



REPUBLIC OF KENYA



**Wanjiku v Chilumo (Civil Appeal E068 of 2021)  
[2024] KEHC 438 (KLR) (16 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E068 OF 2021  
SN MUTUKU, J  
JANUARY 16, 2024**

**BETWEEN**

**ELIZABETH WANJIKU ..... APPELLANT**

**AND**

**CHONGA STEPHEN CHILUMO ..... RESPONDENT**

*(Being an appeal from the Judgement of the Senior Principle Magistrate's Court at Ngong Law Courts, Ngong delivered on 28th October, 2021 by the Hon. P. Achieng (Mrs)(S. P.M)*

**RULING**

1. Elizabeth Wanjiku, the Applicant, has moved this court through a Notice of Motion dated 2<sup>nd</sup> June, 2022 brought under section 79G of the [Civil Procedure Act](#) and Order 42 Rule 35 of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeking the following orders:
  - a. That the Appellant's Memorandum of Appeal dated 4<sup>th</sup> November, 2021 be dismissed for want of prosecution.
  - b. That the Appellant does bear the costs of this appeal and the present application.
2. The grounds in support of the application, found on the face of it and in the supporting affidavit dated 2<sup>nd</sup> June, 2022, are that the Appellant filed a Memorandum of Appeal on 4<sup>th</sup> November, 2021 but has never taken any steps to have the matter progress and/or prepare the Record of Appeal; that it is a clear demonstration that the Appellant is not interested in prosecuting the appeal and therefore, the same should be dismissed. Further, that the present appeal is an abuse of court process and that the continued delay in prosecuting the appeal greatly prejudices the Respondent as he is not able to enjoy the fruits of his judgement.
3. The Respondent opposed the application through a Replying Affidavit dated 7<sup>th</sup> August, 2022 in which it is deposed that the application is misconceived and bad in law; that Appellant has been keen



to prosecute the appeal which is arguable and has merit and that advocates for the Appellant wrote to the Executive Officer at Ngong Law Courts seeking to be furnished with typed proceedings in order to prepare a record of appeal but that the proceedings have not been availed to them. The Appellant annexed a letter marked 'MM1' to demonstrate the efforts he put in place to get proceedings and deposed that as a result of the failure to secure proceedings, she has not been able to file their record of appeal. ought to be given before an appeal is dismissed for want of prosecution.

4. It is deposed that the threshold for dismissal of the appeal for want of prosecution has not been met; that the application lacks merit and ought to be dismissed; that the Respondent has not shown what prejudice he would suffer if the Appellant were to be allowed more time to prosecute the appeal. It was deposed that this court ought to take judicial notice of the backlog of typing of proceedings in the lower court; that the right to appeal is a constitutional right and though the Appellant has given excusable reason for delay the court ought not to allow the application and that under Article 50 of [the Constitution](#) every person has a right to trial and ought not to be stopped from accessing court.

### Submissions

5. This application was canvassed through written submissions as directed by this court. The Respondent's submissions are dated 1<sup>st</sup> December 2023. The Respondent has raised three issues for determination:
  - i. Whether the appeal should be dismissed for want of prosecution for which it was submitted that it should for reasons that the Memorandum of Appeal was filed on 4<sup>th</sup> November 2021 but the appeal has not been prosecuted, 2 years down the line causing prejudice to the Respondent; that the Appellant has deliberately failed to take any action towards prosecuting the appeal and therefore the appeal ought to be dismissed. The Respondent cited [Peter Kipkurui Chemoiwo v Richard Chepsergon \[2021\]](#) eKLR.
  - ii. Whether the Respondent's application is an abuse of court process to which it was submitted that the Respondent is exercising his right to seek justice from the court to dismiss the appeal for want of prosecution and allow the Respondent to enjoy the fruits of the judgment and therefore he is not abusing this court's process. Further that it has not been demonstrated that the Respondent is abusing the process of the court.
  - iii. Whether the Respondent will suffer prejudice if the application is not allowed, to which it was submitted that the Respondent was awarded judgment in his favour over two years ago and has not been able to enjoy the fruits of that judgment due to this appeal which has not been prosecuted.
6. The Appellant, in her submissions dated 15<sup>th</sup> August, 2023, has argued that contrary to the Respondents arguments, she has been keen to prosecute the Appeal. She relied on Njai Stephen -vs- Christine Khatilala Andik Civil Appeal No. 248 of 2017 where the Court summarized the law on appeals under Order 42 Rule 35 of the Civil Procedure Rules as follows:

“Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the [Civil Procedure Act](#) as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.”



7. The Appellant argued that from the authorities relied on, an appeal cannot be dismissed before directions are given; that directions have not been given so far; that for an appeal to be fit for directions, the lower court file must equally be availed at the appellate court which has not been done and that the application as filed is premature as the Applicant has not exhausted all avenues and remedies provided under Order 42 of the [Civil Procedure Rules](#) and that the appeal is yet to be admitted for hearing and as such cannot be dismissed for want of prosecution.
8. The Appellant cited Kenya Power & Lighting Company Limited-vs- Robert Kamau Njonjo Civil Appeal No 188 of 2010 & In Mini Bakeries Limited -vs- Edward Mbuta Komu HCCA 836 of 2005 to the effect that an appeal could not be dismissed for want of prosecution where it had not been admitted to hearing. In addition, and that under Order 42 Rule 35 (2) only the Registrar can issue notice to both parties to show cause why the appeal cannot be dismissed for want of prosecution.
9. The Appellant argued that the Applicant has not exhausted all remedies as provided under Order 42 to warrant dismissal of the appeal. She urged this court to dismiss the application and cited African Highlands Produce Company Limited- vs- Colins Moseti Ontweka, Civil Appeal No 38 of 2002 where the court refused an application to strike out an appeal for want of prosecution where the appellant had failed to file the record of appeal for a considerable period of time allegedly because the court had delayed in supplying typed proceedings to the appellant.

### **Analysis and Evaluation**

10. I have considered this matter and the rival arguments. Order 42 Rule 35 (1) and (2) of the [Civil Procedure Rules](#) provide 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.
11. I have considered the explanation by the Appellant that she is yet to get the proceedings from the lower court and that she has written letters requesting for the same, to no avail. I have seen only one letter dated 6<sup>th</sup> February 2023 which refers to an earlier letter dated 7<sup>th</sup> September 2022 requesting for typed proceedings. This court is not aware that the letter of 7<sup>th</sup> September 2022 existed since it was not annexed to the affidavit. Be that as it may, it seems that the Appellant has not been vigilant to seeking the typed proceedings. She has not demonstrated her efforts in doing so and I agree with the Respondent that the action of the Appellant seems deliberately aimed at delaying this matter to deny him the fruits of the judgment.
12. However, the law under Order 42 Rule 35 (1) of the [Civil Procedure Rules](#) is clear that directions have to be issued before a Respondent can take either of the two options given under that provision: either to set the appeal down for hearing or apply for it to be dismissed for want of prosecution. This position was well articulated by the court in [Pinpoint Solutions Limited and Another -vs- Lucy Waithegeni Wanderi \(as the Legal Administrator of the Estate of James Nyanga Muchangi\) \[2020\]](#) eKLR , that: -
 

“ ..... The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant



fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid...”

13. I have read the records in the court file. I have noted that the Memorandum of Appeal was filed on 5<sup>th</sup> November, 2021. The Appellant has not filed a Record of Appeal as she has explained the challenges facing her in that regard. The record is clear that no directions have been given this matter. This application is therefore premature. The Appellant should, however, not take advantage of the situation and delay this matter unnecessarily. She needs to vigorously pursue typed proceedings to enable this matter to proceed to the next level.
14. Consequently, I decline to grant this application and dismiss the same for the reasons given in this ruling. I order that costs shall be in the cause. The Appellant shall, without further delay, file a record of appeal within the next 60 days.
15. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

