



**Kigori v Oloo & another (Environment and Land Appeal 4 of 2019) [2024] KEELC 5284 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5284 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 4 OF 2019**

**LL NAIKUNI, J**

**JULY 9, 2024**

**BETWEEN**

**PETER KIGORI ..... APPELLANT**

**AND**

**CAROLINE AKINYI OLOO ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS OTIENO OLOO (APPLYING AS LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE OLOO AGORO OLOO) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. This Honourable Court is caused to make a determination of the Notice of Motion application dated 10<sup>th</sup> May, 2022 filed by Caroline Akinyi Oloo and Julius Otieno Oloo (the duly appointed Legal Administrators of the estate of OLO AGORO OLOO), the Respondents/Applicant herein. It was brought under a Certificate of Urgency and the dint of the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 and Order 17 Rule 2 of the Civil Procedure Rules, 2010 Laws of Kenya.
2. Upon service of the same, the Respondent responded to the application through a 12<sup>th</sup> paragraphed Replying Affidavit sworn on 22<sup>nd</sup> June, 2022. The Appellant through his counsel further opposed the application through a further Replying Affidavit sworn on 14<sup>th</sup> June, 2024.

**II. The Respondents' Case**

3. The Respondents/ Applicants sought for the following orders:-
  - a. Spent.
  - b. That the Honourable court be pleased to dismiss this appeal for want of prosecution.



- c. That the Honourable Court be pleased to issue orders vacating the orders given on 18<sup>th</sup> February, 2019 in favour of the Appellant.
  - d. That the Honourable Court be pleased to effect orders of the court given by Honourable C. N. NDEGWA on 13<sup>th</sup> February, 2019 upon terms and conditions it may deem fit.
  - e. Costs of this application be in the course.
4. The application by the Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 8 paragraphed annexed affidavit of Caroline Akinyi Oloo and Julius Otieno Oloo the Respondents/Applicants herein with two (2) annexures marked as “C.J.O.1 to 2”. The Applicant averred that:
- i. The Respondent to this appeal obtained a decree of the court on 13<sup>th</sup> February, 2019 and the appellants herein filed this appeal and obtained temporary orders on 18<sup>th</sup> February, 2019 which have lapsed and did not exist. Annexed in the affidavit and marked as “C.J.O – 1” of the ruling dated 13<sup>th</sup> February, 2019 and annexed and marked as “C. J. O – 2” were ordered.
  - ii. This appeal had not been executed for the last 3 years and the Applicants had been prejudiced to effect their orders given on the 13<sup>th</sup> February, 2019 and according to the provision of Order 17 of the Civil Procedure Rules, 2010 had expired and should be dismissed forthwith for want of prosecution
  - iii. They stood to suffer if this appeal was not dismissed.
  - iv. It would be for the interest of Justice that this appeal be dismissed to reduce backlogs of cases in the registry.

### **III. The Appellant’s Response**

5. The Appellant opposed the Notice of motion application by way of a 12<sup>th</sup> Paragraphed Replying Affidavit sworn by Peter King’ori sworn on 22<sup>nd</sup> June, 2022 with four (4) annexures marked as “PK - 1 to 4” where he averred as follows:-
- a. The brief history of this matter was as follows:-
    - i. On 6<sup>th</sup> February, 2017 Respondents filed the Civil case – “Msa Environment and Land Case No. 14 of 2013” simultaneously with a Notice of Motion application.
    - ii. The Appellant applied to have the above suit transferred to the Chief Magistrate’s Court which was allowed on 23<sup>rd</sup> July, 2018 and given a new Number CMCC Land Case No.41 of 2018.
    - iii. On 28<sup>th</sup> August, 2018 the Respondents filed an application in the former Msa Environment & Land Case No. 14 of 2017 which was incompetent and wrongly before the Court since that number no longer existed but despite of this being brought to the attention of the trial magistrate Hon. Ndegwa ARM, ignored the same.
    - iv. The Respondents fixed the application for hearing and served the Appellant’s advocates with a hearing notice in the new file CMCC Land Case No. 41 of 2018.
    - v. The Appellant nevertheless filed a Replying affidavit as per a copy of the Replying Affidavit marked as “PK - 1”.



- vi. Both the Respondents and Appellant submissions as per copies of submissions marked as “PK - 2A & 2B,” respectively.
- vii. The matter was scheduled for mention on 12<sup>th</sup> February, 2019 and had been called in the absence of the Appellant’s Advocates. It was adjourned and fixed for hearing the following day on 13<sup>th</sup> February, 2019 (as per copy of hearing notice served by the applicants marked as “PK - 3”).
- viii. Instead of proceeding for hearing on 13<sup>th</sup> February, 2019 as duly served, the court delivered a Ruling and made orders for the arrest of the Appellant without any hearing at all.
- ix. The magistrate further ignored the Replying Affidavit and proceeded to deny that there was no Replying Affidavit when in fact there was as per copy in (e) above.
- x. Despite bringing the above anomaly to the attention of the Trial Magistrate he ignored the same and proceeded to read the ruling, thereby occasioning injustice to the Appellant who was not heard on the application thereby denying the Appellant the opportunity to be heard contrary to all known procedure, the law and Rules of Natural Justice.
- xi. Despite being faced with such a contempt of court the Learned Trial Magistrate hurried to write the ruling even without considering or properly considering the Appellants Replying affidavit and submission which if considered would have led to a different finding.
- xii. The Appellant then filed this appeal which had very high chance of success especially on the following grounds as per the Memorandum of Appeal on record namely:-
  - a. The Learned Trial Magistrate erred in law and fact by finding and holding that the Appellant contact amounted to contempt of court when the Respondents had not proved the same to the required standards.
  - b. The Learned Trial Magistrate erred in law and fact by finding and holding that the Appellant was in contempt of court when there was no adequate material and evidence before the court to prove the same.
  - c. The Learned Trial Magistrate erred in law and fact by failing to apply or properly apply the relevant law and precedent on contempt of court.
  - d. The Learned Trial Magistrate erred in law and fact by failing to find and hold that there was no service or proper service of the order dated 17<sup>th</sup> January, 2018 the subject of the contempt of court Application upon the Appellant.
  - e. The Learned Trial Magistrate erred in law and fact by finding and holding and issuing a warrant of arrest against the Appellant.
  - f. The Learned Trial Magistrate erred in law and fact by failing to find that the Respondents’ evidence was hearsay and inadmissible and inadequate to allow the application.
  - g. The Learned Trial Magistrate erred in law and fact by failing to find and hold that the Respondent had not been duly served with the order at all.



- h. The Learned Trial Magistrate erred in law and fact by considering irrelevant facts and material in arriving at the decision including that the Appellant tore the Order and said that it was fake and useless when there was no such evidence.
- i. The Learned Trial Magistrate erred in law and fact by failings to analyze and/or properly analyze all the facts, the evidence, submissions and the law.
- j. The Learned Trial Magistrate erred in law and fact by failing to find and hold that the alleged video clips were not availed in court while the alleged photographs did not show the Appellant carrying on the alleged construction or any dates thereof and/or the state of the alleged construction before or after the order
- k. The Learned Trial Magistrate erred in law and fact by finding and holding the Respondents evidence was not disputed when there was a Replying Affidavit disputing and denying the same but failed to notice and/or consider properly consider the same.
- l. The Learned Trial Magistrate erred in Law and fact by allowing the Respondent's application with costs without adequate and/or proper evidence of the same.
- m. That despite bringing the above anomaly to the attention of the Learned Trial Magistrate he ignored the same and proceeded to read the ruling, thereby occasioning injustice to the Appellant who was not heard on the application.
- b. His advocates wrote several letters to the court for proceedings and/or to fix the appeal and/or to confirm whether the appeal has been admitted so as to fix the same for hearing to avail (as per copies marked "PK-4A", "4B", "4C").
- c. Further delays were occasioned by the closure of court's operations by the Covid - 19 pandemic.
- d. He was willing and ready to prosecute the appeal immediately and comply with any set timeliness for justice to be administered on merits as per *the constitution* (2010) Art.159(1) (d).
- e. Due to inadvertence in this matter escaped the attention for some time and was very sorry and truly Counsel's mistake should not be revisited upon him.
- f. The issues raised was this appeal was very weighty and border on his freedom and liberty and he humbly plead to be given a last opportunity to advance his appeal others if dismissed he would suffer substantial and irreparable damages while in fact he did not and could not and would not disobey any court of law he was a law abiding citizen and above all he was also an ordained Christian pastor of God and he truly believe in Christian virtues.
- g. He now honestly and humbly pleaded for a chance to advance his cause in this appeal in accordance with the rights of appeal accordingly.
- h. The Applicants should not be prejudiced at all because the orders issued on 13<sup>th</sup> February, 2019 never affected them or the substance of the trial suit at all and any inconvenience could be catered by way of thrown away costs.
- i. Considering all the circumstances of this case and in the interest of justice this application should be dismissed accordingly.



#### IV. The Appellant's further affidavit

6. The Appellant further in opposition to the Notice of Motion application dated 10<sup>th</sup> May, 2022 through a 13 Paragraphed affidavit sworn by STEPHEN M. MUTISYA, the Advocate for the Appellant, sworn on 14<sup>th</sup> June, 2024 where he averred that:-
- a. It was not true that the Appellant had taken no steps to have this Appeal prosecuted.
  - b. The Appellant had taken many steps to have the Appeal fixed for hearing while the Respondent has also contributed to the delay.
  - c. The Appellant applied for certified copies and proceedings (as per copies of letter marked as "SMM - 1").
  - d. There were interim applications which had to be dispensed with first and the Respondent applied for before Hon. Yano) for adjournment allegedly because the 2<sup>nd</sup> Respondent was sick.
  - e. The record was also clear as follows:-
    - i. On 10<sup>th</sup> July, 2019 - Court ordered parties to file written submissions and Ruling set for 3<sup>rd</sup> October, 2019.
    - ii. On 3<sup>rd</sup> October, 2019, the Ruling was not ready and adjourned to 27<sup>th</sup> January, 2020.
    - iii. On 27<sup>th</sup> January, 2020 Ruling was delivered and application allowed. He also thereafter wrote a letter on the proceedings (as per copy marked as "SMM - 2").
    - iv. On 11<sup>th</sup> May, 2022 (Before Hon. Naikuni J.)- Respondents application not certified urgent.
    - v. On 29<sup>th</sup> June, 2022 - Court not sitting - Respondent to fix dates in the Registry. They had not done so to date.
    - vi. The Appellant's advocates fixed the matter for mention 25<sup>th</sup> April, 2023 to confirm the position of proceedings and Ruling which was not ready from the original court file could not be traced.
    - vii. On 25<sup>th</sup> April, 2023 and in the presence of all parties the court confirmed the same was not ready and fixed further mention on 5<sup>th</sup> June, 2023.
    - viii. On 5<sup>th</sup> June, 2023 in the presence of both parties the court confirmed the same was not ready and fixed further mention on 4<sup>th</sup> October, 2023 to confirm the same.
    - ix. On 4<sup>th</sup> October, 2023 in the presence of both parties, the court directed the Appellant's Advocates to write an official letter to the Deputy Registrar ELC which was done (as per copy of letter marked as "SMM - 3").
    - x. The matter was fixed for further mention on 30<sup>th</sup> January, 2024 and the deputy Registrar summoned by the court to explain the position of the original lower court file and the matter fixed for further mention on 27<sup>th</sup> May, 2024.
    - xi. On 27<sup>th</sup> May, 2024 instead of pursuing the issue of the Deputy Registrar about the original file, the Respondent raised the issue of the application dated 10<sup>th</sup> May, 2022 to be heard first hence the court directed for submissions and Ruling on 9<sup>th</sup> July, 2024



- f. From the above it was clear that the Appellant had done a lot of steps to have the typed proceed for hearing which the court could confirm through to various mentions and letters.
- g. The Respondent had concealed material fact that the Appellant’s application was allowed by Justice Yano on 27<sup>th</sup> January, 2020 hence the prayer to vacate the orders and/or effect those of Hon. Ndegwa are misconceived because there is stay pending Appeal.
- h. The Appeal herein was very serious and meritorious and borders on loss of liberty by alleged contempt of court by the lower court and should be heard and determined on merits not technicalities for substantive Justice under the provision Article 159(1) (d) of the constitution.
- i. The Appellant had a constitutional right of Appeal under the provision of Article 50 of the Constitution of Kenya, 2010.
- j. The averment to dismiss the appeal to minimize back log was also false because the Appellant had been very diligent.
- k. To progress the Appeal the court could give timelines and orders the Deputy Registrar to abide by the earlier directives to avail the original file.
- l. Most precedent authorities were against dismissed of Appeal for want of prosecution e.g. on similar applications the Court held:-
  - a. “Civil Appeal 248 of 2017, Njai Stephen – Versus - Christine Khatiala Andika [2019] eKLR”.  
 Before an appeal was dismissed for want of prosecution, directions ought to be been given which is not the case herein.  
 Every person ought not be shut out from accessing court or having his day in court a party should have access to court to have his dispute heard and determined.  
 The Appellant did not have control of the court diary hence the Deputy Registrar should be directed to facilitate the typing of the proceedings and placing of the low court file in this court.  
 To progress the matter direction should be given on time lines.
  - b. “Civil Appeal 34 of 2016, Attorney General – Versus - Lucy Nduta Nganga [2017] eKLR”.  
 Before an appeal was dismissed for want of prosecution, directions ought to be been given which was not the case herein.  
 The overriding objection in civil litigation is a policy issue which the court invokes to obviate hardships, expenses, delay, and to focus on substantive justice.  
 The Court ought to decline to strike out the appeal in the interest of justice. The court should weigh the prejudice likely to be suffered by the appellant against the applicant.
- m. Considering all the above facts and the circumstances of this case and in the interest of justice and fair play, this application should be dismissed accordingly.

## V. Submissions

- 7. On 29<sup>th</sup> May, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 10<sup>th</sup> May, 2022 be disposed of by way of written submissions. Pursuant, to



that all parties complied accordingly. Subsequently, the Honourable Court reserved the 9<sup>th</sup> July, 2024 for the delivery of the Ruling accordingly.

#### **A. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/ Applicants**

8. The Respondents acting in person filed their written submissions dated 2<sup>nd</sup> June, 2022. The Applicants commenced by stating that the Respondents filed their case in the Chief Magistrate's Court and obtained orders on 13<sup>th</sup> February, 2019 which were binding upon the Appellants and the Respondents. The Appellants herein obtained temporary orders of stay of execution on 18<sup>th</sup> February, 2019 which at the moment did not exist. The Appeal had never been prosecuted from the inception of its filing to date. The Respondent were prompted to file this application under a Certificate of Urgency served on 17<sup>th</sup> May, 2022 which sought the following orders: -
  - a. That the Honourable Court be pleased to certify the matter as urgent and service of the same be dispensed with ex-parte at the first instance.
  - b. That the Honourable Court be pleased to dismiss this appeal for want of prosecution.
  - c. That the Honourable Court be pleased to issue orders vacating the orders given on 18<sup>th</sup> February 2019 in favour of the Appellant.
  - d. That the Honourable Court be pleased to effect orders of the court given by Honourable Ndegwa on 13<sup>th</sup> 2019 upon terms and conditions it may deem fit.
  - e. Costs of this application be in the course
9. The application were supported by an affidavit which had not been responded to. They reiterated the contents of their application and their Supporting Affidavit. It was true and it was on record that this appeal was long overdue and it should be dismissed forthwith to minimize backlog of cases in the registry. The Appeal was filed by a qualified person who understand the tolerated by this court. They thanked the Honourable Court for having cured their application under Article 159 (1) (2) of *the Constitution* as they had omitted Order 42 Rule 20 (1) of the Civil Procedure Rules, 2010. Their application was highly merited and they prayed that the orders being sought be granted as prayed. According to the Applicants in conclusion they did not need to look for authorities on a straight forward issue.

#### **B. The Written Submissions by the Appellant**

10. The Appellant through the Law firm of Messrs. Mutisya & Associates Advocates filed his written submissions dated 14<sup>th</sup> June, 2024. Mr. S.M. Mutisya Advocate submitted that the Appellant's objected to the Respondent's notice of motion application dated 10<sup>th</sup> May, 2022. He filed a Replying affidavit on the same. It was not true that the Appellant had taken no steps to have this Appeal prosecuted. The Appellant had taken many steps to have the Appeal fixed for hearing while the Respondent had also contributed to the delay. The Appellant applied for certified copies and proceedings. There were interim applications which had to be dispensed with first and the Respondent applied for before Hon. Yano) for adjournment allegedly because the 2<sup>nd</sup> Respondent was unwell.
11. According to the Learned Counsel the record was clear as follows:-
  - i. On 10<sup>th</sup> July, 2019 - Court ordered parties to file written submissions and Ruling set for 3<sup>rd</sup> October, 2019.
  - ii. On 3<sup>rd</sup> October, 2019, the Ruling was not ready and adjourned to 27<sup>th</sup> January, 2020.



- iii. On 27<sup>th</sup> January, 2020 Ruling was delivered and application allowed. He also thereafter wrote a letter on the proceedings (as per copy marked as “SMM - 2”).
  - iv. On 11<sup>th</sup> May, 2022 (Before Hon. Naikuni J.)- Respondents application not certified urgent.
  - v. On 29<sup>th</sup> June, 2022 - Court not sitting-Respondent to fix dates in the Registry. They had not done so to date.
  - vi. The Appellant’s advocates fixed the matter for mention 25<sup>th</sup> April, 2023 to confirm the position of proceedings and Ruling which was not ready from the original court file could not be traced.
  - vii. On 25<sup>th</sup> April, 2023 and in the presence of all parties the court confirmed the same was not ready and fixed further mention on 5<sup>th</sup> June, 2023.
  - viii. On 5<sup>th</sup> June, 2023 in the presence of both parties the court confirmed the same was not ready and fixed further mention on 4<sup>th</sup> October, 2023 to confirm the same.
  - ix. On 4<sup>th</sup> October, 2023 in the presence of both parties, the court directed the Appellant’s Advocates to write an official letter to the Deputy Registrar ELC which was done (as per copy of letter marked as “SMM - 3”).
  - x. The matter was fixed for further mention on 30<sup>th</sup> January, 2024 and the deputy Registrar summoned by the court to explain the position of the original lower court file and the matter fixed for further mention on 27<sup>th</sup> May, 2024.
  - xi. On 27<sup>th</sup> May, 2024 instead of pursuing the issue of the Deputy Registrar about the original file, the Respondent raised the issue of the application dated 10<sup>th</sup> May, 2022 to be heard first hence the court directed for submissions and Ruling on 9<sup>th</sup> July, 2024
12. The Learned Counsel submitted that from the above, it was clear that the Appellant had done a lot of steps to have the typed proceedings for hearing which the court could confirm through to various mentions and letters. The Respondent had concealed material fact that the Appellant’s application was allowed by Justice Yano on 27<sup>th</sup> January, 2020. Hence the prayer to vacate the orders and/or effect those of Hon. Ndegwa were misconceived because there was stay pending Appeal. The Appeal herein was very serious and meritorious and borders on loss of liberty by alleged contempt of court by the lower court and should be heard and determined on merits not technicalities for substantive Justice under the provision of Article 159(1)(d) of *the Constitution* of Kenya, 2010.
13. The Learned Counsel submitted that the Appellant had a constitutional right of Appeal under the provision of Article 50 of *the constitution*. The averment to dismiss the appeal to minimize back log was also false because the Appellant had been very diligent. To progress the Appeal the court could give timelines and orders the Deputy Registrar to abide by the earlier directives to avail the original file. Most precedent authorities were against dismissal of Appeal for want of prosecution e.g. on similar applications the Court held;
- a. “Civil Appeal 248 of 2017, Njai Stephen – Versus - Christine Khatiala Andika [2019] eKLR”.  
    - “ Before an appeal was dismissed for want of prosecution, directions ought to be been given which is not the case herein.



Every person ought not be shut out from accessing court or having his day in court.....a party should have access to court to have his dispute heard and determined.

The Appellant did not have control of the court diary hence the deputy registrar should be directed to facilitate the typing of the proceedings and placing of the low court file in this court.

To progress the matter direction should be given on time lines.

b. “Civil Appeal 34 of 2016, Attorney General – Versus - Lucy Nduta Nganga [2017] eKLR”.

Before an appeal was dismissed for want of prosecution, directions ought to be given which was not the case herein.

The overriding objection in civil litigation is a policy issue which the court invokes to obviate hardships, expenses, delay, and to focus on substantive justice.

The Court ought to decline to strike out the appeal in the interest of justice. The court should weigh the prejudice likely to be suffered by the appellant against the applicant.

14. The Learned Counsel concluded by stating that considering all the above facts and the circumstances of this case and in the interest of justice and fair play, this application by the Applicants should be dismissed accordingly

## VI. Analysis and Determination

15. I have carefully read and considered the pleadings herein, the filed written submissions and the cited authorities by parties herein, and the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed, reasonable and fair decision, the Honorable Court has two (2) framed the following issues for determination.

- a. Whether the application dated 10<sup>th</sup> May, 2022 by the Applicants to have the appeal lodged by the Appellants be dismissed for want of prosecution has any merit.
- b. Who will bear the Costs of Notice of Motion application 10<sup>th</sup> May, 2022.

### **Issue No. a). Whether the application dated 10<sup>th</sup> May, 2022 by the Applicants to have the appeal lodged by the Appellants be dismissed for want of prosecution has any merit.**

16. Under this sub – title, the Honourable Court shall examine whether the Respondents/Applicants have made out a case for the dismissal of this appeal for want of prosecution. With all due respect, the court notes that the provisions cited in application namely the provision of Section 3A, of the *Civil Procedure Act*, Cap. 21 and Order 17 Rule 2 of the Civil Procedure Rules, 2010 Laws of Kenya in the strict sense of the law only apply to suits but not to appeals. However, since the Respondents/applicants never raised this issue, I will not digress and proceed to make a determination of the application on its own merit.
17. Legally speaking, dismissal of appeal is provided for under the provision of Order 42 Rules 20 and 35 of the Civil Procedure Rules. Order 42 Rule 11 and 13 of the Civil Procedure Rules requires that an appellant, within thirty (30) days of filing the appeal, cause the matter to be listed for directions under Section 79B of *Civil Procedure Act*. It is the duty of an appellant to cause the appeal to be placed before the judge for directions.



18. Order 42 Rules 20 (1) and (2) and 35(1) of the Civil Procedure Rules stipulates as follows: -

Rule 20

(1) “Where on the day fixed, or on any other day to which the hearing may be states: adjourned, the Appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under Rule 16, the court may make an order that the appeal be dismissed.

(2) Where the Appellant appears, and the Respondent does not appear and has not filed a declaration under Rule 16 (3), the appeal may be heard “ex – parte”.

Rule 35 states:-

“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.”.

Rule 35(2) stipulates as follows: -

“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”.

19. This legal position is supported by a plethora of Court decisions. They include the case of “Haron E Ongechi Nyaberi – Versus - British American Insurance Co Limited HCCA No 110 of 2001 eKLR” where it was held that:

“It will be the Appellant who shall really cause the appeal to be listed for directions before a judge by serving the Memorandum of Appeal and serving the Record of Appeal.”

20. However, it will be noted as a general rule that appeals cannot be dismissed under Order 42 Rule 35 (1) unless directions have been given under the provision of Order 42 Rule 11, 13 and 16 of the Civil Procedure Rules, 2010. This legal position was well articulated by Hon. Justice J. Kamau in the case of: “Pinpoint Solutions Limited and Another – Versus - Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR” and which decision I am fully in agreement with. The Learned Judge held that: -

“20. 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 Rules 11 and 13 of the Civil Procedure Rules, 2010.

21. 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 the 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...”

21. In this instant case, and as already stated out the appeal was instituted by way of a Memorandum of Appeal dated 15<sup>th</sup> February, 2019 and filed the same day. In addition, the records show that the Memorandum of Appeal was not admitted. It follows therefore that the no directions as required the provision of Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules 2010 were ever made in this file. Subsequently, under the provision of Order 42 Rule 35 (1), the Respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the Appellant.
22. Be that as it may, this does not mean that this court cannot dismiss an appeal before directions are given. Where there are sufficient reasons, the court can invoke its inherent powers as bestowed on it by the *Civil Procedure Act*, Cap. 21 and the Rules to dismiss an appeal for want of prosecution even where directions have not been given. Odunga J in the case of:- “China Road & Bridge Corporation – Versus - John Kimenye Muteti [2019] eKLR” held that:-
  - “ 19. It is therefore clear that it is upon the Appellant to trigger the process of the giving of directions and an Appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given.....” (See also Abraham Mukhola Asitsa – Versus - Silver Style Investment Company Ltd [2020] eKLR).”
23. As such, where the Appellant files an appeal and goes into slumber, this court can invoke its inherent powers as provided for under the provision of Sections 1, 1A, 3 & 3A of the Civil Procedure or Sections 3 and 13 of the Environment & Land Court or Sections 1010 of the *land Registration Act*, no. 3 of 2012 or Section 150 of the *land Act*, No. 6 of 2012 to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. Furthermore, the provisions of Article 159(2) (b) of *the Constitution* to do justice without undue delay. This is notwithstanding that directions have not been given.
24. Having stated all this, the main question that lingers herein is whether this is a proper case for the court to invoke its inherent powers and dismiss the appeal herein (notwithstanding that directions have not been given)? In defense to this laxity, it was averred that that he was prevented from doing so by the insurgency of the global Covid-19 pandemic and which led to the closure of the court’s registry. However, this court takes judicial notice that the first case of Covid-19 was reported in Kenya in March 2020 and which was almost eight (8) months after the said orders. By this stand alone reason, the Court finds the excuse rather not only illogical, misleading but baseless. I say so based on the following grounds. Firstly, the principles to be considered while considering an application for dismissal of appeal were restated by the Court of Appeal in the case of:- “Peter Kipkurui Chemoiwo – Versus - Richard Chepsergon [2021] eKLR” and include 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. (See also “Ivita – Versus - Kyumba [1984] KLR 441”). It is clear from the instant case that the delay herein is indeed prolonged. The Respondent blamed Covid-19 for the same but as I have already said, the pandemic hit Kenya



many months after the orders on filing of the Record of Appeal were given. Secondly, it is a matter of public notoriety that despite the pandemic, directions were issued by the Hon. Chief Justice on the e-filing of matters. The Appellant being represented by an advocate cannot as such blame the closure of the registries for his failure to file the Record of Appeal.

25. Suffice it to say, the court is of the considered view that in the interest of Justice, Equity and Conscience, justice can still be done despite the delay as dismissal of a matter before party is substantively heard is a draconian action and allow the appeal to proceed on but upon the Appellant meeting certain pre – conditions as stated herein below. con.

#### **Issue No. b). Who will bear the Costs of Notice of motion application dated 10<sup>th</sup> May, 2022**

26. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
27. In the present case, the Honourable Court elects not to award any costs.

#### **VII. Conclusion & Disposition**

28. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 10<sup>th</sup> May, 2022 by the Respondents be and is hereby found to lack merit thus it is dismissed with no orders as to costs subject to the fulfilment of the Pre – condition set out herein.
  - b. That an order be hereby made that the Appellant to file the Record of Appeal within 21 days from the date of this ruling.
  - c. That thereafter, for expediency sake, the appeal to be listed for directions under Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010 on 2<sup>nd</sup> October, 2024 and Judgement on the main appeal to be delivered on 9<sup>th</sup> December, 2024.
  - d. That the Respondents/Applicants is awarded throw away costs assessed at a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/=) to be paid within 14 days from the date of this ruling. In default, the appeal by the Appellant will automatically stand dismissed thereof.
  - e. That there shall be no orders as to cost.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, MEANS, SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JULY 2024.**



**HON. MR. JUSTICE L. L. NAIKUNI,**

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**ENVIRONMENT AND LAND COURT AT MOMBASA**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, Court Assistant;
- b. M/s. Caroline Akinyi & Mr. Julius Otieno Oloo acting in person as the Appellants/ Respondents.
- c. Mr. S. M Mutisya Advocate for Respondents/ Applicants

