



**Muguongo v Mutuma & 4 others (Family Appeal E008 of 2023)
[2024] KEHC 11097 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL E008 OF 2023
EM MURIITHI, J
SEPTEMBER 19, 2024**

BETWEEN

DAVID GATURURU MUGUONGO APPELLANT

AND

**SUSAN KANANA MUTUMA & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4
OTHERS & 4 OTHERS RESPONDENT**

RULING

1. By Notice of Motion dated 22nd January 2024 pursuant to Order 42 Rule 13 (1) of the [Civil Procedure Rules](#) and all other enabling sections of the law, the respondents seek;
 1. That this court do issue directions of the appeal under Order 42 Rule 13 (1).
 2. That costs of the application be provided for by the appellant/respondent.”
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Sarah Kagwiria Kimathi, one of the respondents herein, sworn on even date. She avers that this appeal was filed on 28/3/2023 and has been pending now for 10 months. She has been advised by her advocates that the same should have been listed for hearing 21 days after filing. The appellant does not see the urgency for the appeal to be heard and determined speedily and he has also not filed and served them with the record of appeal because he is occupying the entire estate. She therefore prays that this appeal be listed for directions as a matter of urgency for the hearing process to commence or in the alternative the appeal to be dismissed for want of prosecution.
3. The application has not been responded to.
4. The respondents vide their submissions dated 22/7/2024 fault the appellant for failing to file the record of appeal 15 months since the impugned ruling was made, and thus the provisions of Order 42 Rule 13 (1) of the [Civil Procedure Rules](#) have not been complied with. They urge that the appellant’s inaction in



ensuring the appeal is fixed for directions is calculated to ensure they are denied their right to enjoy the fruits of the impugned ruling, and urge the court to be guided by *Mbogo & another v Shah* 1968] EA 93 and *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR. They urge that the appellant has failed to offer any cogent explanation for the delay in prosecuting the appeal, and pray for its dismissal for want of prosecution with costs.

Analysis and determination

5. The issue for determination is whether the appeal should be dismissed for want of prosecution.
6. Order 42 Rule 13 of the *Civil Procedure Rules* provide that;
 - “(1) 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. (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 considerations to be made in determining whether or not to dismiss matters for want of prosecution were deliberated in the case of *Ivita v Kyumbu* [1975] EA 441, 449, where Chesoni J. held as follows:

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.....The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”
8. The appellant went into slumber after filing his memorandum of appeal on 29/3/2023. The Record of Appeal has not even been filed to date and no explanation has been proffered for the failure and/or delay. The appellant’s indolence and prolonged inaction is a clear indication that he has utterly lost any interest in prosecuting his appeal. Despite service on the Appellant’s Counsel of the application herein, no response has been filed and Counsel did not ever attend court on the various hearing/mention sessions.



9. Nonetheless, the court will, in the spirit of Article 159 (2) (d) of the *Constitution* and the overriding objectives stated under Section 1A and 1B of the *Civil Procedure Act*, indulge the appellant, who is undoubtedly undeserving.

Orders

10. Accordingly, for the reasons set out above, and in line with the policy of the court not to drive a litigant away from the seat of justice without a hearing, the court will allow the application dated 22/1/2024 in the following terms:

1. The appellant is hereby directed to file and serve the Record of Appeal within thirty (30) days from the date hereof.
2. In the event of default, the appeal shall stand dismissed.
3. The costs of this application shall be paid by the Appellant to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S L. Kimathi Kiara & Co Advocates for the Appellant.

Mrs. Kirera for Mr. Kinyua for the Respondent/Applicant.

