



**Sang & another v Musani (Civil Appeal 102 of 2022)
[2024] KEHC 10016 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 102 OF 2022
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

SAMWEL KIPRONO SANG 1ST APPELLANT

JOSHUA KIRWA 2ND APPELLANT

AND

TOMAS MUSANI RESPONDENT

RULING

1. Before me is the Chamber Summons dated 22/02/2024 wherein the Applicant seeks the following orders;
 1. That the Appeal herein be dismissed for want of prosecution.
 2. That costs of Appeal be awarded against the Appellants.
 3. The costs of this application be awarded to the Applicant.
2. The application is premised on the grounds therein and is further supported by the Applicant's Affidavit sworn on the same date.
3. The Applicant deposed that the Appellants/Respondent being aggrieved and or dissatisfied with the judgment and decree in Eldoret Small Claims Court, Civil Case No. E042 of 2022 (Tomas Musani V Samwel Kiprono Sang and Joshua Kirwa) lodged the Memorandum of Appeal dated 3rd August, 2020, that the Appellants appeal is against the trial Magistrate's decision in its entirety, that upon filing the Memorandum of Appeal no further steps were undertaken by the Appellants in ensuring that their appeal was prosecuted expeditiously, that the appeal has never been set down for hearing, that a period of over one and half years has lapsed since the filing of the Memorandum of Appeal. According to the Applicant, it is patently clear that the Appellants are not keen on have the Appeal prosecuted, that it is in the interest of justice to have the appeal dismissed for want of prosecution.



The Response

4. The application is opposed by the Respondents' insurance company vide the Replying Affidavit sworn by Caren Manyonge, on 4/06/2024.
5. She deposed that the Memorandum of appeal herein was filed way back on 21/07/2022, that since then they have been writing to Court for typed proceedings which were only made available to them this year, that the record of appeal herein was then filed on 12/01/2024 immediately after they received the typed proceedings, that since then they have been following up with the registry to fix a hearing date for the appeal but the same has been in vain, that they even wrote to the Deputy Registrar asking for a date however the registry declined to receive the same stating that dates will be allocated on all matters in due time. The Appellants/Respondents deny the assertions by the Applicant that no further steps were undertaken by the Appellants in ensuring that the appeal was prosecuted expeditiously since they have been keenly pursuing the matter and that the proceedings were only ready beginning of the year. The Appellants/Respondent maintain that the delay caused in fixing of this matter for hearing is no way their fault since they have been keen on fixing the matter for hearing and prosecuting the same. According to the Appellants/respondents, it is in the interest of justice that the application herein is be disallowed since allowing the same will be largely prejudicial to their right to a fair hearing.
6. In a re-joinder, the Applicant filed a Further Affidavit dated 10/6/2024 wherein he further deposed that the Appellants' Replying Affidavit is misleading the Court and that the same has been made in bad faith. The Applicant contended that since the Respondents received a copy of the typed proceedings and compiled their record of the appeal, they have not made any further steps to prosecute the appeal. The Applicant contends that although the Appellants claim to have been following up with the registry to fix a hearing date for the appeal, there is no proof and or letter to show that they tried to seek a date for appeal. Further the applicant maintains that his Advocate on record gave the Applicants ample time to prosecute the matter after they filed and served their record of appeal but no action has been undertaken since then and that no communication has been rendered to explain the reasons for the delay has been conveyed and that it is now close to 2 years since they instituted the appeal and that it then that his Advocate on record decided to make an application to dismiss the suit for want of prosecution and has been seeking a date for hearing of the application at the registry. The Applicant contends that despite being served with a date for hearing of the application for dismissal, the Appellants still have made no efforts to prosecute the appeal, that further their very late response to the application dated 22/02/2023 exudes their disinterest in the appeal and thus this Honourable Court should be pleased to allow the application in favour of the Respondent. According to the Applicant, the Appellants will not be prejudiced if the application is allowed since they have not shown that prosecuting the appeal is not a matter of urgency.

Analysis and Determination

7. Having appreciated the parties pleadings on record, I find that the only issue for determination is whether the appeal ought to be dismissed for want of prosecution.
8. The Small Claims Court delivered a judgment in Eldoret Small Claims Court, Civil Case No. E042 of 2022 (Tomas Musani V Samwel Kiprono Sang and Joshua Kirwa) on 4/07/2022. However, being dissatisfied with said judgment, the Appellants/Respondents hereon on 21/7/2021 lodged a Memorandum of Appeal dated 15/7/2022. Consequently, the Appellant on 12/1/2024, filed their Record of Appeal.



9. The Applicant is now before this Court seeking to dismiss the appeal herein for want of prosecution. The Applicant contends that the appeal has never been set down for hearing and that the Appellants are not keen on having the appeal prosecuted.

10. in the case of *Pinpoint Solutions Limited & Another v Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying:-

“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 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.”

11. Order 42 Rule 35 of the *Civil Procedure Rules*, envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as is envisaged in Order 42 Rule 11 of the *Civil Procedure Rules*. The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the Registrar shall on notice to the parties list the appeal before the judge for dismissal.

12. Section 79B of the *Civil Procedure Act* provides as follows:

“Before an appeal from a subordinate court to the high court is heard, a judge of the high court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

13. Order 42 Rule 13 of the *Civil Procedure Rules* provides as follows:

“1) Upon 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.”

14. It is evident from the provisions of Section 79B of the *Civil Procedure Act* that a judge has to peruse the appeal before he can summarily reject the same. Order 42 Rule 35 (1) and (2) of the *Civil Procedure Rules*, provides: -

“(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.”

15. The underlying legal theory behind the dismissal of lawsuits for lack of prosecution is the idea that parties who appear in court seeking justice should expedite and conclude the litigation. In the case of *Mwangi S. Kimenyi v Attorney General & Another*, Civil Suit Misc. No. 720 of 2009 held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

16. 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 fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the *Civil Procedure Rules, 2010*.

17. 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 *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. It must be noted, that every person is entitled as envisaged under Article 50(1) of the *Constitution* of Kenya, 2010 to have a fair trial. The said Article 50(1) of *Constitution* of Kenya provides as follows:

“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.”

19. From the court file, it is clear that the record of appeal was filed on 12/01/2024, thus the Appellants have since complied and filed the record of appeal which has subsequently been served upon the Applicant’s Counsel. The Appellants have explained the delay in filing the record of appeal as was occasioned by failing to get the proceedings in time. The Appellants have thus demonstrated that their delay in filing the record of appeal which is a prerequisite to fixing the appeal for directions and hearing thereto was occasioned by the delay in obtaining the typed proceedings.



20. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay is not inordinate and has been explained and evidence furnished. The Appellants are not to blame for the long period it took the lower court to type and supply them with the proceedings.
21. The record of appeal has been compiled, filed and served thus the court is inclined to exercise its discretion and allow appeal to be heard on its merit rather than dismissing it for want of prosecution. I am convinced that the Respondent may suffer prejudice if this application is allowed.
22. The upshot of the above is that the Chamber Summons dated 22/02/2024, is hereby struck out. Costs to abide the outcome of the appeal.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE

