



**Macharia v CIM Investment Limited & another (Civil Appeal
222 of 2020) [2025] KEHC 9992 (KLR) (Civ) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9992 (KLR)

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

CIVIL

CIVIL APPEAL 222 OF 2020

AC MRIMA, J

JULY 11, 2025

BETWEEN

ANNE WANJIKU MACHARIA APPELLANT

AND

CIM INVESTMENT LIMITED 1ST RESPONDENT

DIAMOND TRUST OF KENYA LIMITED 2ND RESPONDENT

RULING

1. Through an application by way of a Notice of Motion dated 9th April 2024, the Appellant/Applicant sought the following orders: -
 1. Spent
 2. That this honourable Court be pleased to set aside the orders issued on 12th May 2023 dismissing the appellant/applicant's appeal hereof and reinstate the same for hearing.
 3. That this honourable Court be pleased to grant the Appellant/applicant leave to file a Record of appeal out of time.
 4. That the draft Record of Appeal annexed herewith be deemed as filed.
 5. That costs of this application be provided for.
2. The application was strenuously opposed by the 2nd Respondent, hence this ruling. The 1st Respondent, did not participate in the matter.
3. The application was supported by the grounds on the face of it and the Affidavit sworn by the Appellant on 28th January 2025. The application arose out of the Order of this Court dated 12th May



2023 where this Court dismissed the appeal for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules. The Applicant averred that her failure to prosecute the appeal was occasioned by the delay in obtaining certified proceedings, decree and judgment thereby making it difficult for her to file the Record of Appeal. Additionally, the Applicant averred that she has never been issued with a Certificate of Delay despite request and that she was never served with the Notice to show Cause for dismissal to allow her participate in the application. The Appellant averred that she learnt that the appeal was dismissed for want of prosecution upon perusal of the Court file. In conclusion, the Applicant prayed that the appeal be reinstated and the Record of appeal be admitted as she stands to suffer prejudice and be condemned unheard.

4. In opposing the application, the 2nd Respondent filed a Replying Affidavit sworn by one Faith Ndonga on 12th February 2025. It averred that there was inordinate delay in prosecuting the appeal which was around 4 years. Further, it averred that it continues to incur costs in legal fees due to the continued pendency of the appeal and that it is in the interest of justice that litigation should come to an end. In praying that the application be dismissed with costs, the 2nd Respondent averred that the Applicant's hesitance to expedite the matter has resulted to wasteful use of Court's resources and time and that it is fair and in the interest of justice that the application be dismissed.
5. Pursuant to the directions of this Court, the application was canvassed by way of written submissions. The Applicant's submissions were dated 10th March 2025 while the Respondent's submissions were dated 24th March 2025. The gist of these submissions will be ingrained in the latter part of this ruling.
6. Having considered the application, the responses, the submissions and the decisions referred to by the parties, the issue that stands out for this Court's determination is whether the application is merited.
7. The appeal was dismissed on the basis of Order 42 Rule 35(2) of the Civil Procedure Rules which provides as follows: -

Dismissal for want of prosecution [Order 42, rule 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.
 - (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. The above provision gives two scenarios upon which a Court may dismiss an appeal for want of prosecution. The first instance is where directions have been given in the appeal. In that case, if the appeal is not set down for hearing within three months of the directions, then, the Respondent may either set the appeal down for hearing or apply for its dismissal. The second instance arises when the appeal is not set down for hearing within one year of service of the memorandum of appeal. In such a case, the Registrar may list the appeal for dismissal.
 9. The above rule ought to be read in tandem with Article 159[2][b] of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* which call for expeditious and fair determination of disputes. To that end, further to the provisions of Order 42 Rule 35 of the Civil Procedure Rules, a Court seized of an appeal may, subject to appropriate notice given, dismiss an appeal at any time if the circumstances call for such an order. For instance, if a Court lists an appeal for directions and the parties do not appear despite service on several occasions, the Court may dismiss the appeal either for want of prosecution and/or for non-attendance. It all depends on the peculiar instances of a case. Order 42 Rule 35 of the



Civil Procedure Rules should, therefore, not be construed to mean that appeals can only be dismissed under the two scenarios provided therein. A Court always reserves its inherent powers to ensure that justice is done and such powers include dismissal of appeals in appropriate instances.

10. From the record, the appeal was dismissed on 12th May 2023 under following issuance of a Notice to Show Cause why the appeal should not be dismissed. On the said day, none of the parties appeared and there being no cause shown, the appeal was dismissed. It is further noteworthy that prior to the dismissal, there was no activity in the appeal or at all. It would, therefore, appear that the date upon which the matter was dismissed was in fact the first time the matter was in Court.
11. Article 50[1] of *the Constitution* guarantees every party the right to a fair trial. Giving a party an opportunity to present its case is at the heart of the constitutional imperative of fair trial. In this case, despite the delay in bringing the instant application, the Applicant was not accorded an opportunity to be heard before the appeal was dismissed. Additionally, directions were never taken in the matter to accord the Applicant an opportunity to prosecute the appeal.
12. For the foregoing reasons, the application is merited and the following final orders do hereby issue: -
 - a. The appeal be and is hereby reinstated and the dismissal order made on 12th May 2023 is hereby set-aside and quashed accordingly.
 - b. The Applicant is granted leave to file the Record of Appeal within 14 days of this Order.
 - c. Each party to bear their own costs of the instant application.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Ms Kemunto, Learned Counsel for Applicant.

Mr. Mbiungi, Learned Counsel for 2nd Respondent.

Amina/Abdirazak – Court Assistants.

