



Trustees AIC Mahiga Children’s Home & 2 others v Wachira & 2 others (Environment and Land Appeal 20 of 2019) [2022] KEELC 14504 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 20 OF 2019
JO OLOLA, J
NOVEMBER 3, 2022**

BETWEEN

**TRUSTEES AIC MAHIGA CHILDREN’S HOME 1ST APPELLANT
CHAIRMAN KIRITI NURSERY SCHOOL COMMITTEE 2ND APPELLANT
HEAD TEACHER – KIRITI NURSERY SCHOOL 3RD APPELLANT**

AND

**JEDIDAH WANGECHI WACHIRA 1ST RESPONDENT
SIMON MUTHOGA KIIRU 2ND RESPONDENT
ELIZABETH WAIRIMU NDEGWA 3RD RESPONDENT**

RULING

1. By this notice of motion dated January 5, 2022, Jedidah Wangechi Wachira and 2 Others (the applicants) urge that the appeal herein be dismissed with costs for want of prosecution. The application which is supported by an affidavit sworn by one Leonard Gikaru Wachira is premised on grounds:
 - (i) That from the time the appeal was admitted for hearing some times in July, 2020 the appellants have never taken any action to have it prosecuted and it is now a year since the appeal was admitted for hearing;
 - (ii) That the appellants appear not to be interested in prosecuting the appeal; and
 - (iii) That the respondents are greatly prejudiced by the delay in prosecuting the appeal.
2. The Trustees AIC Mahiga Children’s Home (the 1st appellant) is opposed to the application. In a replying affidavit sworn on its behalf by its manager, David Mbugua as filed herein on March 21, 2022, the 1st appellant avers that though the matter was admitted for hearing in July 2020, the record of appeal was only filed in court on October 2, 2020.



3. The 1st appellant avers that it is an institution in which many committee members are of old age and that given the Covid-19 global pandemic, it was difficult for them to meet and make decisions and the courts had equally scaled down their activities.
4. The 1st appellant avers that no unlawful activities are taking place in the suit premises and asserts that a dismissal of the appeal is bound to affect hundreds of children who utilize the premises on a daily basis.
5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein.
6. The applicants herein have urged this court to dismiss the present appeal for want of prosecution. Dismissal of an appeal for want of prosecution is provided for under order 42 rule 35 of the [Civil Procedure Rules](#) which provides thus:

- “ 35. Unless within three months after the giving of directions under rule 13 the
- (1) 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.”

7. As was stated in [Argan Wekesa Okumu v Dima College Limited & 2 Others \(2015\) eKLR](#):

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay ...

Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

8. In the matter herein, it was not in dispute that the appeal was admitted to hearing in July, 2020 and that as at the time this application was filed a period slightly in excess of one year had lapsed before any action was taken.
9. While conceding that they did not take any action within the required period, the respondents/ appellants have explained that they were unable to do so as the committee members of the 1st appellant are older members of society and that they were unable to meet at the time due to the conditions imposed by the Ministry of Health following the Covid-19 global pandemic. It is further their case that the courts had greatly scaled down their operations during the relevant period and hence their inability to cope with the timelines.
10. This court takes judicial notice that during the relevant period, the government had indeed imposed restrictions on meetings and gatherings and that at some point in time, the operations of the court were indeed greatly scaled down. Arising from the foregoing, I was unable to pin blame solely upon the appellants for the failure to comply with the timelines provided under order 42 rule 35 of the [Civil Procedure Rules](#).



11. Accordingly I decline to allow the application herein and instead hereby direct the appellants to set down the appeal for hearing within 3 months from today failure to which the same shall stand dismissed with costs.

12. The costs of this application shall be in the appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 3RD DAY OF NOVEMBER, 2022.**

In the presence of:

Mr S K Njuguna for the applicant

Ms Kimunyo holding brief for Waweru Kiragu for the respondent

Court assistant - Kendi

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J O OLOLA

JUDGE

