



REPUBLIC OF KENYA



KENYA LAW
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Mwangi v Gathoga (Suing as the Legal Representative of the Estate of Herman Gathoga Ndirangu - Deceased) (Civil Appeal 27 of 1993) [2025] KEHC 8558 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 27 OF 1993
PN GICHOHI, J
JUNE 18, 2025**

BETWEEN

DAVID GITHAIGA MWANGI APPELLANT

AND

GERYSON GAD MATIRU GATHOGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HERMAN GATHOGA NDIRANGU - DECEASED) RESPONDENT

RULING

1. This Ruling is in respect of the Respondent's Notice of Motion dated 14th July, 2022, brought under Order 17 Rule 2(3) and Order 51 of the Civil Procedure Rules and Sections 3A of the [Civil Procedure Act](#) seeking for Orders that -
 1. The Appeal herein be dismissed for want of prosecution.
 2. The Appellant be condemned to pay costs of this Application and the Appeal.
2. The grounds are on the face of the Motion and supported by the Affidavit of Geryson Gad Matiru Gathoga sworn on 14th July, 2022. He stated that the Appellant herein filed this Appeal in the year 1993 which is over 28 years ago and has never taken any steps to prosecute the same, an indication that he lost interest in the Appeal. He thus, prayed for the dismissal of Appeal for want of prosecution.
3. The application was served upon the Appellant through their Advocates on record, M/S Waithaka Mwangi & Company Advocates, on 21st March, 2025, as evidence by the Affidavit of service sworn by Boniface Muendo Munyao, a court process server, on 22nd March, 2025.
4. Despite service, the Appellant did not file any response as such the application is unopposed.



Applicant's Submissions

5. The gist of the Applicant's submissions is that the Appellant has failed to diligently prosecute their Appeal for an inordinate period of 23 years, despite a statutory requirement under Section 79B of the [Civil Procedure Act](#) and Order 42 of the Civil Procedure Rules to list the matter for directions within 30 days of filing.
6. Citing the case of Haron E. Ogechi Nyaberi V. British America Insurance Co. Ltd and Bruce Mutie Mutuku T/A Dian Tours and Travel Center & Equity Bank Ltd[2012] eKLR, the applicant emphasizes that the Appellant's compliance with these rules is a prerequisite for the appeal to be admitted and directions given.
7. Further reliance is placed in the case of Bruce Mutie Mutuku T/A Dian Tours and Travel Center & Equity Bank Ltd [2014] eKLR where the Court stated that;-

“The Appellant deliberately refused to comply with Order 42 (11) of Civil Procedure Rules. The Appellant had to secure the matter to be listed to enable the Judge to give directions under Section 79B of the Act”
8. Accordingly, that the delay is deemed inexcusable with no sufficient reason provided.
9. Regarding costs, the Applicant submitted that costs should follow the event and considering the extensive delay, associated expenses, and prejudice he has suffered, this Court should invoke the overriding objectives of Section 1A of the [Civil Procedure Act](#) to mitigate the hardship and delay experienced by the Applicant, and to award the costs of both the Application and the Appeal.

Analysis and Determination

10. The Application is premised on Section 3A of the [Civil Procedure Act](#) and Order 17 Rule 2(3) and Order 51 of the Civil Procedure Rules.
11. Section 3A of the [Civil Procedure Act](#) provides: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
12. Order 17 Rule 2 (1) & (3) provides that; -

“(1) 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...

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
13. However, dismissal for want of prosecution of Appeal is provided for under Order 42 Rule 35 of the Civil Procedure Rules, 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.”

14. In the present case, the original file containing the Memorandum of Appeal could not be traced. Orders of this Court (Rachael Ngetich, J) dated 2nd March, 2020 were only complied to the extent that a skeleton file was opened but the firm of Waithaka Mwangi & Co Advocates did not supply the Court with the Appeal and the record thereof.
15. Nevertheless, the annexed Memorandum of Appeal shows that the Appeal has not yet been admitted. Consequently, no directions have been issued for its hearing. It is also evident from the record that the Deputy Registrar has not yet utilized the option of placing the appeal before a judge for dismissal despite the fact that the appeal was filed in the year 1993, over 32 years ago.
16. Therefore, no doubt that the appeal does not fall under any of the situations envisaged under Order 42 Rule 35 (1) and 2) of the Civil Procedure Rules.
17. That notwithstanding, Section 1A and 3A of the *Civil Procedure Act* empowers this Court to make orders that meet the ends of justice or prevents abuse of its process in any matter before it and can in appropriate cases, dismiss an appeal for want of prosecution even if the appeal was not admitted and directions had not been issued.
18. In such a scenario, M. Odeny, J dismissed the Appeal being Eldoret E.L.C. Appeal No. 11 of 2015, for want of prosecution. Aggrieved by that ruling/order, the Appellant preferred an appeal being Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] KECA 979 (KLR) and while finding that the learned Judge did not err, the Court of Appeal held:-

“...the learned Judge correctly appreciated the principles in dismissing an appeal for want of prosecution as espoused in various cases such as in Ivita –v- Kyumba [1984] KLR 441; that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay.”
19. This Appeal was indeed filed 32 years ago but no action has been taken by the Appellant towards its prosecution. It is evident that the Appellant has lost interest in this matter. Litigation has to come to an end.
20. In the circumstances, this Appeal is dismissed with costs for want of prosecution.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF JUNE, 2025.

PATRICIA GICHOHI

JUDGE

In absence of parties duly notified

