



**Ahumu v Waone & another (Civil Appeal E021 of 2021)
[2024] KEHC 8599 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E021 OF 2021
DO CHEPKWONY, J
JULY 15, 2024**

BETWEEN

LILIAN AWINO AHUMU APPELLANT

AND

GEORGE OTIENO WAONE 1ST RESPONDENT

DAVID OTIENO 2ND RESPONDENT

RULING

1. The court issued notice to show cause dated September 21, 2023 for the parties to show cause why the Appeal should not be dismissed for want of prosecution.
2. The Appellant filed a Reply to the said Notice to Show Cause which was sworn on October 4, 2023, wherein the Appellant averred that she had a misunderstanding with her counsel on the matter and the Counsel returned the file to her so that she could instruct another advocate. She claims that she then instructed M/S Achoki & Co Advocates to take up the Appeal and was asked to pay a deposit of Kshs 75,000/= but she only managed to raise Kshs 10,000/=. She states that she was unable to pay the balance as she lost her job in June, 2022. She further states that she had a small vegetable business where she expected she could make the money but the same got burnt down during anti-government protests.
3. The Appellant avers that when she went to the offices of the new Counsel to explain her predicament, she was directed to go to Kituo cha Sheria who intervened and pleaded with her Counsel to proceed with the Appeal on her behalf. She contends that she wrote an apology letter to the Counsel and he agreed to prosecute the Appeal on July 20, 2023 and on the same day, counsel wrote a letter to court requesting for Directions on the Appeal but the court file could not be traced.
4. According to the Appellant, her Counsel was then called by the Court Registry and was informed that the court file had been traced and that it had a mention date of November 30, 2023. She avers that the



Record of Appeal has already been filed and what was remaining is for the lower court file to be availed from Kikuyu Law Courts so that the Appeal can be set down for hearing.

5. The Appellant attributes the delay in the disposal of the Appeal on the misunderstanding between her and her Advocate(s), the loss of her job and business which prompted Kituo Cha Sheria to intervene. She has urged the court to indulge her and set down the Appeal down for hearing.
6. Mr. Muindi, counsel for the Appellant orally submitted to court that upon filing of Record of Appeal, his client withdrew instructions and instructed another counsel but was unable to raise the legal fees for the said counsel. He stated that Kituo cha Sheria then approached and urged them to continue representing the Appellant on pro bono basis, which they agreed. It is his contention that they have already filed the appeal and has urged the court to set aside the Notice to Show Cause and allow them to take directions on hearing of the appeal.

Analysis and determination.

7. I have read through the disposition in the Replying Affidavit sworn by the Appellant on 4th October, 2023, the oral submissions made by her counsel, Mr. Muindi and the record of proceedings herein. I find the issue for determination being whether the Appellant has established/shown sufficient cause why the Appeal should not be dismissed for want of prosecution as provided for under Order 42 Rule 35 of the Civil Procedure Rules.

8. The law on dismissal of appeals for want of prosecution is enshrined under order 42 rule 35 of the [Civil Procedure Rules](#) which provides as follows:-

Order 42 rule 35 (1) of the [Civil Procedure Rules](#) stipulates as follows:-

“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”.

Order 42 rule 35 (2) of the [Civil Procedure Rules](#) stipulates as follows:-

“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”

9. It is trite law that there are several factors to be considered in dismissal of appeals as stated in the case of [Argan Wekesa Okumu -v- Dima College Limited & 2 others](#) (2015) eKLR the court stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of [Ivita vKyumbu](#) (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on



its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

10. From the record, this Appeal was filed back in the year 2021 against the Judgment of the trial court dated January 14, 2021 and thereafter, the Record of Appeal filed on March 31, 2021. The Appellant’s Counsel wrote a letter dated August 16, 2021 addressed to the Deputy Registrar High Court wherein he requested for a mention date for directions. From then, no action was taken until the year 2023 when the matter was fixed for Mention on 30th August, 2023 and the Deputy Registrar issued a Notice to Show Cause since none of the parties were present in court and set the same for hearing on 30th November, 2023. On this day of November 30, 2023, Mr Muindi Counsel for the Appellant appeared before court and urged that the Notice to Show Cause be set aside as per the response given.
11. The court has gone through the reasons given by the Appellant for the delay in having the appeal disposed of being lack of funds to instruct an Advocate which was brought about due to loss of job and burning down of her business. This appeal was lodged way back in the year 2021 and a period of two (2) years have lapsed with no action being taken to prosecute the same. While the law is clear that if no action is taken within one year, then the Appeal should be dismissed for want of prosecution. This court finds the reasons given by the Appellant for not taking any action in having the appeal prosecuted sufficient predicament, which has not been rebutted by the Respondents. Furthermore, it will also be noted that neither Respondent has filed any response or attended court to demonstrate any prejudice they would suffer if the appeal is allowed to proceed for hearing.
12. In view of this, the court invokes its inherent power under section 3A of the [Civil Procedure Act](#) to issue such orders as may be necessary to meet the ends of justice. In the case of [Wachira Karani v Bildad wachira](#) [2016], the court stated:-

“The fundamental duty of the court is to do justice between the parties Fundamental to that duty is that parties should be allowed a proper opportunity to put their case upon the merits of the matter....The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vided in the court are of wide scope and ambit”.
13. Further, courts are also enjoined to lean on the rules of natural justice which require that a party in a dispute be allowed an opportunity to be heard on merit. (See article 50(1) of [the Constitution](#)).
14. This court finds that the Appellant has shown sufficient cause why the appeal should not be dismissed for want of prosecution. In conclusion, the court orders as follows:-
 - a. The Notice to Show Cause issued on 21st September, 2023 be and is hereby set aside.
 - b. The Deputy Registrar to call for and avail the original record of proceedings in Kikuyu SPMCC No.268 of 2017, *Lilian Awino Abumu v George Otieno Waone and David Otieno*.
 - c. There shall be no orders as to costs since the Notice to Show Cause was issued by the court.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS 15TH DAY OF JULY 2024

D. O. CHEPKWONY

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

