



Kenya Power & Lighting Co Limited v Musembi & another (Civil Appeal 540 of 2018) [2023] KEHC 1967 (KLR) (Civ) (8 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1967 (KLR)

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

CIVIL

CIVIL APPEAL 540 OF 2018

JN NJAGI, J

MARCH 8, 2023

BETWEEN

KENYA POWER & LIGHTING CO LIMITED APPELLANT

AND

JOCHONIAH MUSEMBI 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The Applicant has filed an application dated June 2, 2022 seeking for orders that the appeal herein be reinstated for hearing and determination after it was dismissed by Justice Dorah Chepkwony on March 25, 2022 for want of prosecution. The grounds in support of the application are that the Applicant was not served with the notice to show cause dated January 19, 2022, where they were required to show cause why the appeal should not be dismissed for want of prosecution. That the Applicant is keen on prosecuting the appeal and has made the application without undue delay. That he is willing to abide by any conditions the court may issue for reinstatement.
2. The Respondents did not file a response to the application.
3. I have perused the affidavit of service sworn by a Court Bailiff, Martha Wangare on the 9th of February 2022 wherein she says that she served through registered mail the pertinent notice to show cause dated January 19, 2022 upon the advocates for the Applicants, Ogetto, Otachi & Co Advocates, which indicated that the Notice to show cause was coming up on March 24, 2022. It would appear that the matter was not placed before court on that day but was placed in court on March 25, 2022 when the Applicant was not present in court and the matter was dismissed for want of prosecution. I have however noted that the Court Bailiff did not attach any document to show that the Applicant was served through registered mail.



4. During the hearing of the application, Mr Beyo, Advocate holding brief for Mr Managene for Respondents told the court that Mr Managene was not opposed to the application.
5. The advocates for the Applicant, Ogetto, Otachi & Co Advocates, submitted that the appeal was not ripe for dismissal in that there was no compliance with the provisions of Section 79B of the Civil Procedure Act and Order 42 Rule 12 of the Civil Procedure Rules 2010.
6. Section 79B of the Civil Procedure Act provides:

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily.”
7. Order 42 Rule 12 provides:

“Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”
8. It was submitted that there was no indication that the appeal was admitted for hearing before the appeal was dismissed for want of prosecution. It was submitted that no notice of admission was communicated to the Appellants as required by the law. It was submitted that an appeal cannot be dismissed for want of prosecution before the provisions of Section 79B and Order 42 Rule 12 are complied with. The advocates relied on the case of Pinpoint Solutions Limited & Another Vs Lucy Waitibegeni Wanderi (as the legal administrator of the estate of James Nyanga Muchangi) (2020) eKLR where it was held that:

“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.

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.”
9. I have perused the court file. There is no indication that the appeal was admitted for hearing by a Judge as required by Section 79B of the Civil Procedure Act 2010 nor was notice sent to the Applicants informing them that the appeal had been admitted for hearing. I am in agreement that an appeal cannot be dismissed for want of prosecution before the provisions of Section 79 B of Civil Procedure Code and Order 42 Rule 12 are complied with. I agree with submissions that the appeal herein was not ripe for dismissal.
10. In view of the fact that the appeal had not been admitted for hearing when it was dismissed and the fact that there was no evidence placed before the court that the Applicant was served through registered mail to appear before court on the 24th of March 2022 and show cause why the appeal should not be



dismissed for want of prosecution, there is sufficient reason to set aside the order for dismissal of the suit for want of prosecution and reinstate the appeal.

11. The court thereby makes the following orders:
 - a. The orders of the court issued on March 25, 2022 dismissing the appeal for want of prosecution are set aside and the appeal is reinstated for hearing;
 - b. The court hereby extends the time within which the Applicant is to file the record of appeal by 30 days from the date hereof. The Record of Appeal will be deemed to be properly filed upon payment of the requisite fees.
 - c. Matter to be mentioned on May 19, 2023.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ondari for Applicant

No appearance for Respondent

Court Assistant - Simon

