



REPUBLIC OF KENYA



**KENYA LAW**

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**Ngugi & another v Kariuki (Civil Appeal E004 of 2021)  
[2024] KEHC 8338 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E004 OF 2021  
PN GICHOHI, J  
JULY 10, 2024**

**BETWEEN**

**PETER MUETI NGUGI ..... 1<sup>ST</sup> APPELLANT**

**PAUL KARIUKI KIARIE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GRACE MUTHONI KARIUKI ..... RESPONDENT**

**RULING**

1. Paul Kariuki Kiarie and Peter Mueti Ngugi (herein referred to as the Respondents) were aggrieved by the judgment delivered on 18/12/2020 in Nakuru CMCC No. 1346 of 2015 in favour of Grace Muthoni Kariuki (herein referred to as the Applicant).
2. They therefore filed on 11/01/2021 and Memorandum of Appeal dated 06/01/2021 challenging the entire judgment. They sought orders that:-
  1. The appeal be allowed with costs.
  2. The judgment of the trial court delivered on 18/12/2020 be set aside and the suit be dismissed with costs.
  3. They also sought that the costs of appeal be borne by the Respondent.
3. The Applicant has now moved this Court by a Notice of Motion dated 03/02/2023 against the Respondents and under Order 42 Rule 35 and Order 50 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* and seeks the following orders:-
  1. That the Honourable Court be pleased to dismiss the appeal for want of prosecution.
  2. That the manager CBA Bank City Centre Branch be ordered to lift the fixed deposit Account Number 4795090038 of Kshs. 78,400/= and be remitted to the Applicant's advocates.



3. That the costs of this application be provided for.
4. The grounds are on the face of the application supported by the Affidavit sworn by Evans Juma Matunda, in his capacity as the Advocate on record for the Applicant. He depones that over a period of one (1) year has lapsed since the appeal was lodged in court and served upon the Applicant and this shows Respondents herein have no conceivable interest in their appeal.
5. He therefore states that continued pendency of the unprosecuted appeal is prejudicial to the Applicant herein. That it is in the interest of justice that the appeal be dismissed as prayed.
6. The Respondents filed their Replying Affidavit sworn on 08/11/2023 by Lawrence Njuguna Advocate for the Respondents seeking dismissal of this application with costs to the Respondents on the ground that it is misconceived.
7. Acknowledging that indeed the Respondents instituted an appeal through the said Memorandum of Appeal, he states that the Respondents complied with conditions of stay pending appeal by making part payment of Kshs. 78,400/= to the Applicant herein and depositing Kshs. 78,400/= into a joint interest earning account in the names of both firms dated 18/08/2021.
8. He attributes the delay in filing of the Record of Appeal to the failure, refusal decline and /or error by the Court Registry to supply them with the copies of the proceedings, judgment and decree despite making several requests to the registry for the supply. Citing Article 159 of the Constitution, he depones that the Court is enjoined to administer justice without undue regard to procedural technicalities.
9. He therefore states that the Respondents are desirous of prosecuting the appeal and its expeditious disposal. He urges that Court to dismiss the application with costs and allow the appeal to proceed on merits.

#### **Repondent/applicant's Submissions**

10. Through the firm of E.M. Juma & Ombui Advocates, the Applicants filed submissions on 16/02/2024. They submit that since the filing of the Memorandum of Appeal, it has never been set down for hearing or for mention for directions and that the Appellants/Respondents herein have never pursued any alternative avenue of its prosecution.
11. It is submitted that their failure to ensure the appeal is prosecuted as intended and within timelines provided for by the law has caused inordinate delay in its hearing and determination.
12. Arguing that no response to the Applicant was served on them by the Respondents despite this Court's directions, the Applicant urged the Court to consider the application as unchallenged and that there is no justifiable reason for their adamance to prosecute the appeal. That they have not shown specifically what prejudice they would suffer if the appeal is dismissed as prayed .
13. While urging the Court to allow the application and dismiss the appeal, the Applicant cited the case of Mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2004] 1 eKLR where it was held that dismissal of appeal for want of prosecution is within the discretion of the court and meant to prevent injustice and/or abuse of court and the case of Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR, 630 on principles governing dismissal for want of prosecution that is :- delay must be inordinate; the delay is inexcusable; and that the Defendant is likely to be prejudiced by the law.
14. Lastly, the Applicant cited the case of Abraham Mukhola Asitsa v Silver Style Investment Company Limited [2020]eKLR and submits that the Respondents herein have slept on their appeal for 3 years without justifiable reasons and therefore the Court should not aid that indolence.



## Appellants/respondents' Submissions

15. On their part and through the firm of Kimondo Gachoka & Co. Advocates, the Appellants/ Respondents herein filed their submissions on 07/12/2023 and while restating the contents of their Replying Affidavit, they submitted that the appeal raises triable issues which need to be determined on merit.
16. Further, they relied on Article 50 of the of the Constitution on the right of a party to be heard and while relying on the High Court decision in Grace Njeri Theuri v John Mburu Wainaina[2022]eKLR, they urged the Court to dismiss the Respondent/Applicant's Notice of Motion and allow the Appellants/ Respondents to prosecute their appeal to its logical conclusion.

## Determination

17. This Court has considered the material presented by parties herein. There is no dispute that there has been a delay of about three (3) years in prosecuting this appeal.
18. Order 42 Rule 35 of the Civil Procedure Rules by which this Court is moved provides that:-
  - (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.”
19. What is clear from that provision is that directions have to be given first before an application for dismissal of appeal for want of prosecution can apply.
20. In the circumstances, the cases cited by the Respondent/ Applicant being Agip (Kenya) Limited and Mobile Kitale Service Station (*supra*) do not apply here for the issues therein were dismissal of the suit for want of prosecution and not appeal as in this case.
21. While it was for Appellants to approach the Court in regard to the challenges, they faced in prosecuting this appeal, they failed to do so and were only woken up from their slumber by this application.
22. That is the slumber the Respondent/Applicant has highlighted while citing the case of Abraham Mukhola Asitsa (*supra*) to urge the Court not to condone the indolence and proceed to dismiss the Appeal as prayed.
23. However, this Court does not construe Order 42 Rule 35 to mean that only the Appellant can move the court for directions. Both parties have a duty to ensure expeditious disposal of this Appeal.
24. The fact that the Appellants/Respondents satisfied the conditions for stay pending appeal granted by this Court but that should not have given them the licence to causally handle this appeal. It is not known how long they would have waited for proceedings, judgment and decree so as to file their record of appeal but there is no justification for the orders sought by the Respondent/Applicant. It is this Court's view that substantive justice would be achieved for both parties if this Appeal is expedited for hearing on merit.
25. In the circumstances, the Court makes the following orders:-
  1. The Respondent/Applicant's Notice of Motion dated 03/02/2023 be and is hereby dismissed.



2. The costs of the Application to abide the outcome of the appeal.
3. The Appellants/Respondents to file and serve their record of Appeal within Forty- Five (45) days from the date of this ruling.
4. Either party at liberty to apply.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Wafula holding brief for the Respondent/Applicant

N/A for Appellants/ Respondent

Ruto - Court Assistant

