Kapseret AM Sacco & another v Kisambo (Civil Appeal E073 of 2023) [2025] KEHC 8607 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8607 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E073 OF 2023

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

KAPSERET AM SACCO ..... 1ST APPELLANT

RUTH JERONO BUSIENEI ..... 2ND APPELLANT

AND

LIVINGSTONE KISAMBO ..... RESPONDENT

(Appeal from the Judgment dated 14/04/2023 delivered in Eldoret CMCC No. E14 of 2020 by Hon. B. Kiptoo-PM)

RULING

1. This Appeal was filed by way of the Memorandum of Appeal filed herein on 10/05/2023 through Messrs Kimondo Gachoka & Co. Advocates. After more than 1 year of inaction, the Respondent, by his Notice of Motion dated 4/07/2024, sought the dismissal of the Appeal for want of prosecution and for failure to comply with Court orders requiring the Appellant to deposit security as a condition for grant of an order of stay of execution pending Appeal. However, upon the Court's persuasion, the Respondent agreed to withdraw the said Application, which he did, through his Advocates, on 24/09/2024, and in return, by consent of the parties, the Appellant was granted a period of 45 days to prosecute the Appeal. I then fixed the Appeal for directions on 19/11/2024, after lapse of the 45 days.

2. On 19/11/2024, neither of the parties attended Court for the directions and in view thereof, I issued a Notice (NTSC) requiring the Appellant to show cause why this Appeal should not be dismissed for want of prosecution. This Ruling is therefore in respect to the said NTSC.

3. In response to the NTSC, one Janerose Nanjira, who described herself as an Advocate practicing at Messrs Kimondo Gachoka & Co., the Advocates on record herein for the Appellants, filed the Affidavit sworn on 10/02/2025. She deponed that the Appellants are keen on prosecuting the appeal and seek the Court's indulgence to order the production of the lower Court file with typed proceedings, that

the Appellants complied with the conditions of stay by paying Kshs 153,225/- to the Respondents and further deposited Kshs 153,225/- in a joint interest earning account and that the Appellants have not been able to retrieve the typed proceedings and have written letters to Court in respect to which their clerk keeps visiting the Court Registry for follow up. She exhibited copies of two letters to this effect

4. She deponed further that the delay which is not inordinate cannot be attributed to the Appellants but to the lower Court and if there are such delays, it is not as unreasonable and/or inordinate as to prejudice the Respondents as security has already been provided for. She urged that the NTSC be vacated/ and or set aside for reasons that the Appellants are following-up on the typed proceedings, that even though the overriding objective is expeditious disposal of suits, *the Constitution* mandates that the same must be done justly, equitably and proportionately to the right to fair hearing and that the Appellants believe that they have a viable Appeal which is against quantum as awarded by the trial Court and as such, stand to suffer serious prejudice in the event that the Appeal is dismissed. In conclusion, she deponed that it is in the interest of justice that the Appeal be retained with this Court issuing directions for logical determination thereof.

5. In response, the Respondent filed the Affidavit sworn 17/02/2025 in which he pointed out that one of the two letters exhibited in the Appellant's Affidavit does not bear the Court's stamp, which is a critical omission as the absence of the Court stamp raises serious questions on whether this letter was ever filed with the Court and that given the lack thereof, the legitimacy of the letter cannot be verified. He contended that the Appellants have failed to prosecute the appeal expeditiously or with diligence, and have taken no substantive steps to advance the appeal ever since then and that the only action taken by the Appellant, as evidenced by the letter dated 22/08/2023, was to request for typed proceedings and that the Appellants never bothered to follow-up on the same. He urged that it is a settled principle that "equity aids the vigilant and not the indolent", that the delay in prosecuting the appeal without providing adequate justification is prejudicial to him and to the administration of justice, that the Appellants' Affidavit fails to provide a convincing explanation for the lengthy period of inactivity and failure to progress the Appeal since its filing in 2023 and as such, the Appellants' conduct warrants the dismissal of the Appeal for want of prosecution.

Determination

6. The issue for determination herein is "whether this Appeal should be dismissed for want of prosecution".

7. Order 42 Rule 35(1) and (2) of the Civil Procedure Rules provide as follows:

(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"

8. It is therefore evident that Order 42 Rule 35 envisages two situations for the dismissal of an Appeal for want of prosecution. The first is where an Appellant, after directions have been given as contemplated under Section 79B of the *Civil Procedure Act* and Order 42 Rule 11 of the Civil Procedure Rules, fails to cause the matter to be set down for hearing within 3 months. The second scenario is where the Registrar lists the Appeal for dismissal where, 1 year after service of the Memorandum of Appeal, the Appeal has still not been set down for hearing.

9. It is evident from the provisions of Section 79B that giving of directions is an important step in the process of preparing an Appeal for trial. A Judge has the noble duty of perusing the Record of Appeal and related material for purposes of verifying that the same is properly filed before giving the Appeal the greenlight to proceed to hearing. These are the directions contemplated under Order 42 Rule 11 which provides as follows:

> "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".

10. If therefore appeal is not summarily dismissed, then, under Order 42 Rule 12 the Registrar is required to so notify the Appellant who shall then serve the Memorandum of Appeal upon the Respondent(s) within 7 days of receipt of the notice. Under Order 42 Rule 13, after service of the Memorandum of Appeal, upon not less than 21 days' notice to the parties, the Appellant shall cause the Appeal to be listed before the Judge for directions.

11. Once directions are given under Order 42 Rule 13, if within 3 months thereafter the Appellant still fails to fix the Appeal for hearing, then under Order 42 Rule 35(1), the Respondent may fix the same for hearing and/or seek dismissal thereof for want of prosecution or if within 1 year after service of the Memorandum of Appeal the Appeal is not set down for hearing, the Registrar may, under Order 42 Rule 35(2), list the same before a Judge for dismissal.

12. From the foregoing, it is evident that the giving of directions by a Judge has been given a prominent role in the process leading to the setting down of an Appeal for hearing and is in fact, a prerequisite step. On paper therefore, directions ought to have been given before an Appeal can be liable for dismissal for want of prosecution.

13. This apparent rigidity and/or loophole in Order 42 Rule 35(1) and (2) has however been regularly exploited and grossly abused by Appellants, particularly those enjoying orders of stay of execution, to delay Appeals. Being aware that it is the lower Court's duty to type and supply proceedings and that delay to do so would be blamed on that Court, such "clever" Appellants would, after delivering the initial request for proceedings, deliberately omit to make any further effort to follow-up to ensure that the process of typing is in fact undertaken. Some unscrupulous Appellants would even go further and "cause" the lower Court typing process to be placed on a deliberate "go-slow" mode. Granted, the Courts in Kenya suffer the chronic challenge of gross understaffing in respect to typists, however delays in typing are more often than not, not necessarily a result of understaffing but deliberately caused by "vested interests".

14. For the said reasons and in a bid to beat such unscrupulous Appellants at their own game, the Courts, correctly in my view, are now increasingly resorting to invoking the inherent powers by declining to interpret Order 42 Rule 35 in the narrow and literal manner in which it has erstwhile been construed.

For instance, L. Njuguna J in the case of John Njagi Karua v Njiru Gatumu [2021] eKLR, held as follows:

> " 15. What is clear from the above therefore is that the directions as required under Order 42 Rule 11 and also under Order 42 Rule 13 of the Civil Procedure Rules 2010 were never made in this file. Under Order 42 Rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the appellant.
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> 16. It is my considered opinion therefore that the application herein is premature as it was filed before directions were given as is required by the Rules.
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> 17. However, this does not mean that this court cannot dismiss an appeal before directions are given. Where there are sufficient reasons, the court can invoke its inherent powers as bestowed on it by the *Civil Procedure Act* and the Rules and dismiss an appeal for want of prosecution even where directions have not been given
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> .....
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> 18. As such, where the appellant files an appeal and goes into slumber, this court can invoke its inherent powers under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and further the provisions of Article 159(2) (b) of *the Constitution* to do justice without undue delay. This is notwithstanding that directions have not been given."

15. Similarly, Odunga J in the case of China Road & Bridge Corporation –vs- John Kimenye Muteti [2019] eKLR, held as follows:

> " 19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given ....."

16. Further, Onyancha, J in the case of *Protein & Fruits Processors Limited & Another vs. Diamond Trust Bank Kenya Limited [2015] eKLR, Civil Appeal 9 of 2007* held that:

> " Three years later the applicant is seeking dismissal of the appeal. It is not disputed that directions have not been given in this appeal, in my view the appeal cannot therefore be dismissed under Rule 35 (1) since the appeal has not be placed before the judge for direction. As it is, the appeal is incomplete and the Appellants have not furnished the court with the record of appeal. The only alternative the applicant is left with is under Rule 35(2) which requires the Deputy Registrar to list the appeal for dismissal by a Judge. In the current

application the applicant is seeking an order that the Deputy Registrar be directed to list the appeal for dismissal before a judge in chamber. I have no reasons not to grant the prayer, the appeal hearing has been pending in court for six years and it is only fair if the matter can be finalised. In the circumstances of this matter, I will not order the Deputy Registrar to place the file before a judge for dismissal; instead, I will dismiss the appeal. This court has the inherent discretion to do so under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of *the Constitution* to do justice without any delay."

17. In any event, since in this case a NTSC was issued as aforesaid, Order 42 Rule 35(2) of the Civil Procedure Rules applies. As already cited above, the said Rule 35(2) provides that an Appeal can be listed "before a judge in chambers for dismissal if, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing".

18. In this case, the order that the Appeal be prosecuted within 45 days was made by the consent of the parties on 24/09/2024, in exchange for the Respondent agreeing to withdraw his Application seeking a similar order of dismissal of the Appeal for want of prosecution. It was therefore a quid pro quo deal between the parties. The order, reproduced verbatim, was premised as follows:

> " By consent: the Appellant is granted 45 days to follow up on all procedures and file and serve Record of Appeal within 45 days."

19. I issued the NTSC after the Appellants failed to comply with the said consent order on timelines given on 24/09/2024 requiring them to file and serve the Record of Appeal within 45 days and even worse, upon failure by the Appellants' Advocates to attend Court on 19/11/2024 for directions, which non-attendance has not even been addressed in the Appellant's Affidavit. The Appellant has also not even bothered to apply for extension of the said agreed 45 days.

20. The Memorandum of Appeal herein was filed on 10/05/2023, more than 2 years ago. According to Counsel for the Appellants, by the letter dated 22/08/2023, they applied for the typed proceedings and Judgment, and subsequently, made follow-up through the letters dated 19/11/2024 and 17/01/2025. I however note that out of the 3 letters, only the one dated 22/08/2023 bears the Court stamp of 17/11/2023. Neither of the two subsequent letters is even alleged to be appearing as filed in the Judiciary Case Tracking System (CTS) online platform. As such, these two subsequent letters cannot be relied upon as evidence of any follow-up made by the Appellants. I decline to consider them as I highly doubt their authenticity.

21. In the case of Ivita vs. Kyumbu [1984] KLR 441 which was followed in Peter Kipkurui Chemwoio Vs. Richard Chepsergon [2021] eKLR, the test to be applied in an application for the dismissal of an action for want of prosecution was stated to include whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite the delay and that even if the delay is prolonged, whether the Court is satisfied with the excuse for the delay. Where justice can still be achieved, the action will not be dismissed but will be ordered to be set down for hearing at the earliest available time.

22. Applying the above guidelines, it is clear to my mind that the Appellants have not been diligent enough in following up the request for proceedings. Writing one letter in 2 years is not enough, an Advocate must aggressively, regularly and consistently follow-up on all requests made to the Court. I am not convinced that the Appellants have been making any follow-up, they simply wrote one letter 2 years ago and left it at that. Where delay to supply proceedings is prolonged and no communication is being

received from the Court regarding such delay, a diligent Advocate would seek audience with even the Chief Magistrate or even seek a Mention date before him to bring up the issue of delay and procure a way forward.

Final Orders

23. In the end, this Appeal is hereby dismissed with costs to the Respondent, for want of prosecution, and also for failure to comply with the timelines agreed upon in the consent order recorded in Court on September 24, 2024.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Appellants

Ms. Akinyi for the Respondent

Court Assistant: Edwin Lotieng