



**Quickmart Limited v MHA (Minor Suing through Christian Matekwa,
Legal Representative and Guardian Ad-Litem) & another (Civil Appeal
E101 of 2024) [2025] KEHC 2345 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E101 OF 2024
S MBUNGI, J
FEBRUARY 12, 2025**

BETWEEN

QUICKMART LIMITED APPELLANT

AND

**MHA (MINOR SUING THROUGH CHRISTIAN MATEKWA, LEGAL
REPRESENTATIVE AND GUARDIAN AD-LITEM) 1ST RESPONDENT
CHRISTIAN MATEKWA (SUING AS THE LEGAL REPRESENTATIVE
AND ADMINISTRATOR OF THE ESTATE OF ZIPPORAH MWANZA -
DECEASED) 2ND RESPONDENT**

RULING

1. The applicant filed a motion dated 02.12.2024 under Certificate of Urgency seeking the following orders:
 - i. Spent;
 - ii. That This Honourable Court do hereby dismiss the Memorandum of Appeal dated 27th May, 2024 for want of prosecution with costs.
2. The application is premised on the following grounds:
 - a. That The Memorandum of Appeal dated 27th May, 2024 contravenes Order 42, rule 35 (1) for want of prosecution within three (3) months.
 - b. The Memorandum of Appeal consists of an error apparent on the face of the record as the referenced Symon Lariak therein is a stranger in the cause herein whilst reading the judgment of Hon. Gladys Kiamah dated and delivered on 24th May 2024 in Kakamega SCCOMM E589 of 2023;



- c. The deposit of Kshs. 140, 000 made in Court by the Appellant's Advocate demonstrates that indeed the Appellant won't suffer a substantial loss if the Honourable Court were to dismiss the Appeal in order to satisfy the Orders made and decreed by the learned Magistrate in the judgment delivered and dated 24th May 2024.
 - d. Unless the Honourable Court intervenes by dismissing the Appeal for want of prosecution, the 1st Applicant/Respondent shall suffer irreparable loss and may never enjoy the fruits of his judgment as justice delayed is justice denied.
 - e. Justice will be done and seen to be done if the Honourable Court grants the Orders to the instant application.
 - f. It is in the best interest of the child cited in the cause herein under Article 53 (2) of *the Constitution* that the Honourable Court allows this application.
3. The application was supported by an affidavit sworn by the applicant.
 4. The respondent filed grounds of opposition to the application stating that the application was premature and offends the provisions of Order 42 rule 13 and Order 42 rule 35 of the Civil Procedure Rules as the appeal is yet to be set down for directions as to the hearing of the appeal. The respondents also stated that the application is incompetent, an abuse of Court process, brought in bad faith and only aimed at shutting out the Appellant from the seat of Justice. They prayed that the application should be dismissed with costs.
 5. The parties agreed to canvass the application by way of written submissions.

Applicant's Submissions.

6. The applicant submitted that the evidence on record showed that the appeal filed by the respondent was misleading, since it was an application for review of the trial court's judgment and ought to be dismissed ex debito justitiae.
7. The applicant further submitted that the respondent ought to have sought for review from the court of first Instance, being the small Claims Court and not the High Court, in accordance to the provisions of Section 41 of the *Small Claims Court Act*, and Section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules. She averred that the High Court has no power to interfere with the decree and judgment of the Small Claims Court.
8. It was the applicant's submission that the five grounds of appeal enlisted by the respondent were not purely on law as required under Section 38 of the *Small Claims Court Act*. She submitted that ground 2 and 3 in the memorandum of appeal contended matters of evidence and fact which is not permitted under Section 38 of the *Small Claims Court Act*.
9. The applicant prayed that the application dated 02.12.2024 be allowed, and that the court be guided by the best principles in the interest of the child and minor under Article 53 of *the Constitution* of Kenya.

Respondent's Submissions.

10. The respondent submitted the procedure for hearing of appeals is provided under Order 42 Rule 13 of the Civil Procedure Rules, where the Hon. Judge has to be satisfied that the memorandum of appeal, and all documents before the trial court are on record, and have been served upon the other party before the appeal is set down for hearing.



11. The respondent submitted that on the other hand, dismissal for want of prosecution is provided under Order 42 Rule 35, if within the 3 months after giving directions under rule 13, the appeal is not set down for hearing by the parties or if within 1 year after service of the memorandum of appeal the appeal shall not be set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.
12. On whether parties have taken directions under Rule 13, the respondent submitted negatively. The respondent averred that from the court record, parties were yet to take directions and the Record of appeal was yet to be filed since the lower court file was still in chambers pending ruling of an application filed by the applicant herein in the trial court seeking to set aside a consent entered by parties to deposit the security. The respondent averred that the delay to file the record of appeal was not inordinate since the appellant cannot obtain typed proceedings for the reasons stated above and cited the case of Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi) [2020] eKLR. Where the learned Judge held that.... the appellant does not seem to have a role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of the Civil Procedure Rules and order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.
13. As to whether one year had lapsed after the service of the memorandum of appeal and the appeal has not been set down for hearing, the respondent submitted negatively, since the memorandum of appeal was filed 27.05.2024.
14. The respondent submitted that the application was premature and prayed that it be dismissed with costs to the appellant.

Analysis and Determination.

15. I have looked at the application, the supporting affidavit, the grounds of opposition, the rival submissions by the parties and authorities cited.
16. I isolate the main issue for determination as whether the application has merit.
17. I have looked at the submissions made with the applicant dated 14th January, 2025 mostly the submissions zeroed on the merit of the appeal and not the Application for dismissal of the appeal dated 2nd December, 2024.
18. I have looked at the chamber summons 2nd December, 2024 it is premised on order 42 Rule 35 of Civil Procedure Rules 2020 among other provisions of the law.
19. Order 42 Rule 35 of Civil Procedure Rules provides as follows. Dismissal for want of prosecution. 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.
20. Order 42 Rule 35 (2) of the Civil Procedure Rule provides 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
21. Order 42 Rule 35 of the Civil Procedure Rules 2010 presents two aspects for dismissal for an appeal for want of prosecution.



- i. When an appellant fails to cause the appeal to be listed for directions under section 79 (B) of the *Civil Procedure Act* as is envisaged in order 42 Rule 11 of the Civil Procedure Rules.
 - ii. If after service of the memorandum of appeal, the appeal would not have been set down for hearing, registrar shall on notice the parties list the appeal before the Judge for dismissal.
22. Section 79 (B) of the *Civil Procedure Act* provides as follows:- Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.
23. Order 42 Rule 13 of the Civil Procedure Rules provides as follows:-
- 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).
24. As per the provisions of Section 79 (B) *Civil Procedure Act*, a Judge has to peruse the appeal before he can summarily reject the same. This as the directions envisaged in Order 42 Rule 11 of Civil Procedure



Rules which provides that; Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.

25. If the Appeal is not summarily rejected, then the registrar shall notify the appellant who shall serve the memorandum of appeal upon all the respondents within 7 days of receipt of the notice from the registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.
26. After service of the memorandum of appeal, on notice to the parties delivered not less than 21 days, the appellant shall again cause the appeal to be listed before the Judge for directions as provided for under Order 42 Rule 13 of the Civil Procedure Rules.
27. Under Order 42 Rule 13 (4) of the Civil Procedure Rules provides as follows:-

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).
28. From the above analysis it is clear that, it is after the Judge has given directions under Order 42 Rule 13 of the Civil Procedure Rules, is when the provisions of Order 42 Rule 35 (1) and (2) can be invoked. See the case of Njai Stephen Vs Christine Khatiala Andika (2019) eKRL, Kirinyaga General Machinery Vs Hezekiah Mureithi Ileri (2007) eKLR.
29. I have looked at the record, record of Appeal has not been filed, the lower court file and proceedings have not been availed to the Deputy Registrar. The Appellant no control over the same. The Judge cannot allow an appeal to proceed for hearing unless record of Appeal if dully filed.
30. From the above it is clear that, the Applicant filed the Application dated 2nd December, 2024 for dismissal of the Appeal for want of prosecution prematurely.
31. I therefore find the Application has no merit and I hereby dismiss it.
32. Costs in cause.
33. Mention on 14th May, 2025 to confirm whether the record of Appeal has been filed and for further directions.
34. Right of Appeal within 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF FEBRUARY, 2025.



S.N MBUNGI

JUDGE

In the presence of:

Applicant – Absent

Respondent- Absent.

Mr. Oduor for the Appellant/Respondent – present (online).

Mr. Andole for the Respondent/Applicant-present (online).

Court Assistant – Elizabeth Angong'a

