



**Mwangi & 2 others v Waweru & another (Suing as the legal representatives of the Estate of the Late Owen Karugu Githu) (Civil Appeal 96 of 2020) [2024] KEHC 8363 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 96 OF 2020  
HM NYAGA, J  
JULY 5, 2024**

**BETWEEN**

**JAMES MWANGI ..... 1<sup>ST</sup> APPELLANT  
SIMON MBUTHIA ..... 2<sup>ND</sup> APPELLANT  
ABRAHAM KAMAU GITU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REBECCA WANGARI WAWERU & DAVID MUNGAI KARUGU (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE OWEN KARUGU GITHU) ..... RESPONDENT**

**RULING**

1. The Applicant vide an application dated 15<sup>th</sup> June, 2022 brought under Sections 1A, 1B, 3A and 79B of the *Civil Procedure Act*, Order 42 Rules 11, 13 and 35(1)(2) of the Civil Procedure Rules seeks for ORDERS:
  1. Spent
  2. That the Honourable Court be pleased to dismiss the Appellants' appeal for want of prosecution.
  3. That the costs be in the cause.
2. The Application is premised on the grounds on its face and supported by an affidavit sworn by the Applicants, Rebecca Wangari Waweru and David Mungai Karugu on even date.



3. They deponed that the judgement was entered in their favour on the 27<sup>th</sup> May, 2020 and since then the Appellants have not made any deliberate attempts or efforts to have this matter listed for directions to date.
4. They believe the delay by the Appellants in listing the appeal for directions is deliberate, inordinate, inexcusable and meant to deny them their right to enjoy the fruits of the judgement.
5. In opposition to the Application, Victor Ng'ang'a, the Appellants'/Respondents' counsel swore a replying affidavit on 6<sup>th</sup> September,2022.
6. He deposed that contrary to the Respondent's assertions, the Appellants are interested in pursuing this appeal.
7. He averred that the Appellants complied by depositing Ksh. 981,550/- in court on 22<sup>nd</sup> September,2021.
8. He deposed that the Appellants have not been able to retrieve the typed proceedings and have written a letter to court and as such the delay cannot be occasioned to them but to the lower court which has not caused the typing of the proceedings.
9. He averred that if there is any delay the same is not inordinate, unreasonable and can be remedied through costs. He posited that the orders sought by the Respondent cannot issue since the directions have not been given.
10. He prayed that the Appellants be given a chance to prosecute their appeal on merits.
11. The Application was canvassed through written submissions.
12. The Respondent/Applicant submitted that the Appellant/respondent has not advanced any sufficient and plausible reasons for the delay in preparation of the Record of appeal, and that for the last 13 months they have not written a letter to the Nakuru Executive Officer requesting for typed proceedings.
13. The Applicants argued that the Respondents' inaction is inexcusable and prayed that the appeal be dismissed. To buttress their submissions, the Applicants relied on the case of Peter Kipkurui Chemoiwo vs Richard Chepsargon [2021] eKLR.
14. For the appellant/respondent their submissions dated 1<sup>st</sup> January 2023 and filed on 13<sup>th</sup> February 2023 were in respect of the appeal itself, rather than the application in question.

#### Analysis & Determination

15. The sole issue for determination is whether the appeal should be dismissed for want of prosecution.
16. Dismissal of appeal is provided for under Order 42 Rule 35 of the Civil Procedure Rules which stipulates 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".



17. It is not in dispute that directions had not been given in this appeal. In *Pinpoint Solutions Limited and Another vs Lucy Waithegeni Wanderi* (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR the court held that:-

“ ... The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid...”

18. The same position was stated in *Grace Njeri Theuri vs John Mburu Wainaina* (2022) eKLR.

19. Order 42 Rules 11, 12 and 13(1) were amended vide Civil Procedure (Amendment) Rules, 2020, Legal Notice No.22 of 2020 and provides: -

“ 11. A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

12. Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the Registrar.

13. Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a Judge in Chambers.”

20. Under the amendment Order 42 Rules 11, 12 and 13(1) the requirement to list the matter for directions is no longer a duty of the Appellant but that of the Deputy Registrar.

21. Flowing from the decisions that I have referred to, it is evident that under Order 42 Rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the appellant.

22. It is to be noted that under Order 42 Rule 35 (2) of the rules, the court has powers to dismiss an appeal on its own motion if the same is not set down for hearing within a year from the date of filing and service of the memorandum of appeal. This process does not involve the respondent at all.

23. The appellant instituted their Memorandum of Appeal on 28<sup>th</sup> May, 2020 and filed the record of appeal on 22<sup>nd</sup> November, 2022. Their explanation for delay in filing the Record of appeal is that the Court Registry never supplied them with copies of the typed and certified proceedings and Judgment for purposes of preparation of the Record of Appeal. They have annexed the letter dated 22<sup>nd</sup> September, 2021 requesting to be furnished with typed proceedings and certified copies of judgement and decree.



24. From the court record, it is evident that the lower court file has not been forwarded to this court, thus directions are yet to be given as envisaged by the law.
25. Therefore, although there has been inordinate delay on the appellant's part there is an acceptable explanation to it.
26. Further, the court must consider the prejudice that might be suffered by the appellants if not granted their day in court. In this case it is undisputed that the respondents complied with stay conditions that was set pending appeal.
27. Considering the Record of Appeal is now on record, I am of the view that justice can still be done despite the delay, as dismissal of a matter before party is substantively heard is a draconian action.
28. In the premises, it is only fair that the appellants get the opportunity to prosecute the appeal.
29. I disallow the Application and make the following orders;
  - i. The appeal herein is admitted and directions will be given by the court shortly.
  - ii. The record of appeal to be served upon the respondents forthwith.
  - iii. The lower court record to be availed forthwith.
  - iv. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

Court Assistant Jamleck

Ms Chemutai for Appellant

Mr. Kairu for Respondent

