



**William & another v Wambui (Civil Appeal 565 of 2015)  
[2023] KEHC 17804 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17804 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL 565 OF 2015**

**JN MULWA, J**

**MAY 18, 2023**

**BETWEEN**

**OLIECH WILLIAM & ANOTHER ..... APPELLANT**

**AND**

**JAMES MWAURA WAMBUI ..... RESPONDENT**

**RULING**

1. The Respondent, James Mwaura Wambui brought the application dated September 9, 2021 seeing an order of dismissal of the Appeal for want of prosecution stating that for 5 years and 8 months at date of filing the application, the Appellants had not taken any step towards prosecution of the appeal. It is based on provisions of Order 42 Rule 35(2) and Order 51 Rule 1 of the Civil Procedure Rules. The applicant swore the affidavit in support on the September 9, 2021 deponing that the appellants have lost interest in the appeal; and the continued delay has prejudiced his interests by a denial of enjoyment of his judgment fruits awarded to him on the November 4, 2015 in Milimani CMCC No 7654 of 2013.
2. In opposing the application, the Appellant's Advocate Kelvin Ngure swore the replying affidavit on the January 7, 2022. At paragraph 6 of the replying affidavit, he avers that on the December 3, 2015, upon an application for stay of execution filed by the appellants, the said application was compromised by a consent order dated December 17, 2015 in terms that the respondent/applicant would be paid Kshs 541,110/- being half of the decretal sum and the balance of Kshs 419,160/- would be deposited in court, which was done.
3. It is a further deposition by the appellants that they are yet to file the record of appeal as the court file could not be traced, and in any event, that until provisions of Order 42 Rule 35(2) of the CPR have been complied with by the Deputy Registrar, the Appeal cannot be dismissed for want of prosecution.
4. Upon the above depositions, the Appellants urge for dismissal of the application and allow them to prosecute the Appeal.



## Analysis and determination

5. The application was argued orally. Mr Kiptanui Advocate appeared for the Applicants/Appellants while Mr Njuguna argued for the Respondent.

In the court's opinion, one issue arise for determination:

### Whether the respondent's application dated September 9, 2021 is merited.

6. Dismissal for Appeals for want of prosecution is provided under Rule 35 (1) & Order 42 (2) of the [CPR](#). It states:

- i. 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.
- ii. 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.

7. The test to be applied when considering whether to dismiss a suit or an appeal as in the present circumstances were enunciated in the case of [Ivita v Kyumbu](#) (1984) KLR 441 and re stated in numerous court decisions that:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from the lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed but will be ordered that it be set down for hearing at the earliest possible time.”

8. Is the Appellant guilty of inordinate delay, and if so, is the delay intentional and inordinate? I have considered that the trial courts proceedings were ready for collection and parties advised to collect them by the Deputy Registrar by a letter dated August 20, 2020, but the appellants to collect them. They continued in their sleep sweet sleep only to be awakened by the filing of this application on the November 17, 2021, over one year since the court file was available for either of the parties to do whatever they wished to do.
9. Even then, the appellants did nothing upon being served with the instant application for dismissal for their Appeal. It is instructive to note that despite the above and up to January 2023, no record of appeal had been filed, at least to mitigate the inordinate and delay.
10. It is therefore not true that the appellants have failed to trace the trial court file since 2017. One letter dated January 17, 2017 written to the Executive Officer requesting for proceedings cannot be enough. No seriousness has been shown in trying to obtain the proceedings. On the February 5, 2021 another letter was written requesting for the proceedings. However, had he appellants been keen and desirous of following up, they would have found that the trial court file was available for their perusal.



11. Clearly, the appellants went to slumber the moment they deposited some of the decretal sum into court. What they failed to take into account is that while they cared less of the Respondent's prejudice by their intentional actions, they kept the respondent out of enjoyment of his judgment award for over 5 years for no plausible reasons.

12. As ably stated in the old age case of *Ivita v Kyumbu* (supra) a prolonged and inexcusable delay denies the respondent justice, as justice to both parties must be considered.

Whereas there is no doubt that the continued delay has prejudiced the Respondent/Applicant, the Appellants have not shown or demonstrated any prejudice should the Appeal be dismissed. – *Nancy Wanjira & Another v Peter Njoroge Kamotho* (2023) eKLR; and *Jaribu Credit Traders LTD v Mumias Sugar Co LTD* Hccc No 465 of 2009.

13. Further Section 1A and 1B of the *Civil Procedure Act* mandates courts and litigants to facilitate the just, expeditious proportionate and affordable resolution of civil disputes. This court has inherent power donated to it by section 3A of the Act to make such orders as may be necessary for ends of justice to be met.

14. The Appellant's inertia runs contra to the overriding objections stated in the above provisions.

Having stated as above, this court finds that dismissal of the Appeal will not occasion the Appellants prejudice to the level it would cause to the Respondent/Applicant by sustaining the Appeal.

15. For the forgoing, the Respondent's application dated September 9, 2021 is allowed.

16. **Consequently,**

**The Appeal is dismissed for want of prosecution with costs to the Respondent.**

**The sum of Kshs 419,160/= deposited in court by the Appellants shall be released forthwith to the Applicants/Respondent, through his Advocates for onward transmission to him.**

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2023**

**JANET MULWA**

**JUDGE**

