



REPUBLIC OF KENYA



**Moranga & another v James & 3 others (Civil Appeal
142 of 2022) [2025] KEHC 7911 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 142 OF 2022**

**A MSHILA, J
MAY 16, 2025**

BETWEEN

JANET MIRANYI MORANGA 1ST APPELLANT

EVANS KENYANYA MOMANYI 2ND APPELLANT

AND

PHIRES KERUBO JAMES 1ST RESPONDENT

GEOFFREY MOSOTI MOMANYI 2ND RESPONDENT

NATIONAL IRRIGATION BOARD 3RD RESPONDENT

PATRICK MWITA 4TH RESPONDENT

RULING

1. This Court issued a Notice to Show Cause against the Applicants for them to show cause why their Appeal should not be dismissed for want of prosecution. The Appeal had been listed for hearing on 27/07/2023 and due to the non-attendance by the Applicants to prosecute the Appeal this Court issued the Notice to Show Cause and scheduled the same for hearing on 21/07/2023; In Reply to the Notice the Applicants filed a Replying Affidavit made by Leo Masore Nyangau dated 26/09/2023 where he asked this Court to allow the Applicants to proceed with the hearing and determination of the Appeal;
2. Therein the deponent gave reasons why the Appeal ought not to be dismissed; In it he indicated that before receiving the typed certified proceedings a Memorandum of Appeal against the impugned Ruling was filed on 28/06/2022; From the court portal it was established that the matter was scheduled for hearing on 27/07/2023 there was no appearance by the parties and the court listed the matter for Notice to Show Cause Why the Appeal should not be dismissed for want of prosecution.



3. The said counsel stated that he was not aware of the hearing date of 27/07/2023 and despite making several requests to the Ruiru Law Courts for typed certified proceedings the same were not forthcoming; Letters detailing the requests were annexed to the Replying Affidavit as 'LMN1' and 'LMN2'; Counsel even made several attempts to personally visit the Ruiru Law Courts seeking the proceedings to enable the filing of a Record of Appeal only to be informed that the court file could not be traced; The Applicants cannot therefore be faulted for failing to prosecute the Appeal.
4. When the file was finally traced on 14/06/2023 and proceedings availed. The Record of Appeal was prepared dated and filed on 17/07/2023;
5. By the hearing date scheduled for 27/07/2024 the appeal had not been admitted and no directions given. The admission was done on 28/07/2023. The Applicants are thus ready and willing to proceed to hearing on a date that is convenient to the court and prays that the court does not deny them a chance to prosecute the Appeal in the interest of justice.
6. In response the 1st and 2nd Respondents submit that the appeal ought to be struck out as it contravenes mandatory requirement that the Applicants should attach a copy of the decree/order being appealed from. Reliance was placed in the Court of Appeal case of Chege vs Suleiman (1988) eKLR. No plausible reason was given by the applicants for failure to prosecute the appeal for more than one year. Further, that no certificate of delay was availed by the Applicants as such the court was urged to sustain the Notice to Show Cause and dismiss the appeal with costs to the Respondents.
7. Subsequently, the 3rd and 4th Respondents submit that there is no order extracted emanating from the impugned ruling which was said to be a fatal defect. Reliance was placed on among other cases the case of Ndegwa Kamau T/A Sideview Garage vs Fredrick Isika Kalumbo (2016) eKLR. It was submitted that the Applicants cannot seek refuge under Article 159(2)(d) of *the Constitution* as the provision does not relate to matters touching on the substance of the law. Lastly that the Applicants never sought for extension of time to file the Record of Appeal out of time. The court was urged to strike out the appeal with costs.

Issues For Determination.

8. Having considered the Replying Affidavit and the respective written submissions filed herein; the Court has framed only one issue for determination:
 - i. Whether to discharge the Notice to Show Cause for dismissal of the suit for want of prosecution.

Analysis.

9. Dismissal by the court of suits for want of prosecution is governed by Order 17 Rule 2(1) of the Civil Procedure Rules 2010 which provides that: -

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

10. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR, the court observed: -

“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. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. 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.”

11. The statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit. The court must however, consider the reasons advanced for the delay or failure to prosecute the suit. The delay must be excusable, reasonable and with just cause.
12. On examination of the record it is clear that the matter herein has not been prosecuted for over one year and it was the Respondents contention that the Applicants were not interested in prosecuting the appeal as evidenced by the failure to file the Record of Appeal; The Applicants on the other hand have indicated that through no fault of their own they were unable to secure the certified typed copies of the proceedings but were always ready and willing to prosecute the appeal and are now ready and willing to proceed with the Appeal on a date that this court affords.
13. It is this courts considered view that the Applicants have given an explanation that is found to be satisfactory; and this Court is satisfied that it would be in the interest of justice, equity and conscience to allow the Applicants prosecute this Appeal to its logical conclusion.

Findings And Determination.

14. For reasons of the forgoing the Notice to Show Cause is hereby discharged, on the following conditions;
 - i. The Applicant to file and serve Supplementary Record of Appeal within Fifteen (15) days
 - ii. Mention on 3/07/2025 for compliance
 - iii. The costs shall be borne by the Applicant.
 - iv. Costs assessed at Kshs.8,400/- payable before the next mention date.

Orders accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 16TH DAY OF MAY, 2025.

HON. A. MSHILA

JUDGE

In the Presence of:

Julie – Court Assistant

Masore – for Applicant/Appellant

Atonga – for the 1st Respondent

N/A – by Karanja for 2nd, 3rd and 4th Respondent

