



Juba v Pasta (Civil Appeal 30 of 2020) [2023] KEHC 1575 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 30 OF 2020
SM GITHINJI, J
MARCH 1, 2023**

BETWEEN

EVANS CHIVATSI JUBA APPELLANT

AND

YUSUF PASTA RESPONDENT

RULING

1. This ruling was prompted by a notice to show cause dated August 19, 2022 that was listed for hearing on the December 5, 2022. The record in this matter shows that on September 7, 2020 the appellant told the court that they had been unable to file the record of appeal because they had not received certified copies of the proceedings of the lower court. The court directed that counsel be granted 30 days to make follow up of typed and certified proceedings within which period counsel was to file and serve his record of appeal.
2. On December 5, 2022, counsel for the appellant told the court that he was yet to get a copy of proceedings and sought a further 30 days to prepare the record. Counsel for the respondent on the other hand asserted that the order of April 21, 2020 was to the effect that the record of appeal be filed within 14 days, he did not comply with that order and that the appeal was to be disposed by way of written submissions. He also contended that this court orders have not been complied with and that the appeal if filed is dismissed by operation of time.
3. Counsel for the appellant in response told the court that they had filed an appeal on July 9, 2020 and that directions by Justice Nyakundi were issued at the time of covid-19. He also stated that request for proceedings was made in the lower court on September 4, 2020, January 3, 2021 and June 16, 2022 though no evidence was adduced. He requested for a chance to prosecute the appeal.

Determination

4. Dismissal of appeal is provided for under Order 42 rule 35 of the [Civil Procedure Rules](#) and which is the provision under which the instant application is brought.



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.”

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”.

5. In the present case, the appeal was instituted by way of a memorandum of appeal dated April 25, 2020 and filed in court on July 9, 2020. The record is however not clear as to whether the appellant requested for proceedings at any given time. This being the case, it is difficult to ascertain whether the appellant has made any necessary steps to prosecute the appeal.
6. That notwithstanding, this court is alive to the fact that where the appellant files an appeal and goes into slumber, this court can invoke its inherent powers under section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process, and further the provisions of article 159(2) (b) of the [Constitution](#) to do justice without undue delay.
7. The Legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded within a reasonable time by parties who come to court seeking justice. The principles to be considered in an application for dismissal of appeal for want of prosecution were restated by the Court of Appeal in [Peter Kipkurui Chemoiwo v Richard Chepsergon](#) [2021] eKLR and include whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice be done despite the delay. This was also held in [Ivita v Kyumba](#) [1984] KLR 441. It is clear from the instant case that the delay herein is indeed prolonged. The appellant’s reason has been the same since 2020 of having not received a copy of the proceedings. The appellant’s position is that they requested for proceedings on several instances but have nothing to establish it.
8. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of [Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi](#) [2014] eKLR the court quoted the following passage from [Snell’s Equity by John MC Ghee Q.C. \(31st Edition\)](#) at page 99:

“The court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

9. I am of the view that the appellant slept on his rights by having not complied with the orders issued by Justice Nyakundi and the said delay defeats equity. The appellant herein was jolted back to action by the notice to show cause. In my view, it is not for the court to prompt the appellant back to action. Thus, I find the appeal herein ripe for dismissal. In so doing, I associate myself with the sentiments of Gikonyo J in [Fran Investment Ltd v G4S Security Services Ltd](#) [2015] eKLR where he stated as follows: -

“It is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed expeditiously, which is



founded upon the old adage and now an express constitutional principle under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff.”

10. The bottom line is that the appeal is dismissed for want of prosecution.

RULING FOR MALINDI READ, SIGNED AND DELIVERED VIRTUALLY AT GARSEN THIS 1st DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

1. Mr Kilonzo for the Respondent
 2. Ms. Otuya holding brief for Mr Adhoch for the Appellant
- Ms Otuya ;-I pray for copies of the ruling and leave to appeal.

Court; - Application granted.

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S.M. GITHINJI

JUDGE

