



Okaja Limited t/a Casa Vera Lounge v Office of the Data Protection Commissioner (Civil Appeal E1117 of 2023) [2025] KEHC 1880 (KLR) (Civ) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1117 OF 2023

TW CHERERE, J

FEBRUARY 20, 2025

BETWEEN

OKAJA LIMITED T/A CASA VERA LOUNGE APPELLANT

AND

OFFICE OF THE DATA PROTECTION COMMISSIONER APPLICANT

RULING

1. Before this court for determination is the Chamber Summons dated 02nd September 2024 filed by the Applicant, brought under Sections 1A, 1B, 3A, and 78 of the *Civil Procedure Act* and Order 42 Rule 35(1) and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking the following orders:
 1. That this appeal be struck out for want of prosecution
 2. That this appeal be struck out as the Appellant has failed to set it down for hearing
 3. That the costs of this application be provided for.
2. The application is premised on the grounds that the Appellant, despite being served, failed to appear before the court on multiple occasions, namely 23rd January 2024, 20th February 2024, and 16th July 2024. Further, the Appellant failed to file the record of appeal despite directions having been issued on 09th May 2024 and served on 17th May 2024.
3. The application is supported by the affidavit sworn on 21st September 2024 by Oscar Otieno, the Applicant's Deputy Data Commissioner, who reiterates the grounds set out in the application. The Appellant, though served, did not file any response to the application.
4. The sole issue for determination is whether the appeal ought to be dismissed for want of prosecution.



Analysis

5. I have considered the application, the supporting affidavit and the court record. Order 42 Rule 13 of the Rules provides that:

“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.”

6. The court record reveals that the Appellant did not attend court on 09th May 2024 when directions on the appeal were issued, requiring their issuance in his absence. Although the directions were served on 17th May 2024, the Appellant has to date not filed the record of appeal.

7. Order 42 Rule 35(1) of the [Civil Procedure Rules](#) 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.”

8. The legal basis for dismissal of suits for want of prosecution is the principle that litigation must be expedited. Litigants are expected to diligently prosecute their cases to ensure timely resolution. In [Ivita v Kyumba](#) [1984] KLR 441 the court held:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

9. The Appellant’s failure to respond to this application has deprived the court of the opportunity to determine whether the inaction on his part is deliberate or inadvertent.

10. The Supreme Court of Kenya in [Bwana Mohamed Bwana v Silvano Buko Bonaya & Another](#) [2015] eKLR held that:

“Without a record of appeal, a court cannot determine the appeal cause before it. If the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law or [the Constitution](#) where an appeal is incompetent. An incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

11. The Appellant’s failure to file the record of appeal, as highlighted in the Bwana case, renders the appeal incompetent and prevents this court from exercising its jurisdiction.

12. While Article 50 of [the Constitution](#) of Kenya guarantees the right to a fair hearing, this court has a duty to uphold judicial efficiency and prevent indefinite delays in litigation, ensuring that justice is neither delayed nor denied.



13. In conclusion, I reiterate the importance of adhering to procedural timelines to avoid dismissal of suits for want of prosecution for the reason that prolonged inactivity without sufficient cause could lead to the dismissal.

Determination

14. Given the foregoing, I find that the Respondent has satisfied the threshold under Order 42 Rule 35(1) of the Civil Procedure Rules.
15. Consequently, the Chamber Summons dated 02nd September 2024 is allowed on the following terms:
1. This appeal is dismissed for want of prosecution
 2. The costs of this application and the appeal shall be borne by the Appellant

DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Ms. Tannk for Miller & Co. Advocates

For Appellant - N/A for Chesikaw & Kiprop Advocates

