appeal No 250 of 2003 and *Jibo vs Haji Adan Sarbo & Another* Civil Appeal No 162 of 2000.
9. Counsel urged the court to dismiss the appeal for want of prosecution as the delay has not been explained and that the pendency of this suit will prejudice the respondent.

Appellant/respondent's submissions

10. Counsel submitted that the respondent is keen on proceeding with the appeal and has taken steps to have the matter fixed for hearing with the latest letter done on February 11, 2022 only to receive an application filed on January 20, 2022 seeking to dismiss the appeal for want of prosecution.
11. Mr Mkan further submitted on the principles governing dismissal for want of prosecution as was stated in the cases of *Agnan Wekesa Okumu vs Dima College Limited & 2 Others* (2015) eKLR, *Ivita Kyumbu* (1984) KLR 441, *Naftally Opondo vs National Bank of Kenya Ltd* (2005) eKLR and that of *Mwangi S Kimenyi vs AG* Civil Misc No 720 of 2009.
12. Counsel therefore urged the court to dismiss the application and fix the appeal for hearing as the applicant will suffer no prejudice.

Analysis And Determination.

13. The issue for determination is whether the application for dismissal of this appeal for want of prosecution has merit. Order 42 rule 11 of the Civil Procedure Rules states; -

Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the act.



14. Further order 42 rule 12 of the *Civil Procedure Rules* states; -

“After the refusal of a judge to reject the appeal under section 79B of the act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”
15. Order 42 rule 35(1) of the *Civil Procedure Rules* stipulates as follows: -

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.
16. Similarly order 42, rule 35(2) states; -

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.
17. Counsel submitted that the appellant had failed to comply with the directions of this honourable court of October 28, 2020. The records show that the matter was in court on the said date when parties agreed to withdraw the application dated February 17, 2020 and the court made the following orders “the appeal is hereby admitted. Parties to come for directions on January 25, 2021.”
18. On the January 25, 2021 the appellant sought for time to file and serve the record of appeal and the record further shows that the appellant’s advocate wrote to the Deputy Registrar on February 10, 2022 seeking to have a mention date for purposes of fixing the matter for hearing but counsel was informed that the matter was already fixed for hearing of the present application.
19. In the case of *Ivita vs Kyumba* (1984) KLR 441 the principles to be applied in dismissal of applications for want of prosecution are whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay.
20. In the case of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR Gikonyo J stated that: -

“Order 17 rule 2 (1) of the *Civil Procedure Rules* grants the court power to dismiss a suit in which no step has been taken for one year. The order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the *Constitution* and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the *Constitution*, that justice delayed is



justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.
This is the test I shall apply here.”

21. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed. The costs to abide by the outcome of the appeal. The appellant to fast track the hearing of the appeal and fix a date within 30 days’ failure to which the appeal shall stand dismissed

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

