



REPUBLIC OF KENYA



KENYA LAW
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**Wanjira & another v Kamotho (Civil Appeal 246 of 2016)
[2023] KEHC 594 (KLR) (Civ) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 246 OF 2016

JN MULWA, J

FEBRUARY 9, 2023

BETWEEN

NANCY WANJIRA 1ST APPELLANT

JOSEPH KARIUKI KAMAU 2ND APPELLANT

AND

PETER NJOROGE KAMOTHO RESPONDENT

RULING

1. By a notice of motion dated July 15, 2021, the respondent in this appeal sought the following orders against the appellants:
 1. That this honourable court be pleased to dismiss this appeal for want of prosecution.
 2. That the Kshs 804,119/- deposited at NIC (now NCBA) bank account No xxxx on August 6, 2016 as a condition of stay of execution of the decree together with interest to date, be released to counsel on record for the respondent, that is, Wambugu Kariuki & Associates Advocates.
 3. That the cost of this application and the entire appeal be provided for.
2. The application was brought pursuant to order 42 rule 35 of the *Civil Procedure Rules* and sections 1A, 1B, and 3A of the *Civil Procedure Act*. It is based on the grounds on its face and supported by an affidavit sworn by the respondent's advocate PW Kariuki and the annexures attached thereto. The respondent avers that the appellants have not made any effort towards the prosecution and finalization of the appeal since September 2019 when the appeal was admitted to hearing. The respondent further avers that justice delayed is justice denied.



3. In opposing the application, the appellants filed two similar replying affidavit sworn by Joyce Chichi advocate and Kelvin Ngure, the deputy claims manager of their insurer, Directline Assurance Company Limited, on November 30, 2021 and February 24, 2022 respectively. The deponents aver that the appellants are still keen on prosecuting the appeal. They blame the delay on the court's failure to avail the file to them to enable them secure a mention date for purposes of taking directions on the appeal. To this end, the appellants' advocate has attached a letter dated February 4, 2020 addressed to the deputy registrar of this court requesting for a date for directions. It was also their contention that the respondent has not demonstrated that he has been prejudiced by the delay in the prosecution of the appeal.
4. The application was canvassed by way of written submissions which the court has carefully considered alongside the affidavits in support of and against the application. In the court's view, the only issue that arises for determination is whether the respondent's application dated July 15, 2021 is merited.
5. 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 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.”
6. The test to be applied when considering whether to dismiss a suit or an appeal as in the present circumstances were enunciated in the case of Ivita v Kyumbu (1984) KLR 441 and restated in numerous other cases that:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from the lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay the action will not be dismissed but will be ordered that it be set down for hearing at the earliest available time.”
7. In the instant case, the record shows that the appeal was instituted by way of a memorandum of appeal dated May 11, 2016 and filed in court on even date. Thereafter, the appellants obtained a conditional stay of execution by depositing the decretal sum of Kshs 804,119/- in an interest earning account in the names of the parties advocates. About two years later, the respondent filed the first application dated September 12, 2018 seeking for dismissal of the appeal for want of prosecution. *Vide* a ruling delivered on April 4, 2019, the Hon Justice Mbogholi found that the appellants were not at fault and thus directed the deputy registrar to secure the lower court file and inform counsel in order to facilitate the prosecution of the appeal. The appellants filed their record of appeal on September 25, 2019. Subsequently, on October 8, 2019, Justice Sergon, upon perusing the record of appeal and ascertaining that it was complete, admitted the appeal to hearing.



8. There is no doubt that there had been a prolonged delay of over two years in the prosecution of the appeal as at the time the respondent filed the instant application. Is the delay excusable or satisfactorily explained? The appellants have done nothing more than writing one letter dated February 4, 2020 (annexture JC1) to the deputy registrar of this court requesting for a mention date for directions on the appeal. Their advocates claim that the same has never elicited any response but the record is clear that no other or further follow up or efforts were made to fix the date. They claim to have made numerous unsuccessful efforts to fix a date through the online platform but no proof of this has been exhibited for the court's consideration. The appellant's clearly went into slumber after their advocate's letter of February 4, 2020 and were only roused when the respondent filed the instant application.
9. What this means is that there has been inordinate and unexplained delay in prosecuting the appeal and the appellant has not offered any cogent or reasonable explanation that would sway the court to exercise its discretion in their favour. Whereas this court appreciates that a party should not be unnecessarily driven out of the seat of justice, the interests of justice demands that if such a party exhibits utmost laxity and disinterest in their matter, they should not be allowed to continue holding the other party hostage. The appellants' right to appeal against the decision of the trial court must be weighed against the respondent's right to enjoy the fruits of his judgment. The mere fact that the decretal sum is secured in an interest earning account in the bank is not a license for the appellants to continue sleeping on their rights while the respondent is locked out of the use of money. In the court's considered view therefore, the respondent has been greatly prejudiced by the prolonged delay.
10. Further, it is important to note that section 1A and 1B of the *Civil Procedure Act* upon which the instant application is anchored mandates courts and litigants to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This court also has inherent powers under section 3A of the *Civil Procedure Act* to make such orders as may be necessary for the ends of justice to be met. Considering the above legal provisions in light of the fact that there has been a prolonged, intentional and inexcusable delay in the prosecution of the appeal, the court finds that justice can only be done by dismissing the appeal herein.
11. For the foregoing, the respondent's application dated July 15, 2021 is hereby allowed in the following terms: -
 - a. The appeal is hereby dismissed for want of prosecution
 - b. The sum of Kshs 804,119/- deposited at NIC (now NCBA) Bank Account No xxxx on August 6, 2016 as a condition of stay of execution of the decree together with interest accrued to date shall be released to counsel for the respondent namely Wambugu Kariuki & Associates Advocates for onward transmission to the respondent.
 - c. The respondent is awarded the costs of this application and the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

J N MULWA

JUDGE

