



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Mwaniki v Munyua (Environment and Land Appeal  
53 of 2021) [2025] KEELC 5162 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 53 OF 2021**

**JO OLOLA, J  
JULY 10, 2025**

**BETWEEN**

**JOHN MUCHIRI MWANIKI ..... APPELLANT**

**AND**

**NAOMI GATHONI MUNYUA ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 23<sup>rd</sup> January, 2024, Naomi Gathoni Munyua (the Respondent/Applicant) prays for an order that the suit be dismissed for want of prosecution.
2. The application is supported by an Affidavit sworn by the Applicant and is premised on the grounds that:
  - i. The Appellant has refused, neglected and /or otherwise failed to take any steps to prosecute the suit for a period of over three (3) years;
  - ii. The suit is therefore an abuse of the process of this Court;
  - iii. The Respondent/Applicant continues to suffer unnecessary anxiety due to the delay in the prosecution of the suit; and
  - iv. It is only just, fair and expedient that this suit be dismissed for want of prosecution with costs.
3. John Muchiri Mwaniki (the Appellant/Respondent) is opposed to the application. In his Replying Affidavit sworn on 3<sup>rd</sup> April, 2024, the Appellant avers that an application for dismissal of an Appeal can only be filed once the Record of Appeal has been filed, the Appeal admitted and directions taken under Order 42 Rule 35, which in the instant Appeal are yet to take place.
4. The Appellant avers that the delay in filing the Record of Appeal is inadvertent for the reasons that despite several follow ups at the court Registry, typed proceedings have not been provided. It is the



Appellant's case that the instant application is premature, brought in bad faith, an abuse of the court process and unmerited.

5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the parties herein.
6. By her application before the court, the Respondent urges the Court to dismiss the Appeal filed herein for want of prosecution. It is the Respondent's case that the Appellant has neglected to prosecute the Appeal for more than three (3) years and that the same continues to cause her to suffer unnecessary anxiety due to the delay.
7. On his part, the Appellant denies that he has neglected to prosecute the suit. On the contrary, he asserts that the delay has not been of his own making and that the same has been occasioned by the failure on the part of the court Registry to supply him with typed proceedings.
8. The Respondent's application is expressed to be brought pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules. That provisions pertains to the court's power to dismiss a suit for want of prosecution. Specifically, Order 17 Rule 2 provides that if no application or step has been taken by either party for one year, the court can issue a notice to the parties to show cause why the suit should not be dismissed. If sufficient cause is not shown the court can proceed to dismiss the suit. The court can under those provisions dismiss the suit on its own motion or upon being moved by the Defendant.
9. In the circumstances herein, it was clear that the application has been brought under the wrong provisions of the law. As it were, what is presently before the court is not a suit but an Appeal. The process of filing an Appeal and fixing it for hearing is different and distinct from the process of filing an ordinary suit. Those processes are provided for under Order 42 Rules 11 and 13 of the Civil Procedure Rules.
10. Given those distinct processes, for one to move the Court to dismiss an Appeal, the party ought to approach the court under Order 42 Rule 35 of the Civil Procedure Rules. The said Rule Provides as follows:

“ 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.

11. Those provisions were considered in the case of Pinpoint Solutions Limited & Another v Lucy Waitbegeeni Wanderi (2020) eKLR where the Court observed as follows:

“ a. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any



penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

- b. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

12. In the matter before me, it is evident that the Appeal sought to be dismissed was yet to be admitted by the court as per the requirements of Section 79G of the Civil Procedure Act. Nor have directions been issued herein as to the disposal of the Appeal.
13. Contrary to the Respondent’s assertions that the Appellant was not interested in prosecuting the suit, the Appellant has in the Replying Affidavit annexed various letters addressed to the Chief Magistrate Court at Nyeri requesting for certified copies of the proceedings and the judgment to enable him prepare the Record of Appeal.
14. In the premises, I did not find any merit in the Motion dated 23<sup>rd</sup> January, 2024. I dismiss the same with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF JULY, 2025**

.....

**J.O. OLOLA**

**JUDGE**

In the presence of:

- a. Ms. Firdaus Court Assistant.  
b. No Appearance for the Appellant  
c. No Appearance for the Respondent/Applicant

