



**Peter & another v Okoth (Civil Appeal E111 of 2021)  
[2023] KEHC 17823 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17823 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E111 OF 2021  
RE ABURILI, J  
MAY 22, 2023**

**BETWEEN**

**MAGANJO PETER ..... 1<sup>ST</sup> APPELLANT**

**SHADRACK WAWERU GIHUNGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TOM ODHIAMBO OKOTH ..... RESPONDENT**

**RULING**

1. This Ruling determines the appellant's notice of motion dated March 27, 2023 seeking for dismissal of this appeal for want of prosecution on the premises that since the appeal was filed on September 20, 2021, it has been mentioned 8 times before the Deputy Registrar without any record of appeal being filed hence, the appellant is not interested in the prosecution of the appeal.
2. The appellant filed a replying affidavit through his counsel on record opposing the application and contending that they have not been indolent but that despite writing to the lower court asking to be supplied with certified copies of proceedings and judgment, the same have not been supplied to date.
3. The Appellant's counsel annexed to his affidavit copies of letters to the lower court as received by that court on May 20, 2022 and April 13, 2022.
4. The application was argued orally on April 25, 2023. The parties respective counsel reiterated the averments and deposition in their affidavits.
5. In my determination of this application, it is important to note that article 159 of the Constitution expects that justice shall be administered without undue delay. Courts do exercise judicial authority which authority is delegated to them by the people of Kenya.
6. In addition, article 50(1) of the Constitution guarantees every person the right to a fair hearing. A fair hearing can only be guaranteed if courts play their role effectively and efficiently.



7. In the instant case, the appellants exercised their unreserved right of appeal on September 20, 2021, after being aggrieved by the decision of the lower court on quantum.
8. Immediately the appeal was lodged, the Deputy Registrar of this court did write to the Head of Station Nyando Law Courts on September 21, 2021 requesting for the lower court record to be submitted to this court.
9. Todate, there is no response, 1<sup>1</sup>/<sub>2</sub> years later. Surely, even if this court wanted to hear the appeal, in the absence of the lower court record, the appeal cannot be heard and therefore it is not right to say that the appellant has been indolent in readying the appeal for hearing.
10. I find that this court has been activating this file hoping that the lower court file will be availed to no avail.
11. It is for that reason that I shall be slow to condemn the Appellant for indolence and blame the lower court for not being facilitative of the appellant and this court to have the appeal heard and determined expeditiously.
12. I decline to grant the orders sought, in the interest of justice and dismiss the application dated March 27, 2023 and order that the Court Administrator, Nyando Law Courts be served with summons to attend this court on May 30, 2023 with the lower court file in Nyando SPMCC No. 191 of 2017 and to show cause why proceedings and judgment have not been supplied to the Appellant's counsel and why the lower court file has not been submitted to this court.
13. Each party to bear their own costs of the application dated March 27, 2023.
14. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

