



**Muita t/a Jomuki Enterprises v Republic (Civil Appeal E134 of 2011)
[2024] KEHC 13391 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E134 OF 2011
RN NYAKUNDI, J
OCTOBER 25, 2024**

BETWEEN

JOHN MUITA T/A JOMUKI ENTERPRISES APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before me for determination is an application dated 25th February, 2024 seeking the following orders:
 - a. Spent
 - b. That the appeal herein be reinstated
 - c. That this honorable court do give directions on the appeal where as the appeal has not been admitted and the lower court file has been missing for long.
 - d. That the in charge high court at Eldoret Civil Registry be summoned to explain why the court file in respect of Civil Suit no 64 of 2007 *Britania Oils Ltd v John Muita* has been missing after allegedly being forwarded to the High Court Civil Registry.
 - e. Costs of the cause.
2. The application was premised on six (6) grounds together with an affidavit in support sworn by John Muita, the applicant. The said grounds are as hereunder:
 - i. The court gave appellant/applicant time to file record of appeal.
 - ii. That due to the non-availability of the original lower court file the appellant/applicant has been unable to obtain certified copies of proceedings and decree and consequently proceed with the appeal.



- iii. The appellant/applicant has tried all means to have the original lower court file availed for purposes of provision of proceedings and admission of appeal to no avail.
 - iv. The lack of the lower court file was not foreseeable and at no time has the Appellant/Applicant failed to compile the record of appeal.
 - v. That the Appellant/Applicant is aggrieved and greatly prejudiced by the lack of the court file which has caused the appeal to be delayed and consequently dismissed.
 - vi. That the Appellant/Applicant has not been provided with an alternative.
3. In response to the application, the Respondent filed a replying affidavit on 6th March, 2024. The affidavit was sworn by Sammy Mathai Maina, an advocate of the high court of Kenya.
 4. According to the Respondents, the application is an abuse of the court process and a waste of judicial time and the same should be dismissed at the first instance. That the appellant herein filed his memorandum of appeal on 2nd August, 2011 and thereafter there was no evidence to show that the Appellant/Applicant herein has been moving the court in relation to this appeal.
 5. That the Appellant/Applicant was given a notice of dismissal in the year 2017, pursuant to Order 17 Rule 2 of the *Civil Procedure Rule 2010* having been indolent for more than 6 years from the time of filing the appeal.
 6. The Respondent argued that the Appellant did not comply with orders issued by Justice Ogumbo on the 25th July, 2017 and a letter was written to counsel on that regard.
 7. The Respondent averred that on 16th October, 2017 the Appellant made an application seeking for enlargement of time to comply with orders that were issued by Justice Ogumbo on 25th July, 2017.
 8. Further facts suggest that on the 17th July, 2019 the honorable court enlarged the time for compliance within 90 days from 17th July, 2019. Counsel maintained that upon lapse of the 90 days, the appeal stood dismissed for non-compliance and the court cannot reinstate the same.
 9. It was the averment of counsel that the Appellant was served with another notice of dismissal by the court dated 18th June, 2021 for his indolence. He has never prepared any record of appeal despite the fact that there are typed proceedings and judgment in the court file.
 10. That the letters attached in the application, some have not been received by the court and most of them were written after the appeal stood dismissed for non-compliance with order issued on 17th July, 2019 and for these reasons the Respondent prayed that the application be dismissed.

The Law, Analysis & Determination

11. The parties took directions to have the application canvassed by way of written submissions but at the time of drafting this ruling, I had seen none from either party. I shall nonetheless make a determination based on the pleadings.
12. In arriving at a just conclusion, it is important to set the record straight. A perusal of the entirety of record before the court reveals the history of this appeal as follows. The appeal was filed on 02.08.2011. Six years later, on 2nd June, 2017 the appellant was issued with a notice of dismissal for want of prosecution and the matter was listed for dismissal on 11th July, 2017. The Appellant subsequently filed a response on 25th July, 2017 stating that the delay was occasioned by the transfer of the judicial officer in conduct of the matter. That there was a delay in delivering a ruling for a long time by the



said judicial officer. The court on 25th July, 2017 granted leave for the appellant to pursue the appeal and he was granted 45 days to comply and in default, the appeal would stand dismissed. Subsequently, the appellant filed an application dated 16th October, 2017 seeking to reinstate the appeal and enlarge time given to comply with orders issued on 25th July, 2015. After hearing the application, this court presided by Hon H.A. Omondi delivered its ruling dated 12th June, 2019. In it, the Appellant's appeal was reinstated and he was granted a further 90 days within which to comply. Once the order was issued, the appellant again went to sleep until the Respondent reminded him of his obligation vide a letter dated 9th January, 2020.

13. That which followed after was another notice for dismissal for want of prosecution dated 18th June, 2021 and the matter was listed for dismissal on 13th July, 2021. The Deputy Registrar on 3rd August, 2021 and an order was issued for a letter to be done to the Executive Officer to avail Eldoret CMCC E64 of 2007 without fail. The matter was mentioned on 19th October, 2021 and counsel for the appellant expressed concern that they experienced challenges getting the lower court file. The court then issued summons to the Court Administrator to explain the whereabouts of the said file.
14. The duration between 17th May, 2022 and 25th October, 2022 was yet another period of silence from the appellant, wherein counsel failed to appear on one occasion i.e. 23rd August, 2022. When the parties appeared on 25th October, 2022, learned counsel for appellant argued that he is still facing challenges tracing the file and he stated that the appellant cannot be faulted for a missing file. Summons were issued to the in charge civil registry and extended on 8th November, 2022. The parties attended court thereafter and took directions on various dates leading to the present application, which I am now called to determine.
15. Having set the record straight, what I gather from the proceedings and the record is that the appellant has not been keen in prosecuting the appeal. The appeal was filed in 2011 and 13 years later the blame is squarely apportioned on the court's registry for not availing the same.
16. Article 159 of the Constitution speaks to Judicial Authority in the following terms:
 - i. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
 - ii. In exercising judicial authority, the courts and tribunals shall be guided by the following principles
 - a. Justice shall be done to all, irrespective of status;
 - b. Justice shall not be delayed;
 - c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. Justice shall be administered without undue regard to procedural technicalities; and
 - e. The purpose and principles of this Constitution shall be protected and promoted.
17. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) 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. It is important to point out that under Order 42 Rule 13 (4) of the *Civil Procedure Rules*, the judge shall not allow a matter to proceed for hearing unless the record of appeal is duly filed.
18. Once directions are given under Order 42 Rule 13 of *Civil Procedure Rules* and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the *Civil Procedure Rules* or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of *Civil Procedure Rules*.
 19. Order 42 Rule 35 (1) of the *Civil Procedure Rules* stipulates as follows:

“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”.
 20. Order 42 Rule 35 (2) of the *Civil Procedure Rules* stipulates as follows: -

“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”
 21. The basis for dismissing lawsuits due to lack of prosecution rests on the idea that legal matters should be resolved promptly and efficiently. When parties bring their cases to court, they should actively work to move the process along and reach a resolution. However, if delays occur for a legitimate reason, they should not be excessive, unreasonable, or unjustified. Allowing such delays would unfairly harm one party or both. In such cases, the court has the discretion to dismiss the case.
 22. Should the appeal be reinstated? Whereas the appellant has blamed the court registry for not availing the lower court file, it will be important to examine whether the appellant took steps to vigilantly pursue the appeal in the intervening years since its filing in 2011. It is expected of the appellant to persistently follow up on the matter but the record states otherwise. It explains why the matter has been listed for dismissal in twice. The appellant only started an active quest on occasions when the matter has been listed for dismissal. On two instances the appellant was given timelines i.e. 45 days and 90 days within which to comply but he failed to.
 23. In my view the Applicant has neglected his rights for nearly thirteen years, and he cannot time and again blame the court registry for his failure to pursue the appeal. The fact that a file could be missing for such a long period is difficult to comprehend. It seems clear that the appellant's indolence is the root cause. He ought to accept the judgment delivered by the trial court. His right to be heard was not infringed upon by either the court or the Respondent. He has forfeited the opportunity to have his appeal considered.
 24. Therefore, in light of the substantial passage of time and the absence of compelling justification for the delay, the court exercises its discretion to dismiss the appeal for want of prosecution. I have arrived at this decision to uphold the integrity of the legal process and ensure that cases proceed efficiently towards resolution, thereby promoting fairness to all parties involved.
 25. It would be inimical to the interests of justice for the court to allow the Applicants' motion dated 25.02.2024, which is hereby dismissed with costs to the Respondent.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 25TH DAY OF OCTOBER 2024.



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R. NYAKUNDI

JUDGE

