



Kinuthia v Kamau (Civil Appeal E042 of 2022) [2024] KEHC 9409 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E042 OF 2022
DKN MAGARE, J
JULY 23, 2024**

BETWEEN

JULIAH NJERI KINUTHIA APPELLANT

AND

FREDRICK KARIUKI KAMAU RESPONDENT

RULING

1. This is an application dated 7/8/2023. It seeks the following orders:
 - a. The Honourable court be pleased to dismiss the Appeal herein for want of prosecution.
 - b. The costs be provided for.
2. The grounds are that no steps were taken since July 2022 to file the record of appeal or set the appeal down for hearing. The Applicant is said to suffer prejudice for the prolonged delay. The prejudice however, is not named.
3. The Respondent stated that she had filed suit in 2018. The Respondent blamed previous advocates and asked for time to prosecute the appeal. The Respondent did not file submissions.
4. The Applicant filed submissions dated 8/5/2024.

Analysis

5. I am perturbed that the time taken to prosecute this application should have been used to prosecute the appeal. Order 42 Rule 35 provides as follows:
 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.
6. *Ipsa facto*, the application should be made after compliance with Order 42 Rule 13, which provides as follows: -

13.

- (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
 - (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:Provided that—
 - (i) a translation into English shall be provided of any document not in that language;
 - (ii) the judge may dispense with the production of any document or part of a document which is not



relevant, other than those specified in paragraphs (a), (b) and (f).

7. The main fault the Respondent had is not that they failed to follow up on proceedings. The following up is not a proper word. They should only request for proceedings and pay. The burden of following should not unduly be placed on the Appellant. Only follow up letters are necessary.
8. However, the appeal has not been admitted. The fault in this particular matter is not on the Appellant/ Respondent but the Court. There is delay in doing so. However, the delay is not inordinate. The Appellant appears keen to proceed.
9. For reasons only that the Appeal was not admitted, the application fails. It is not in all occasions where the Appeal is not admitted that the court will refuse to admit the Appeal.
10. In the case of *Rupa Savings & Credit Cooperative Society v Violet Shidogo* [2022] eKLR, R Nyaundi J, stated as follows: -

“ 16. Further, the Applicant remains the owner of the suit and the prosecution thereof is his responsibility. It is for this reason that the Court of Appeal in *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR which decision I cite with approval, declined to simply blame inaction on the mistake of counsel instead stating:

“Our re-evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay”

17. In *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR, the court similarly declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. The Court stated:

“It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costHowever, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court”.

The Court went on further to state:

“I fully agree with the above holding. It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter”.

11. Apaloo J (as he then was) in the case of *Phillip Chemwolo and another v Augustine Kubende* [1986-89] EA 74 at 81:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of his case being heard on merit. I think the broad equity to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The



court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

12. The mistakes made in this case were excusable. The Appeal was not ready for hearing. It is less than one year and one month since filing. It was not indicated when the Memorandum of Appeal was filed. The application is dismissed. Nevertheless the Respondent shall bear costs of Kshs 10,000/= for being woken up by the Applicant. Had the appeal delayed longer the court will have found the delay inordinate.
13. In the circumstances the application is dismissed with costs of Kshs 10,000/= to the Applicant.

Determination

14. The court makes the following orders:-
 - a. The Application dated 7/8/2023 is dismissed. The Applicant is nevertheless awarded costs of Kshs 10,000/= payable within 30 days.
 - b. The Appeal shall be listed on 24/9/2024 for admission.
 - c. The Appellant to file the decree within 14 days.
 - d. The Appeal shall stand dismissed on 26/7/2025, if it has not been prosecuted.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for Applicant

No appearance for Respondent

Court Assistant – Jedidah

