



**Lopadis & another v Mohammed (Civil Appeal E074 of 2022)  
[2024] KEHC 5859 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E074 OF 2022  
EM MURIITHI, J  
MAY 23, 2024**

**BETWEEN**

**NANCY NG'ASIKE LOPADIS ..... 1<sup>ST</sup> APPELLANT**

**FRANCIS GITOMBE ALOBEI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ADAN ADEN MOHAMMED ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 23/10/2023 brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act, the Respondent/Applicant seeks that:
  1. The Appellants' Appeal herein instituted vide the Memorandum of Appeal filed on 15/06/2022 be dismissed for want of prosecution.
  2. The Costs of this Application be borne by the Appellants' in any event.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Adan Aden Mohamed, the Applicant herein sworn on even date. He avers that the Appellants instituted this appeal vide a memorandum of appeal filed on 15/6/2022, but since then, they have not followed to fix the same for hearing or taken any steps to prosecute it. The Appellants have never effected service of the said memorandum of appeal on him or his advocates on record. It is evidently clear that the Appellants and/or their counsel have lost interest in the said appeal and do not intend to prosecute it. It is therefore fair and just for the said appeal to be dismissed for want of prosecution.
3. The Respondents have opposed the application vide a replying affidavit sworn by Nancy Ng'asike Lopadis, the 2<sup>nd</sup> Respondent herein on 16/2/2024. She maintains that they are still interested in this matter, and have been pursuing a copy of the judgment and lower court proceedings to enable them



prepare the Record of Appeal. The proceedings and judgment were finally availed in October 2023 and their advocates proceeded to prepare the Record of Appeal, which was duly filed on 24/10/2023. It is therefore merely a coincidence that the Record of Appeal and the Applicant's application were served on the same date. It is clear that their advocates on record have been diligent in pursuing the appeal by acquiring copies of the proceedings and judgment and proceeding to file the Record of Appeal in the best time possible given the circumstances. They pray for the application to be dismissed with costs, so that they can get an opportunity to ventilate their grievance with the trial court's judgment.

### Submissions

4. The Applicant urges that after filing their appeal on 15/6/2022, the Appellants did not take any steps to vigilantly prosecute the appeal for more than one year until 24/10/2023 when they were served with the present application. He urges the court to exercise its discretion under section 3A of the *Civil Procedure Act* and Order 2 Rule 11 (1) of the *Civil Procedure Rules*, and cites *Protein & Fruits Processors Limited & Anor v Diamond Trust Bank Kenya Limited* (2015) eKLR. He urges the court to dismiss the appeal for want of prosecution with costs.
5. The Respondents deny that they filed the Record of Appeal on 24/10/2023 after being served with the instant application. They maintain that they are actively pursuing the prosecution of the appeal, and cite *Argan Wekesa Okumu v Dima College Limited & 2 Others* (2015) eKLR and *Kwacha Group Companies v Pindoria Holdings Limited* (2022) eKLR.

### Analysis and Determination

6. The singular issue for determination is whether the appeal ought to be dismissed for want of prosecution.
7. The considerations to be made in determining whether or not to dismiss matters for want of prosecution were set out in *Ivita v Kyumbu*, Civil Suit No. 340 of 1971 (1984) KLR 441, 449, where Chesoni J. held as follows:

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court...The defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”
8. The Respondents timeously filed their Memorandum of Appeal on 15/6/2022 against the decision of 24/5/2022 and the lower court record was subsequently called for and duly received on 24/5/2023. On 27/7/2023, in the absence of the parties, the Court directed that the Record of Appeal be filed and the matter was slated for directions on 25/10/2023. It is on that day when directions for the instant application, which was filed on 23/10/2023 were given and a ruling reserved.
9. It is said that the Respondents filed the Record of Appeal after being served with the instant application. That may not be entirely accurate as the same was done in compliance with the directions of the court of 27/7/2023.
10. The Appellants have attributed the delay in filing the Record of Appeal to their inability to procure the impugned judgment and the typed proceedings on time.



11. This court is thus satisfied that the Respondents' delay in prosecuting their appeal was not deliberate but occasioned by the long time it took to obtain the typed proceedings.
12. Since the Record of Appeal has now been compiled, filed and served, this court will, in the spirit of Article 159 (2) (d) of *the Constitution* and the overriding objectives under Sections 1A and 1B of the *Civil Procedure Act*, allow the appeal to proceed to its logical conclusion.

### **Orders**

13. Accordingly, for the reasons set out above, this court finds that the Applicant's application dated 23/10/2023 is without merit and it is dismissed.
14. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Masamba for the Appellant.

Mr. Kitheka for the Respondent.

