



REPUBLIC OF KENYA



Jubilee Insurance Company Limited v AINU SHAMSI HAULIERS LIMITED (Civil Appeal 87 of 2022) [2024] KEHC 6983 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 87 OF 2022
SM GITHINJI, J
JUNE 12, 2024**

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED APPELLANT

AND

AINU SHAMSI HAULIERS LIMITED RESPONDENT

(Being an Appeal from the Judgment of Hon Olivia Koranje – Resident Magistrate delivered on 6th October, 2022 in Mariakani SRMCC No. E182 of 2021)

RULING

1. There are two applications for determination. The first filed by the Respondent is dated 22/4/2024, and brought under section 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 12 rule 6 and Order 51 rule 1 of the [Civil Procedure Rules](#), seeking the following orders: -
 1. Spent.
 2. That this honourable court be pleased to make an order dismissing the appellant’s appeal for want of prosecution.
 3. That the costs of this application be in the cause.
2. The said application is premised on the grounds found at the foot of the motion and supported by the affidavit sworn by the Respondent’s counsel, Seth Ojienda, on the even date. In the supporting affidavit, counsel deposed that since the appeal was filed on 11/10/2022 and stay of execution orders granted on 16/11/2023, the Appellant has failed to take any further steps, particularly, to file the record of appeal within the timelines as directed by the court.
3. Upon being served with the above application, the Appellant moved the court *vide* a notice of motion application dated 30/4/2024 under section 3A of the [Civil Procedure Act](#) and Order 42 rule 6 (1) and (2) of the [Civil Procedure Rules](#) seeking the following orders: -



1. Spent.
 2. Spent.
 3. That the honourable court do vacate and/or review its orders granted on 20/3/2024 discharging the stay of execution orders issued on the 16/11/2023 and reinstate the stay of execution orders.
 4. That the costs of the application be provided for.
4. Similarly, this application is premised on the grounds listed on the face of the motion and supported by a supporting affidavit sworn on an even date by Nancy Kasyoka, the Appellant's legal officer. According to Ms. Kasyoka, this appeal was preferred against a ruling dated 6/10/2022 issued in Mariakani SRMCC No. 182 of 2021. Alongside the memorandum of appeal, the appellant filed an application for stay of execution dated 11/10/2022. That application was heard and on 16/11/2023, the court granted stay of execution on condition that the decretal sum is deposited in a joint interest earning account and the record of appeal be filed within 30 days therefrom.
5. Ms. Kasyoka added that the Appellant complied with the former but was unable to file the record of appeal within the given time due to unavailability of the trial court's proceedings. That on 20/3/2024 when the matter was scheduled for mention, the court granted the Appellant an extension of seven days to comply and vacated the stay orders. As a result, so she added, the Respondent filed an application dated 22/3/2024 seeking to execute the *ex-parte* judgment in the trial court. Counsel added that the Appellant filed the record of appeal on 25/4/2024 and is desirous of executing the appeal. She further deposed that with the imminent execution, irreparable harm will be visited upon the Appellant and that the Appellant's application should be allowed in the interest of justice.
6. There was no response filed for either application. Further, directions were issued on 14/5/2024 that both applications be canvassed by way of written submissions. Notably also, neither party complied with those directions.
7. Order 42 Rule 35 of the [Civil Procedure Rules, 2010](#) envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fail to cause the matter to be listed for directions and 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. The said provision reads: -
- 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. In analyzing the matter, I am guided by 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 be achieved despite the delay.



9. The Appellant filed its memorandum of appeal on 12/10/2022 and filed alongside it an application for stay of execution. The Appellant obtained orders staying execution on 16/11/2023 on conditions that the Appellant deposits the decretal amount and file the record of appeal within 30 days of that order. The Appellant deposited the decretal amount but failed to file the record of appeal. On 13/3/2024 when the matter was mentioned, the Appellant's counsel Mr. Karanja informed the court that the record was yet to be compiled. Consequently, the court granted the Appellant an extension of 7 days to file the record of appeal. The time within which the record should have been filed therefore lapsed on 20/3/2024 when the stay orders were vacated and notice to show cause issued and scheduled for mention on 14/5/2024.
10. In its present application, the Appellant averred that the appeal should not be dismissed since it filed the record of appeal on 25/4/2024. I have perused the present proceedings; I do not see such record of appeal.
11. In the circumstances, and in the absence of any cogent explanation for the delay in prosecuting its appeal for period of over a year, I find that the Appellant has made no sufficient effort to prosecute its appeal despite this court's indulgence on double occasion. In the end I am inclined to allow the Respondent's application to dismiss the present appeal for want of prosecution. In turn, there is no basis for me to consider whether or not stay of execution should be reinstated or granted.
12. The outcome is that the application dated 30/4/2024 is hereby dismissed and the Respondent's application dated 22/4/2024 is allowed. Each party shall bear its own costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12TH DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Tom Ojienda (SC) for the Respondent

Mr Karanja for the Appellant/Applicant

Mr Tom Ojienda; -We had intended to take directions on disposal of appeal.

Mr Karanja: - Each party was to have to file submissions and serve in 7 days.

Mr Ojienda; -The appeal has been dismissed.

Court; -The consent should have come before the Ruling. The appeal has been dismissed.

Mr Karanja;-I seek leave to file an appeal. I seek 14 days leave.

Court; -Mr Karanja is granted 14 days leave to file an appeal.

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S.M. GITHINJI

JUDGE

12. 6.2024

