



Kioria & another v Ingaiza (Suing as the Administrator of the Estate of the Late Kelvin Mbagaya Ingaiza) (Civil Appeal 583 of 2019) [2023] KEHC 2259 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 583 OF 2019
AA VISRAM, J
MARCH 23, 2023**

BETWEEN

JACOB MWANGI KIORIA 1ST APPELLANT

DENNIS MUSYIMI 2ND APPELLANT

AND

JOYCE ADISA INGAIZA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KELVIN MBAGAYA INGAIZA) RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated April 27, 2021 (“the Motion”). The application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 35(1) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and all enabling provisions of law. The application is seeking an order to the effect that the appellants’ appeal be dismissed for want of prosecution with costs to the applicant (respondent in the appeal).
2. The Motion is supported by the grounds presented on its face and further grounds in the supporting affidavit of MrPatrick Waiganjo Wachira sworn on April 27, 2021.
3. No affidavit in reply was filed in opposition to the Motion. The Respondents referred to a replying affidavit allegedly sworn by a MrKevin Ngure in their written submissions dated February 6, 2023, however the same could not be located in either the physical court file or in the digital Case Tracking System (CTS).
4. I have considered the grounds on the face of the Motion together with further grounds in the supporting affidavit and the rival written submissions of each of the parties.



The Applicant's submissions

5. The applicant submitted that the appeal has been pending for more than four years but the respondents have never taken any active steps to have the same listed before a Judge for directions, or to set the same down for hearing. July 13, 2020, was the last time that the matter came up in court, which related to a mention of an application, rather than the appeal itself.
6. Further, the applicant contended that the appeal ought to be dismissed because the respondents had failed to litigate the appeal within the time period as ordered by the court, and had not obtained an extension of time from the court.
7. The applicant argued that the appeal had been filed in bad faith and that the reason for the respondents' continued delay was an intentional ploy by the respondents' to keep the applicant from enjoying the fruits of her judgment.
8. The applicant relied on the authority of *Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited* (2015) eKLR where the learned Judge dismissed an appeal which had never been listed for directions on the following basis:

“I will dismiss the appeal. This court has the inherent discretion to do so under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of *the Constitution* to do justice without any delay.”

The Respondents' submissions

9. In opposition to the Motion, the respondents (appellants in the appeal) submitted that the appeal is merited, and that they have a constitutional right to appeal.
10. They submitted that the court proceedings fall within the administrative functions of the court. Accordingly, the court should take judicial notice of the backlog of the files pending typing of the proceedings at the lower court registry. In short, it was not their fault that they could not obtain the proceedings in time.
11. The respondents argued that the appeal was not ripe for dismissal because directions had not been issued in respect of the same. They relied on the High Court decision in *Jurgen Paul Flach v Jane Akoth Flach* Nakuru Civil Appeal No.119 of 2012, where the court stated that dismissal of an appeal for want of prosecution cannot be granted if directions had not been issued.

Analysis and Determination

12. Dismissal of an appeal is provided for under Order 42, Rule 35 of the *Civil Procedure Rules* which is the provision under which the instant application is brought.
13. 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.”



14. 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”

15. In the present matter the memorandum of appeal was served on October 14, 2019, approximately four years ago. Based on the record, it appears that directions in relation to the appeal were issued on June 23, 2021. The court granted the appellants 60 days within which to obtain typed proceedings and scheduled a mention date for August 24, 2021 to confirm the status of the proceedings. The court stated that

“if the proceedings will not be forthcoming, the application dated 27 April, 2021 will be set down for hearing”.

16. Evidently, the respondents did not comply with the above court order, precipitating the present application. Further to the above, the applicant stated that the respondents had actively avoided setting the matter down for hearing despite the above court order, and had failed to attend court on several occasions. The respondents did not offer any response to this accusation.

17. Looking at the facts in the present matter, I am of the view that it is ordinarily an appellant’s responsibility to pursue his or her appeal. This includes setting down the appeal for directions and complying with court orders relating to time lines. In this regard, my brother Odunga J (as he then was) in the High Court decision of *China Road & Bridge Corporation v John Kimenye Muteti* [2019] eKLR held that; -

“It is therefore clear that it is upon the appellant to trigger the process of the giving of directions, and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions, cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions, to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given.....” (See also *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd* [2020] eKLR).

18. Based on the above authority, I am of the view that even where no directions have been given, this court still has discretion to dismiss an appeal if the appellant is blameworthy. Here, directions were in fact issued in relation to time granted to obtain the typed proceedings relating to the appeal, which were not complied with.

19. The principles to be considered while considering an application for dismissal of appeal were pronounced by the Court of Appeal decision 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 can be done despite the delay. (See also *Ivita v Kyumba* [1984] KLR 441).

20. In the present matter, I am satisfied that a delay of four years is indeed prolonged. Further, I do not think that the delay is excusable because the respondents have not provided any evidence in support of their reasons for delay. Counsel submitted that the respondents wrote two letters to the registry, one on October 9, 2019; and the second, on February 17, 2021 requesting typed proceedings to no avail. First,



I do not think that two letters over a period of four years is a sufficiently diligent effort on the part of the respondents to prosecute their appeal. In any event, the court was unable to verify this submission because the respondents' affidavit and alleged letters were not in the court file.

21. On the issue of prejudice, and whether justice can be done, I am of the view that the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a higher court. In balancing these rights, the courts must have regard to the timelines provided in the *Civil Procedure Rules*. I do not think a party may ignore timelines in one breath and with the other claim that his rights have been denied. Accordingly, on the issue of prejudice, I am persuaded that the scales tip in favour of the applicant.

22. Based on the reasons above, I am satisfied that the Notice of Motion application dated April 27, 2021 is with merit. The orders of this court are as follows:

- a. The appellants' appeal is dismissed for want of prosecution.
- b. The costs of this application are awarded to the applicant.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF MARCH 2023

ALEEM VISRAM

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

