



**Gee Tee Sons Limited v Karungo (Civil Appeal E352 of 2023)  
[2024] KEHC 9037 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9037 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E352 OF 2023  
BM MUSYOKI, J  
JULY 24, 2024**

**BETWEEN**

**GEE TEE SONS LIMITED ..... APPELLANT**

**AND**

**EMMA NJAMBI KARUNGO ..... RESPONDENT**

*(Being an appeal from judgement and decree of Honourable G. Omodho, SRM dated 10-12-2018 in Thika Chief Magistrate's Court civil case number 1112 of 2002)*

**RULING**

1. The respondent has brought a notice of motion dated 17<sup>th</sup> July 2023 under Article 50(1) of the Constitution of Kenya and Section 3A of the Civil Procedure Act. The same prays that the memorandum of appeal filed on 22-01-2019 be struck out for want of prosecution.
2. Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body while section 3A of the Civil Procedure Act provides that nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
3. I have been unable to reconcile the relevance of Article 50(1) of the Constitution with the nature of the application before me but I understand the applicant to be asking the court to terminate these proceedings for reason that the appellant has delayed in prosecuting the same. This is notable from the grounds of the application and the supporting affidavit.
4. This appeal was filed on 22-01-2019 which is now more than four years down the line. I have perused the court file and I have not seen evidence that this appeal was ever admitted for hearing. Section 79B of the Civil Procedure Act has not been complied with. This is obviously the reason the respondent has avoided citing Order 42 Rule 35 in its application. Order 42 of the Civil Procedure Rules which governs



filing and hearing of appeals has rule 11 which provides that 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. This is the first step in the process of disposing appeals. The Rule is couched in mandatory terms. Rule 13 of the same Order which is also in mandatory terms provides that the appellant shall cause the appeal to be listed for directions by a judge in chambers.

5. I understand the respondent's complaints to be based on the failure by the appellant to invoke the above stated Rules. In my view, although the Rules are couched in mandatory terms, the appellant is not expected to act outside the norms of operations of the court and application of other operative rules and procedures governing prosecution and disposal of matters before the courts. That said, it is common knowledge and I take judicial notice of the same that in ordinary course of business for our courts, the parties must adhere and take dates in conformity and convenience of court diaries. In the circumstances, I hold the view that the words used in the Rules that the appellant shall cause the appeal to be listed for directions can only be interpreted to mean that the appellant should take an overt act in applying for dates for directions. Once the appellant applies for a date, they can only go by the court's diary. In my view, these Rules are meant to ensure that the appellant shall remain vigilant in their appeals and not sit back probably enjoying the pendency of their appeals to the detriment of the respondent or any other party involved like in this matter where the appellant is enjoying orders for stay of execution.
6. The appellant has filed a replying affidavit dated 19-12-2023 sworn by one Jared Wanyoike in which it states that the delay in prosecuting the appeal has been caused by failure by the lower court to forward the original file to the High Court.
7. I have read the application, the replying affidavit, the record of both this court and the lower court and the submissions of the parties. I do not agree with the applicant that the appellant sat on its laurels after filing the appeal. There may have been delays from the appellant but I would not say that the same were deliberate or through negligence.
8. An appeal cannot be listed for directions unless the lower court file has been transferred to the high court. It is not clear to me when the appellant made application for proceedings for the purposes of appeal but I note that on 23-01-2019 the Deputy Registrar of this court wrote to the lower court asking for the original record and two certified copies of the proceedings. The appellant could not have control over the speed of typing of proceedings. It is not indicated when the proceedings were ready for collection but I note that the record of appeal in this matter was filed on 18-02-2020.
9. There are correspondences in the court file showing that the appellant's advocates had on 15-09-2021 asked for a date for directions but the court on 16-09-2021 replied to them that date for directions could not be given until the lower court file was forwarded to the high court and the appeal admitted. On 28-02-2023, Honourable M.W. Kurumbu ordered that the lower court file be forwarded to this court within fourteen dates. That was not done until 8-05-2023 through a letter dated 4-04-2023. I cannot attribute that delay to the appellant. The respondent filed the current application barely three months after the file was received in this court's registry. I would have expected the matter to have been placed before the judge for consideration of admission of the appeal after the file was received in this court's registry.
10. Whereas I acknowledge that this is a very old matter, the cause of action having arisen on 19-04-2000, I am not convinced that the delay of prosecuting this appeal can be attributed to the appellant. In the circumstances and considering the age of the matter and for the wider interest of justice, I make the following orders;
  - a. The notice of motion dated 17<sup>th</sup> July 2023 is hereby dismissed with no orders as to costs.



- b. The Deputy Registrar shall within thirty (30) days of delivery of this ruling place the file before the judge for discretion under Section 79B of the *Civil Procedure Act* and any other appropriate orders the judge may deem fit in respect of expeditious disposal of the appeal.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2024.**

**B.M. MUSYOKI**

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**JUDGE OF THE HIGH COURT.**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

