



**Khaemba v Express Freight & Logistics Limited (Civil Appeal
217 of 2018) [2023] KEHC 3 (KLR) (3 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 3 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 217 OF 2018
OA SEWE, J
JANUARY 3, 2023**

BETWEEN

LEONARD HILTON KHAEMBA APPELLANT

AND

EXPRESS FREIGHT & LOGISTICS LIMITED RESPONDENT

RULING

1. The Notice of Motion dated December 3, 2021 is the respondent's. It was filed herein on December 8, 2021 under sections 1A, 1B, 3A, 63(e) and 78(2) of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya and order 2 rule 15(1)(c) and (d) and order 42 rule 13 of the *Civil Procedure Rules, 2010*, for orders that:
 - (a) The court be pleased to strike out the Memorandum of Appeal dated October 18 and filed herein on October 19, 2018;
 - (b) The costs of the application and the appeal be borne by the appellant;
 - (c) the court be pleased to issue any other or further orders as it may deem fit and just to grant.
2. The application was predicated on the grounds that, being dissatisfied with the judgment of the lower court in Mombasa CMCC no 1951 of 2014: Leonard Hilton Khaemba v Express Freight & Logistics Limited, the appellant filed this appeal on October 19, 2018 vide his Memorandum of Appeal dated October 18, 2018; and had the same served upon the respondent on August 1, 2010. It was the assertion of the respondent that, pursuant to order 42 rule 13 of the Civil Procedure Rules, the appellant was obliged to cause the appeal to be listed before a judge in chambers for directions within twenty-one (21) days after the date of service of the Memorandum of Appeal, but is yet to do so.
3. Thus, the respondent complained that, by the time it filed the instant application, it had been more than three (3) years since the appellant filed and served his Memorandum of Appeal; and yet no steps



had been taken to either list the appeal for directions or have the Record of Appeal prepared and served. The respondent further averred that the delay is an indication that the appellant has lost interest in the appeal and that it is only fair and just that the appeal be struck out to avoid the continued injustice and prejudice that is being occasioned to it by the delay in prosecuting the appeal.

4. The application was supported by the affidavit of Godfrey Mutubia, Advocate, sworn on December 3, 2021 in which counsel reiterated the grounds set out on the face of the application; including the assertion that the appellant's inaction for more than three years is an indication that he has lost interest in this appeal.
5. Although the record of the proceedings of March 9, 2022 shows that the appellant filed a response to the instant application, the same is not on the court file. Nevertheless, Mr Onduso for the appellant filed his written submissions on May 30, 2022 in response to the respondent's written submissions dated 11th April 2022, from which the appellant's response can be discerned.
6. In his written submissions, Mr Mutubia quoted section 78(2) of the *Civil Procedure Act* and order 17 rule 2 of the *Civil Procedure Rules* to buttress his submission that the jurisdiction to dismiss an appeal for want of prosecution is provided for under order 17 rule 2 as well as order 42 rule 35 of the *Civil Procedure Rules*. At paragraphs 12 and 13 of his written submissions, Mr Mutubia acknowledged the appellant's response to the application and the reasons given thereby for the delay, but submitted that no evidence was availed to demonstrate that, in spite of the Covid-19 pandemic, the appellant was keen to prepare his Record of Appeal within the required time. He relied on *David Pius Mugambi v Kenya Commercial Bank & 2 Others* [2021] eKLR in which the Court of Appeal held that:

It was not enough for the applicant to rely on the Covid-19 pandemic without explaining the efforts that were made in filing the record of appeal, and how the Covid-19 pandemic affected these efforts. Although the applicant claims that the record of appeal was ready for filing, there is nothing to substantiate this. I find that the applicant has not laid any basis upon which the discretion of the Court can be exercised in his favour.”

7. Thus, Mr Mutubia urged the court to dismiss this appeal with costs for want of prosecution adding that the conduct of the appellant demonstrates that he is not acting bona fides, but is only out to obstruct the cause of justice by delaying the enjoyment by the respondent of the fruits of its judgment.
8. On his part, Mr Onduso for the appellant relied on his written submissions filed on May 30, 2022. He urged that the appellant be accorded the opportunity to prosecute his appeal to its logical conclusion. He relied on *Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 Others* [2012] eKLR in urging the court to find that the appellant is not to blame for the delay. He also urged the court to find that the authorities relied on by the respondent are distinguishable from the facts of this case and posited that each application turns on the reasons given for the delay and therefore ought to be considered on its own merits. In support of this assertion counsel relied on Nyeri Civil Appeal no 34 of 2014: *Joseph Gachubi Muthanji v Mary Wambui Njuguna* in which delay was excused in the interest of justice.
9. I have given careful consideration to the application dated December 3, 2021, its Supporting Affidavit as well as the written submissions filed by learned counsel for the parties and the authorities relied on therein. I have also perused the record and note that, indeed, the appeal was filed on October 19, 2018; and that as at December 8, 2021 when the instant appeal was filed, no action had been taken by the appellant to prosecute the appeal. Accordingly, the single issue for determination is whether the appeal ought to be dismissed for want of prosecution.
10. Dismissal of appeals for want of prosecution is provided for under order 42 Rule 35 of the Civil Procedure Rules, which states: -



- (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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
 - (2) If within one year after 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.
11. Thus, as a general rule, an appeal ought not to be dismissed under order 42 rule 35 (1) unless directions have been given under order 42 rule 11 and 13 of the Civil Procedure Rules. In this respect, I am in agreement with the position taken in *Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR, that: -
20. 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.
21. 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...”
12. A perusal of the court record reveals that, in this appeal, directions are yet to be given for purposes of order 42 rule 11 and rule 13 of the Civil Procedure Rules. In the premises, it is my finding that the appellant ought to be granted an opportunity to prosecute the appeal. Consequently, the orders that commend themselves to me, and which I hereby grant, are as hereunder:
- (a) That the application dated December 3, 2021 be and is hereby dismissed with an order that the costs thereof be costs in the appeal;
 - (b) The Record of Appeal be filed and served within 30 days from the date hereof, failing which the appeal shall stand automatically dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 3RD DAY OF JANUARY 2023.

.....

OLGA SEWE

JUDGE

