



**James & another v Chesimet & another (Civil Appeal  
E026 of 2022) [2025] KEHC 86 (KLR) (15 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 86 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E026 OF 2022  
PN GICHOHI, J  
JANUARY 15, 2025**

**BETWEEN**

**WANYOIKE NGUNYI JAMES ..... 1<sup>ST</sup> APPELLANT**

**DANSON NJUGUNA KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL K CHESIMET ..... 1<sup>ST</sup> RESPONDENT**

**RAFIKI DEPOSIT MICROFINANCE (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent/Applicant has moved this Court by way of a Notice of Motion dated 31<sup>st</sup> July, 2024 brought under Order 42 Rule 35 (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A,1B and 3A of the [Civil Procedure Act](#) seeking for Orders: -
  1. That the Appellants' Memorandum of Appeal dated 24<sup>th</sup> February 2022 be struck out.
  2. That the Appellants' Appeal in High Court Civil Appeal No. E026 of 2022 dismissed for want of prosecution.
  3. That cost of this application be granted to the Applicant.
2. The application is based on the grounds on the face of the application and the Supporting Affidavit of 1<sup>st</sup> Applicant sworn on 31<sup>st</sup> July, 2024.
3. The Applicant states that Appellants filed a Memorandum of Appeal dated 24<sup>th</sup> February 2022, being aggrieved by the judgement of the Hon E.K. Usui delivered on the 28<sup>th</sup> of January 2022 and also filed an application dated 6<sup>th</sup> July, 2023 seeking stay of execution of the judgement.



4. He states that he responded to that applicant and on the 17<sup>th</sup> July 2023, the Court gave directions for conditional stay including directions that the Appellants file a Record of Appeal. However, the Appellants have failed to comply with the consent orders of 17<sup>th</sup> July 2023 which were adopted by the Court on 14<sup>th</sup> November 2023 and no record of appeal has been filed.
5. The 1<sup>st</sup> Applicant terms the Appellants' conduct as a clear indication that they have no intention of proceeding with this Appeal. He depones that the Appellants' inaction and lethargy have had a devastating effect on the Applicant herein who has been denied his right to enjoy the fruits of his judgement through delay tactics.
6. In the circumstances, the Applicant urges that the Memorandum of Appeal on record be struck out in line with Order 42 Rule 35 of the Civil Procedure Rules.

### **Analysis and Determination**

7. The events leading to the filing of this application are that through the firm of Gatonye and Gatonye Advocates, the Appellants filed the application of dated 6<sup>th</sup> July 2023 seeking stay of execution of the judgement delivered by the trial court in Nakuru CMCC No. 290 of 2019- Daniel K. Chesimet v Wanyoike Ngunyi James & 2 others pending hearing and determination of the appeal.
8. The 1<sup>st</sup> Respondent swore a Replying Affidavit on 14<sup>th</sup> July 2023 which was filed through the firm of Gordon Ogola & Kipkoech Advocates where the 1<sup>st</sup> Respondent acknowledged that 1<sup>st</sup> Appellant's insurer had already paid Kshs. 3, 000,000 leaving a balance of Kshs. 4,327,119/= which continued to accrue interest.
9. He deponed that a similar application had been made before the trial court which application was allowed by consent on conditions. However, the Appellants complied with part of conditions but did not comply with the condition for depositing the balance in a joint interest earning account. He therefore urged that the Appellants deposit the balance of Kshs. 4,327,119/= if a stay was to be granted.
10. The record shows that on 17<sup>th</sup> July, 2023, and through the prompt by the Court which noted that Kshs. 3 Million had paid, the parties reached a consent that compromised the application before T.A. Odera J as follows: -
  1. The 1<sup>st</sup> Applicant to deposit a title deed valued at Kshs.4,000,000.
  2. The Title Deed be accompanied by the letter of search and a valuation report.
  3. The 1<sup>st</sup> Applicant to comply within 21 days from 17<sup>th</sup> July 2023.
  4. Mention on 19<sup>th</sup> September 2023 before the Deputy Registrar for compliance.
  5. The lower court file be availed and the Record of Appeal be filed.
11. The matter was subsequently mentioned twice before the Deputy Registrar to confirm compliance with the stay condition but the court noted that none of the conditions had been complied with. On the third mention on 6<sup>th</sup> February, 2024, Mr Gatonye for the Appellants, informed the Court that he was unable to reach his clients for further instructions.
12. He therefore sought another mention so as to file an application to cease acting. He indeed filed the application dated 12<sup>th</sup> March, 2024 which was allowed by this Court on 8<sup>th</sup> July, 2024. As at the time of hearing the instant application, the Appellants are in person. They neither attended court nor filed a response to this application.



13. Flowing from the above, the main issue for determination is whether this Appeal should be dismissed for want of prosecution.
14. Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules, provide that: -
  - (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.
15. The above refers to a scenario where directions have been given under Order 42 Rule 13 of the Civil Procedure Rules which provides that: -
  - (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
  - (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
  - (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
  - (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
    - (a) the memorandum of appeal;
    - (b) the pleadings;
    - (c) the notes of the trial magistrate made at the hearing;
    - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
    - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate; (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that—
      - (i) a translation into English shall be provided of any document not in that language;
      - (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).
16. What is clear from the above provision is that directions have to be given first before an application for dismissal of appeal for want of prosecution can apply.



17. In his case, directions were specific and strictly on compliance on the conditions for granting stay of execution and further, for the lower court file to be availed and Record of Appeal filed. The filing of the Record of Appeal and availability of the lower court file would enable the Court to admit the appeal for hearing and give directions towards disposal of the Appeal. In absence of the same, there was no opportunity for setting down the appeal for hearing.
18. None the less, this Court still has power to make orders as appropriate to prevent abuse of Court process. Section 1A of the [Civil Procedure Act](#) provides that: -
  - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
19. It is evident from the Court record that the lower court file was not availed and the Record of Appeal was not filed. The Appellants did not comply with any of the basic directions given by the Court in regard to stay of execution. Instead, the Appellants frustrated their counsel by persistently failing to furnish him with the requisite instructions to enable him continue representing them.
20. Despite being served with the application by their counsel seeking to cease acting for them, the Appellants did not act in any way. In the circumstances herein, there was no compliance whatsoever with the directions of the Court and no reason was given by the Appellants. It is clear that the Appellants' inaction and delay herein is highly prejudicial to the Respondents/Applicants and in particular, the 1<sup>st</sup> Respondent/Applicant.
21. Indeed, no purpose or justice would be served by maintaining this appeal in the Court system when the Appellants herein have demonstrated clear and total disinterest in the same.
22. In conclusion therefore, this Application is allowed in that the Appeal is dismissed with costs to 1<sup>st</sup> Respondent/ Applicant.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF JANUARY, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

N/A for the parties duly notified

Ruto, Court Assistant

