



**Mukundi v Mugi (Suing as the Legal Representative of the Estate of the Late Cecilia Wanjiru Gathoni) (Civil Appeal E035 of 2021) [2023] KEHC 950 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 950 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E035 OF 2021  
RB NGETICH, J  
FEBRUARY 16, 2023**

**BETWEEN**

**PAUL MWANGI MUKUNDI ..... APPELLANT**

**AND**

**WINFRED WANJIRU MUGI (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF THE LATE CECILIA WANJIRU GATHONI) .... RESPONDENT**

**RULING**

1. The Application dated May 4, 2022 seeks dismissal of this appeal for want of prosecution. The grounds of the application are that the Appellant has not prosecuted the matter since the filing of the Memorandum of Appeal on March 10, 2021 and the applicant's contention is that this appeal is an abuse of the court process.
2. The application is supported by the affidavit of Winfred Wanjiru Mukundi who deposes that the appellant has lost interest in prosecuting the appeal and it is in the interest of justice that the appeal be dismissed.
3. In response, the Applicant filed the Replying affidavit sworn by Victor Nganga, the Advocate in conduct of the matter. He deposes that the appellant is desirous of pursuing the appeal and seeks more time to file a record of appeal. He stated that the delay in prosecuting the appeal is occasioned by the delay in obtaining typed proceedings from the trial court; further the directions on the appeal have not been given and the application is therefore premature. It is the Respondent's position that the appeal is arguable and has high chances of success.
4. The Application proceeded by way of written submissions.



### **Applicant/Respondents' Submissions**

5. Counsel for the Respondent submitted that the instant appeal ought to be dismissed as per Order 42 Rule 35(2) of the *Civil Procedure Rules 2010*. The applicant ought to take necessary steps to progress his case to the logical conclusion as failure causes injustice to the Respondent. Counsel further submitted that one (1) year four (4) months is not an ordinate period and there are sufficient reasons advanced to explain the delay.
6. Counsel urged the court to invoke Section 3A and the overriding objectives under Section 1A, 1B of the *Civil Procedure Act* as well as Article 159(2) of the *Constitution* of Kenya as the appellant/Respondent has occasioned injustice to the Respondent/Applicant and this Appeal should be dismissed with costs to the Respondent.

### **Respondent/Appellant's Submissions**

7. Counsel for the Applicant/Respondent filed submissions dated July 29, 2022 and submitted that there is no prejudice to be suffered by the Respondent if the Appellant is allowed to proceed with the appeal. He further submitted that the appellants have demonstrated the hardship encountered in obtaining the trial court proceedings and argued that the appeal is merited; and the appellants will be greatly prejudiced if the appeal is dismissed as he stands to lose their constitutional right to appeal if the appeal is dismissed. Counsel urged the court to dismiss the application as filed.

### **Analysis and Determination**

8. I have considered averments and arguments by parties herein and wish to consider whether delay in prosecuting this appeal has been sufficiently explained by the Respondent. Order 42 Rule 13 of Civil Procedure Rules provides as follows: -
  - (1) On 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.
  - (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).'

9. The wording of the above section is clear that an application seeking dismissal of an appeal for want of prosecution can only be done if the appeal has been set down for directions.
10. Further, it is important to note that the Respondent/Appellant cites the challenge of obtaining typed proceedings from the trial court. This is a factor beyond the Respondent's control. The Respondent/Appellant cannot be faulted for the omission of obtaining typed proceedings in time. To avoid the lapse of much time, the respondent ought to have filed the record of appeal and continue to pursue the typed proceedings and thereafter file a supplementary record of appeal.
11. It has been held from time to time that the judge may not be quick to dismiss the matter before a record of appeal is filed. Before dismissing an appeal, the judge ought to look at the Memorandum of Appeal and establish whether the appeal is merited or not. I have perused the file and note that pending delivery of this ruling, the Appellant has filed a record of appeal. From the foregoing, it will not be in the interest of justice to dismiss the appeal.
12. Article 50(1) of Constitution of Kenya gives every person a 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.
13. The Appellant has demonstrated and stated that delay in filing the record of appeal was the long time taken in obtaining the trial court proceedings. There is no doubt that the delay is not deliberate and the appellant is not to blame for the period taken by the trial court to type and supply the proceedings. I therefore find that the delay in prosecuting this appeal has been sufficiently explained.
14. Final Orders :-
  1. The Application dated May 4, 2022 is hereby dismissed.
  2. The appeal be fixed for directions on a priority basis.
  3. Costs in the cause.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023**

**RACHEL NGETICH**

**JUDGE**



**In the presence of:**

Martin – Court Assistant

Mr. Gitonga holding brief for Ms. Ndorongo for Respondent/Applicants

No appearance for Appellant/Applicant

