



REPUBLIC OF KENYA



Adan & another v Mwangi ((Suing as the administrator of the Estate of Harun Mwangi Muthee (Deceased)) (Civil Appeal E216 of 2020) [2023] KEHC 4062 (KLR) (Civ) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4062 (KLR)

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

CIVIL

CIVIL APPEAL E216 OF 2020

AN ONGERI, J

MAY 5, 2023

BETWEEN

WAKO ADAN 1ST APPELLANT

WASHARA AYALA 2ND APPELLANT

AND

PHYLLIS WANJIRU MWANGI RESPONDENT

**(SUING AS THE ADMINISTRATOR OF THE ESTATE OF HARUN MWANGI
MUTHEE (DECEASED))**

RULING

1. The application coming for consideration in the ruling is the one dated 26/9/2022 seeking dismissal of this appeal for want of prosecution.
2. The application is based on the grounds on the face of it and supported by the affidavit of Phyllis Wanjiru in which it is deposed that the Appellants have been indolent in prosecuting the appeal and that the delay has been long, inexcusable and unexplained.
3. The application was opposed by the replying affidavit of Victor Nganga dated 14/11/2022 in which he deposed that the appellants are interested in pursuing the appeal contrary to the assertions by the respondent. That indeed the appellants instituted this appeal *vide* a memorandum of appeal dated 8/12/2020 against the judgement of Hon. A.M Obura SPM delivered on 10/4/2019 in Nairobi CMCC 4628 of 2016.
4. He averred that the appellants/respondents complied with the stay conditions by depositing in a joint account a substantial amount of Kes 2,694,500 as security and any release of the monies would prejudice the appellants. He indicated that the appellants have not been able to retrieve the typed



proceedings and have written letters to court seeking the same and which letters their clerk visits the registry to follow up.

5. That the appellants/respondents contend that the delay which is not inordinate cannot be occasioned to them but to the lower court and the present application is therefore premature and intended to defeat the ends of justice.
6. The parties filed written submissions as follows: the respondent/applicant submitted that the appellants/respondents should have filed their appeal by the 19/5/2019 but however failed to do so. They filed an application seeking to file the memorandum of appeal out of time which application was granted on 12/3/2020 on condition that the appellant deposit Kes 2,694,500 as security. The appellants did not comply with the order of the court and instead filed the memorandum of appeal 5 months after the courts stipulated time.
7. The respondent/applicants argued that since then the appellant/respondent has been enjoying interim orders to the detriment of the respondent/applicant. That it is trite law that the successful litigant be allowed to enjoy the fruits of her judgment.
8. It was the respondent/applicant's argument that the delay is prosecution the appeal is prolonged, inexcusable and unexplained. That the appeal herein is therefore an abuse of court process that is intended to deny the respondent the fruits on her judgement.
9. The appellants/respondents alternatively in their submissions argued that they have demonstrated the hardship they have had in obtaining proceedings from the lower court and which has in turn led to frustration of their effort to file their record of appeal. They argued that their appeal has merits as demonstrated in the memorandum of appeal and in the event the appeal is not heard to completion the appellants stand to lose their constitutional right to appeal. In support they cited the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR the Court opined that every person is entitled as envisaged under article 50 of the *Constitution of Kenya* to have a fair trial and held;

“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.”

10. The sole issue for determination in this application is whether the appeal should be dismissed for want of prosecution.
11. I find that the record of appeal has been filed herein and as such the application for dismissal of the appeal for want of prosecution has been overtaken.
12. I admit the appeal for hearing before one judge and direct that the appeal be canvassed by way of written submissions
13. The parties to file written submissions within 14 days each starting with the appellant.
14. This matter will be mentioned on May 29, 2023 for compliance and for a judgment date.
15. The appellants to pay thrown away costs of Kes 20,000 before that date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MAY, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

