



**Thairu & another v Simba (Civil Appeal E188 of 2021)  
[2023] KEHC 3077 (KLR) (Civ) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3077 (KLR)

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

**CIVIL**

**CIVIL APPEAL E188 OF 2021**

**AN ONGERI, J**

**APRIL 14, 2023**

**BETWEEN**

**KIMARU THAIRU ..... 1<sup>ST</sup> APPELLANT**

**AMOS MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SABRINA NEEMA SIMBA ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated May 20, 2022 seeking dismissal of this appeal for want of prosecution.
2. The application is based on the grounds of the face of it that the applicant has failed to take steps to prosecute the appeal for a period of one year and has caused the respondent to suffer by delaying the execution of the award that was given.
3. The application is supported by the affidavit of Musili Mbiti in which he has deponed that the magistrates court in suit number CMCC No 1545 of 2017 delivered judgement in favour of the respondent and the appellants being dissatisfied with the said judgement instituted this appeal on March 8, 2021. The appellant since then has not taken any steps to prosecute this appeal for a period of over one year and therefore the appeal is not made in good faith and is aimed to delay payment in this matter and deny the respondent from enjoying the fruit of his judgement.
4. The application was opposed by the replying affidavit of Lawrence Njuguna dated October 7, 2022. In it he deponed that he had requested for the certified copies of the proceedings, judgement and decree but the registry at Milimani are overwhelmed. He indicated that the appellants are committed



to ensuring the just and timely disposal of the appeal herein if this court grants the appellant more time to obtain the aforementioned documents from the courts registry.

5. The application was canvassed by written submissions. The respondent in his submission argued the appellants have not prosecuted the case herein for almost two years and the court has discretion under Section 3A to make such orders as may be necessary for the ends of justice or to prevent the abuse of court process. In support the respondent cited [China Road & Bridge Corporation v John Kimenyi Muteti \[2019\] eKLR](#) Civil Appeal 40 of 2018 where it was stated;

' In my view the principles guiding the dismissal of suits for want of prosecution apply mutatis mutandi to dismissal of appeals for want of prosecution. The provision that deals with dismissal of appeals for want of prosecution is however Order 42 Rule 35 of the Civil Procedure Rules which states as follows:

35 (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.

18. When are directions to be given? Order 42 Rule 11 of the [Civil Procedure Rules, 2010](#) provides as follows:

'Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.'

19. 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.'

6. The appellants submitted that the court registry informed them that they currently have a lot of proceedings and judgements to type and therefore it will take some time for the certified copies of the proceedings, judgement and decree to be ready. The appellants requested for more time with the assistance of the Executive Officer and Deputy to obtain the certified copies of the proceedings. In support they cited [Njeri Theuri v John Mburu Wainaina \[2022\] eKLR](#) where the court held that;

' Notably, every person is entitled as envisaged under Article 50(1) of the [Constitution](#) of Kenya, 2010 to have a fair trial. The said Article 50(1) of Constitution of Kenya provides as follows:

'Every person has the 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.'



It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, 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 court or tribunal of competent jurisdiction.

From the court file, it is clear that the record of appeal was filed on July 27, 2021 thus the Appellant has since complied and filed the record of appeal which has subsequently been served upon the Respondent's counsel.

The Appellant has explained the delay in filing the record of appeal as was occasioned by failing to get the proceedings in time. A copy of the Appellant's application to the lower court for the proceedings dated May 13, 2020 is annexed as NK1.

Further annexed a copy of the certificate of delay dated August 3, 2021 as annexure NK2 which clearly shows and proves the Appellant's contention that she was unable to file and compile the record of appeal on time as the typed and certified proceedings were only supplied to her on June 30, 2021.

The Appellant has thus demonstrated that her delay in filling the record of appeal which is a prerequisite to fixing the appeal for directions and hearing thereto was occasioned by the delay in obtaining the typed proceedings.'

50. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay is not inordinate and has been explained and evidence furnished. The Appellant is not to blame for the long period it took the lower court to type and supply her with the proceedings.

7. The sole issue for determination is whether this appeal should be dismissed for want of prosecution.
8. I find that the record of appeal has been filed.
9. I direct that the same be served upon the respondents within 7 days of this date.
10. The appeal be and is hereby admitted for hearing before a single Judge.
11. The same to be canvassed by way of written submissions.
12. Each party to file written submissions within 14 days starting with the appellants (Each has 14 days to file and serve their written submissions)
13. The application is accordingly dismissed but the appellant to pay the costs of the application dated May 20, 2022 assessed at Kshs 20,000/= before filing of their submissions.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this April 14, 2023.**

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**A. ONGERI**

**JUDGE**

**In the presence of:**

.....for the 1<sup>st</sup> Appellant

.....for the 2<sup>nd</sup> Appellant

.....for the Respondent

