



**Martin t/a Dalima Works v Phoenix of East Africa Insurance Company Ltd
(Civil Appeal 71 of 2018) [2024] KEHC 786 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 71 OF 2018
JRA WANANDA, J
FEBRUARY 2, 2024**

BETWEEN

LIVINGSTONE MAKULU MARTIN T/A DALIMA WORKS APPELLANT

AND

PHOENIX OF EAST AFRICA INSURANCE COMPANY LTD RESPONDENT

RULING

1. The Appellant in this matter is represented by Messrs Manani Lilan Mweitch & Co. Advocates while the Respondent is represented by Messrs Onyinkwa & Co.
2. On 23/05/2023, noting that there was no party in Court and observing that there had been no activity in this Appeal for a very long time, I fixed the Appeal for dismissal for 6/07/2023 and directed the Court Process Server to notify the parties. When Advocates for the parties appeared before me on 6/07/2023, the Respondent's Counsel drew my attention to the fact that he had earlier also filed an Application seeking dismissal of the Appeal for want of prosecution.
3. In the circumstances, and noting that indeed, there was such a pending Application (Notice of Motion) dated 27/12/2021, I directed that, instead, the same be set down for prosecution. Accordingly, I fixed it for hearing, and in agreement with Advocates for the parties, I directed that the Application be canvassed on the basis of Affidavits. The parties' respective Advocates being on record, I now proceed to determine the Application.

Respondent's Supporting Affidavit

4. The Affidavit in support of the Application is dated 27/09/2021 and is sworn by Mr. Dennis Onyimba Onyinkwa, Advocate for the Respondent. He deponed that the Appeal was filed in the year 2018, that ever since then the Appellant has never taken steps to fix it for hearing and it is now more than 1 year, that the Appellant is not interested in having the Appeal heard and concluded and that the pendency of the Appeal is causing unnecessary anxiety on the Respondent.



Replying Affidavit

5. In opposing the Application, the Respondent filed the Replying Affidavit filed on 20/11/2020 and sworn by the Appellant, Livingstone Makulu Matini. He deponed that his Advocates had written to the Court requesting for certified copies of proceedings and Judgment vide the letter dated 11/05/2021 a copy whereof he exhibited, that their numerous efforts to trace the file at the Court Registry for the purpose of preparing the Record of Appeal have been fruitless as the file is “missing”, that they are keenly interested in having the Appeal heard and concluded and that the Appeal has reasonable grounds for appeal and he will suffer great loss if the same is dismissed.

Analysis & determination

6. The sole issue that arises for determination in this Application is “whether this Appeal should be dismissed for want of prosecution”.
7. I observe that the Appeal has been brought under Order 17 Rule 2 of the *Civil Procedure Rules* which is not the applicable provision since it relates to dismissal of ordinary suits for want of prosecution. Dismissal of Appeals for want of prosecution is governed by Order 42 Rule 35(1) and (2) which provides 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 Act*, 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 not been set down for hearing.
9. Section 79B of the *Civil Procedure Act* referred to above provides as follows:
- “Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.
10. Order 42 Rule 13 of the *Civil Procedure Rules* then provides as follows:
- “1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
 - 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.



- 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

 - i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

11. It is evident from the provisions of Section 79B above that giving of directions is a very 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 and to verify 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”.

12. If the 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.



13. Once directions are given under Order 42 Rule 13, if within 3 months thereafter the Appellant 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.
14. 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.
15. 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 "mischievous" 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"
16. For the said reasons and in a bid to beat such unscrupulous Appellants at their own game, Judges of the High Court are now, correctly in my view, resorting to invoking the inherent powers of the Court 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 *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.
 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.
 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
.....
 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.”



17. Similarly, Odunga J in *China Road & Bridge Corporation –vs- John Kimenyi 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

18. 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 as follows;

“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.”

19. The question therefore is whether this is a proper case for the Court to invoke its inherent powers and dismiss the Appeal notwithstanding that directions have not been given.
20. 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 done, the action will not be dismissed but it will be ordered to be set down for hearing at the earliest available time.
21. Coming back to this matter, it is clear that the Appeal was instituted in 2018 vide the Memorandum of Appeal dated 21/06/2018. The Appellant has exhibited a copy of the letter dated 11/05/2021 alleging that his Advocates requested for certified copies of the typed proceedings vide that letter. It is not lost on me that the letter bears a date 3 years after filing of the Appeal. The instant Application was thereafter filed on 8/10/2021 and despite this act, there is nothing on record to demonstrate that the Appellant made any further efforts to obtain the proceedings. There is also no evidence that the Appellant had, before the letter dated 11/05/2021 made any efforts to obtain the proceedings. It is now 6 years since the Appeal was filed. Evidently, delay in this matter is apparent and has been established.



22. When such delay as demonstrated above is established, unless it is well explained, it becomes inexcusable. In *Agip (Kenya) Limited-v-Highlands Tyres Limited* [2001] KLR 630, Visram J stated of inordinate delay as follows: -

“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”

23. The Appellant alleges that the file “went missing”. However, he has not produced any evidence to support that allegation. There is no correspondence or any communication of any nature from or with the Court to that effect. A “missing” file is a serious and alarming issue which, in practice, a diligent Counsel will often aggressively pursue or follow-up through proactive action through or with the Court. Evidence of such aggressive pursuit will be easily discerned and available for scrutiny. A diligent Counsel will even apply for reconstruction of the Court file. In the absence of any proof of such diligent and aggressive pursuit in this case, I find that the delay herein is inexcusable and was caused by inaction and indolence on the part of the Appellant.

24. The decision the Appellant purports to still seek to appeal against was delivered on 25/05/2018, 6 years ago. It is clear from the conduct of the Appellant and/or his legal team that they are not keen on prosecuting the Appeal. As a principle, matters in Court cannot remain pending indefinitely or in perpetuity, they have to be concluded within a reasonable period of time. It would be unfair to retain this Appeal as pending in Court any longer when the party who initiated it is clearly reluctant to prosecute it. I am satisfied that the Respondent is prejudiced by the delay and should now be released from “the yoke of litigation”.

Final Order

25. In the premise, the Application dated 27/09/2021 is allowed and accordingly, this Appeal is hereby dismissed for want of prosecution with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 2ND DAY OF FEBRUARY 2024

WANANDA J.R. ANURO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

