



Oluoch v Board of Registration of Architects and Quantity Surveyors (Civil Appeal 23 of 2019) [2024] KEHC 7051 (KLR) (Civ) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7051 (KLR)

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

CIVIL

CIVIL APPEAL 23 OF 2019

JN MULWA, J

JUNE 12, 2024

BETWEEN

GODFREY OKOTH OLUOCH APPELLANT

AND

**BOARD OF REGISTRATION OF ARCHITECTS AND QUANTITY
SURVEYORS RESPONDENT**

RULING

1. There are two Applications for determination before the court dated 5/06/2023 and 12/06/2023.
2. The first Application dated 5/06/2023 is brought by the Hon. The Attorney General (Martin Munene State Counsel) under Provisions of Order 43 Rule 35 of the *Civil Procedure Act* seeking dismissal of this appeal for want of prosecution and is supported by an Affidavit sworn by one George Okoth Oluoch the Registrar of the Board of Registration of Architects and quantity surveyors the Respondent herein and grounds stated at its face.
3. It is opposed via a Replying Affidavit sworn on 20/03/2024 and further buttressed by written Submissions dated 20/03/2024.
4. The second application is dated 12/06/2023. It was brought by the Appellant primarily under Order 45 Rule 1, Order 42 Rule 6 and Order 40 Rules 2, 3, 4, and 5 of the Civil Procedure Rules (CPR) as well as Section 13 (A) of the *Architects and Quantity Surveyors Act* Chapter 535 Laws of Kenya among others. The Appellant/Applicant seeks numerous orders but in the main: -
 1. An order for review to clarify and/or expound its ruling dated 3/05/2023 in relation to the Respondents motion dated 17/01/2022.



2. An order staying the Respondents decision dated 14/01/2019 suspending the registration of the appellant as an Architect, and all consequential orders/measures or directions emanating from that decision.
3. An order of injunction restraining the Respondent from Publishing its impugned suspension of the Appellant by Gazette notice to the general public as threatened in a letter dated 26/05/2023

It is supported by an affidavit sworn by Appellant on 12/06/2023 and grounds on its face.

5. The application is opposed by a Replying Affidavit sworn on 20/03/2023 by George Charles Omondi, the Registrar of the Respondent.

In addition, parties were directed to file submissions on both applications but only the Respondent filed its submissions.

6. By nature of the two Applications, I find it appropriate to determine the Application dated 12/06/2023 first.

The appellant in this Application seeks review and/or clarification of the ruling dated 3/5/ 2023. The court's Ruling of 3/5/2023 was in respect of the Respondents motion dated 17/01/2022 wherein the Respondent sought an order to strike out the Appeal for non-compliance of court orders dated 7/05/2020.

7. The orders on 7/05/2020 were issued by the Hon. Njuguna J. to the effect that a stay of execution order of the Respondent's decision dated 14/01/2019 in the matter of suspension of the applicant from the Register of Architects of Architect Oluoch Godfrey Okoth and all consequential orders issued/or emanating from the decision pending the hearing and determination of the appeal upon conditions appearing here below.

8. In my view therefore the court by the said ruling stayed execution of the decision of the Respondent to suspend the appellant pending hearing and determination of the Appeal, upon conditions that:

“...I therefore grant a stay of execution for 90 days within which the appeal should be prosecuted failing which the stay orders shall automatically lapse.....”

9. At that point the appeal was not struck out, but the court added a default clause, that the stay orders would lapse automatically if the appeal is not filed within the timelines set at 90 days. That was on 7/05/2020. By the above therefore, the appeal should have been prosecuted within 90 days of that ruling, that is to say by 5/08/2020.

10. The above ruling gave rise to the Motion dated 17/01/2022 by the Respondent seeking an order that as a result of noncompliance of court Orders of 7/05/2020 the Appeal ought- to be struck out for non-compliance. Upon hearing of the Motion wherein both parties participated by their able Advocates, the court in a ruling dated 3/05/2023 (Mulwa J), rendered at par. 7 that:

“.... It is clear that non- compliance only resulted in the automatic lapse of the order for stay of execution of the Respondents decision. That is to say if the appeal was not prosecuted within the 90 days the stay would lapse automatically and the Appellant would have to serve his suspension while pursuing his appeal. At the time the appeal was not struck out or dismissed and is still “alive”. What lapsed is the stay order, not the appeal.



The above is my clarification of the impugned ruling in line with prayer No. 2 of the Motion under review.

11. In respect of prayer No. 4 of the Application for an order of stay of execution of the Respondents decision dated 14/01/2019 it is clear that this issue was the subject of the Motion dated 22/01/2019 wherein Njuguna J. in her ruling of 7/05/2020 granted the said orders upon conditions that were not complied with and therefore the stay orders lapsed automatically. To attempt to interrogate and determine the same for a second time would be violating the principle of Res-judicata as provided under Section 7 of the Civil Procedure Act. That goes for prayer No. 5 thereon.
12. A temporary injunction in the circumstances being part of the impugned Respondents decision and consequences therefrom, I am still bound to respect the principle of res judicata. The same goes for the test of the prayers being consequences that arose upon suspension of the Quantity Surveyor by the Board in terms of the By- Laws 34 and 35 of its Act.
13. In the Application dated 17/1/2022 subject of the ruling dated 3/05/2023 the court had not been urged to declare nor find that the appellant had in effect served his suspension of three years in order for him to consider whether or not to proceed with the appeal. What the court was urged to direct at prayer 3 was, at the time: that the suspension given by the Respondent against the appellant on 10th December 2018 for a period of three years should start to run from the date the appeal herein is struck out.
14. The court will not ordinarily go out of its way to consider an issue that was not pleaded or raised before it at the hearing of an application. The impugned Notice of Motion speaks for itself.
15. Just to revisit the Motion dated 17/01/2022 and the Ruling thereof dated 3/05/2023.
If indeed the Appellant had served his suspension as he states in the Application dated 12/06/2023, why then would he be seeking orders stay of execution of the said decision of the Board that he states had been overtaken by events?
16. The Architects and Quantity Surveyors By-Laws 1959, no. 34, it is a mandatory requirement that a suspended person return his certificate of Registration to the Board. Whereas the appellant states that the above by-law has no bearing on him on the commencement or suspension, it is evident that the matter remains contentious as the Board by its letter dated 26/05/2023 suggests that the suspension would take effect from the date of his surrender of the certificate of Registration to the Board.
17. On the part of the respondent, it is emphatic that the appellant is yet to serve the three years' suspension and has blatantly failed to comply with Section 34 of the Respondents By-Law, particularly that he has failed to return his certificate of registration to the Board that ought to have been so returned upon his suspension.
18. In my considered view, the appellant has not shown to the satisfaction of the court by demonstrating that upon his suspension though he moved to court to seek stay orders, he complied with the Board's By-laws.

On Review Orders

20. On the legal arm of the application, an applicant for review orders must satisfy the conditions set under Order 45 Rule 1 CPR. It provides: -
 1. "any person considering himself aggrieved: -
 - a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred: or



- b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to retain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
21. There is no appeal against the court’s ruling dated 3/05/2023. A careful perusal and consideration of the reliefs sought by the Appellant, I find no apparent error or mistake on the face of the ruling nor any discovery of anything new, be it by way of documents, or new evidence that was not in the knowledge or reach of the appellant before or after the impugned suspension by the Board. Additionally, the appellant has not stated any other sufficient reason which may fall within the purview under Order 45 CPR.
22. The court in *Pancras T Swai v. Kenya Breweries Limited* [2014] eKLR rendered that: -
- “.....in basing his review Application on the failure by the court to apply the law correctly, the decision on a point of law. That was a good ground for appeal but not a ground for an application for review....”
23. It continued to state that: -
- “...if parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction”.
24. Additionally, the court held that “Discovery of new and important matter or evidence or mistake or error apparent on the face of the record or any other sufficient reason in Order 45 Rule 1 relates to issues of facts which may emerge from evidence”.
25. Ultimately and in conclusion, the court finds no grounds upon which it may proceed to review its orders dated 3/05/2023 but has in the best of its ability clarified, verified and expounded the said orders as sought by the appellant.
26. As to stay of execution pending Appeal, the court finds that the application is *res-judicata* for reasons stated at the body of this ruling.
27. As to whether the appellant’s suspension for three years commenced on the 10/12/2018 as well as whether he is bound to comply with requirements under Section 34 of the Respondents By-Laws among others, the court makes a finding that the issues cannot be determined in an interlocutory application but upon hearing and determination of the Appeal on merits.
- Consequently, the Notice of Motion dated 12/06/2023 is devoid of merit and is dismissed.

Notice of Motion dated 5/06/2023.

28. It is filed by the Hon. Attorney General on behalf of the applicant, Board of Registration of Architects and Quantity Surveyors. I have considered the Application, the supporting and Opposing Affidavits



and submissions by the Applicant/Respondent. The Appellant has not filed any Responses despite having been served or Submissions. It therefore stands unopposed.

Two main prayers are sought-

1. Spent
2. That the Honorable Court be pleased to dismiss the Appeal for want of prosecution for reason that it is over three years from the date when the directions were issued to prosecute the Appeal.
3. That the honorable court be pleased to direct that the suspension given by the Respondent/ Applicant against the Appellant on 10/12/2018 for a period of three years should start to run from the date the appeal is dismissed or on the date when the appellant returns the certificate of Registration.

29. On the first arm of the Application, there is no doubt that the Appellant has failed to prosecute its appeal filed in 2019 despite filing the Record of Appeal and directions taken for its hearing.

By consent order dated 7/05/2020, the court (Njuguna J) directed that the appeal be prosecuted within 90 days which was a condition to the stay of execution orders. This was not done, so the stay orders lapsed automatically.

30. Nothing seems to have happened in respect of the appeal since then until the respondent moved the court for orders of dismissal by this Motion dated 5/06/2023.

31. Surprisingly, despite being served, the appellant has not filed any response. However, the appellant filed a Motion seeking Orders of review and/or clarification of Court Orders dated 3/05/2023 which the court has done herein above.

I have considered the Respondent's/Applicants submissions dated 20/03/2024. There is no issue as to whether or not the appeal is for dismissal. It is evident that the appellant is not interested in prosecuting the appeal despite the court order issued on 7/05/2020 for it to be prosecuted within 90 days.

32. An Appeal belongs to the Appellant just as a suit belongs to the plaintiff. It is its duty to prosecute the appeal, not the duty of the respondent, save that the respondent may opt to do so to protect its interests. The respondent/appellant has not found it proper to file responses to the application as to why and for what reasons it has not prosecuted its appeal for more than three years.

33. Order 42 Rule 35 Civil Procedure Rules empowers the court to:-

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”

33. Pursuant to the above provision, the applicant has moved the court for dismissal of the appeal, and rightfully so. In *Ivita V. Kyumbu* [1984] KLR 441, the test for dismissal of a suit (including an appeal) were set out: -When the Appellant offers no cogent reasons for the delay or failurePrejudice to the respondent for the delay.No justice is served to keep an appeal alive when the appellant has not been interested in prosecuting it until he is prompted to prosecute it.

34. In this appeal, the appellant was awoken from his slumber by the respondent throughby the instant Application. Even then, he opted not to respond to the application at least to state the cause of the inordinate delay. Filing of an Application to counter the application for dismissal without a replying



Affidavit or grounds of opposition cannot be substituted for a response under the Civil Procedure Rules or even under Section 1 A, 1B and 3A of the Civil Procedure Act.

35. Under Order 42 Rule 35(1) CPR it is mandatory for the Appellant to take action on its appeal within 3 months of giving of directions by the court. It is trite that justice delayed is justice denied as clearly held in *Ivita vs. Kyumbu* (supra) ... that justice delayed without explanation is justice denied and delay defeats equity; that discretion must be exercised on the basis that it in the interest of justice regard to whether the delay in prosecuting the suit is inordinate. Unreasonable, is inexcusable and likely to cause serious prejudice to the defendant on account of that delay.
36. See also *Mwangi S Kaimenyi vs. Attorney General & Another*, Misc. Civil suit NO. 720 of 2009 where the court emphasized the testyempasirestated the test in *Ivita V. Kyumbu* that stated above. :-
37. Invariably what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues: -Whether the delay is inordinate and inexcusable
38. For the foregoing this court finds and holds that the appellant's failure to prosecute its appeal for no apparent reasons or grounds or at all is inordinate, unreasonable, unjustified, intentional and prejudices the respondent and gives rise to substantial risk to fair trial under Article 50 of the Constitution, and conclusion of cases without unreasonable delays. The appellant's application for review of court orders as sought in its application dated 12/6/2023 is a standalone application and not dependent on the application for dismissal of the appeal.
39. For the foregoing I find and hold that a dismissal order of the appeal for want of prosecution will serve justice to the respondent who has been carrying the burden of the Appeal on its shoulders since 2019 when the appeal was filed, and parked at the court's registry shelves for over five years is merited.

The appeal herein is dismissed for want of prosecution with costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE.

