



REPUBLIC OF KENYA



**Mugambi & another v Muthiani (Civil Appeal E329 of 2021)  
[2023] KEHC 20814 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20814 (KLR)

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

**CIVIL**

**CIVIL APPEAL E329 OF 2021**

**JN MULWA, J**

**JULY 25, 2023**

**BETWEEN**

**JOSEPH KIIRU MUGAMBI ..... 1<sup>ST</sup> APPELLANT**

**KYALO MULIWA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FAITH WAYUA MUTHIANI ..... RESPONDENT**

**RULING**

1. The Application before the court is a Notice of Motion dated August 11, 2022 brought by the Respondent pursuant to Section 79B of the *Civil Procedure Act* and Order 42 Rule 35 of the *Civil Procedure Rules, 2010*. The Respondent seeks for orders that the Appellants appeal herein be dismissed with costs for want of prosecution.
2. The Application is premised on the grounds set out on its face and supported by the Affidavit of the Respondent's Advocate James Ichaura Wachira. Counsel averred that the Appellants are not keen on prosecuting the appeal as they have not taken any steps in the matter since filing the Memorandum of Appeal on June 30, 2021. He contended that indulging the Appellants lack of diligence in the circumstances would be prejudicial to the Respondent.
3. The Appellants opposed the application vide a Replying Affidavit sworn by their Advocate Victor Ng'ang'a on September 21, 2022. Counsel deposed that the slight delay in the prosecution of the appeal has been occasioned by the lower court registry which has failed to supply them with the typed proceedings, despite writing to the Executive Officer requesting for the proceedings on February 7, 2022 and July 12, 2022 and following up through their clerk. Further, counsel contended that the Application is premature as the Respondent cannot move the court for dismissal of the appeal for want of prosecution under Order 42 Rule 35 unless and until directions have been given as per Section 79B



of the Civil Procedure Act. It was also his averment that any prejudice that may be occasioned to the Respondent by the delay is compensatable by an award of damages and costs.

4. The Application was canvassed through oral submissions wherein learned Counsel Mr Kiptanui for the Respondent and Mr. Ng'ang'a for the Appellants reiterated their clients respective positions above.
5. Upon careful consideration of the Application, the parties respective affidavits and the submissions of learned Counsel, the court flags only one issue for determination: whether the Respondent has met the conditions for granting an order for dismissal of the Appellants appeal for want of prosecution.
6. Order 42 Rule 35 of the Civil Procedure Rules cited by the Respondent envisages two scenarios for dismissal of an appeal for want of prosecution. It states thus:
  - “(1) Unless within three months, after granting 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.”
7. From the above, it is clear that in the first scenario, the Respondent can only move the court for dismissal of an appeal where the appellant fails to fix the appeal for hearing upon the lapse of three months after directions have been given under Rule 13 of Order 42 which provides as follows:
  - “1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
  - 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
  - 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
  - 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
    - a. the memorandum of appeal;
    - b. the pleadings;
    - c. the notes of the trial magistrate made at the hearing;
    - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
    - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;



- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

8. In the second scenario, the deputy registrar, with notice to the parties, can list an appeal before a judge for dismissal after one year of the service of the memorandum of appeal, if no steps have been taken to prosecute the appeal.
9. In the present case, the Appellants filed their Memorandum of Appeal on June 10, 2021 alongside an application for stay of execution pending Appeal. A ruling in respect of the application was made in their favour on November 23, 2021. Indeed, the Appellants are yet to file their Record of Appeal. They have attributed the failure to do so to the lower court registry and have exhibited two letters written to the Executive officer on February 7, 2022 and July 12, 2022 requesting for certified copies of the proceedings and judgment to enable them prepare the same. Further, a perusal of the court record reveals that no directions have been given on the appeal in order to invoke the provisions of Order 42 Rule 35(1) and, neither has the Respondent made any request or application for the deputy registrar of this court to list the appeal for dismissal under Order 42 Rule 35(2).
10. For the foregoing:
- a. The Respondent’s Notice of Motion dated August 11, 2022 is hereby dismissed with no order as to costs.
  - b. The Appellants are directed to file and serve the Record of Appeal within sixty (60) days of this Ruling and return for mention on October 5, 2023 to confirm compliance and for further directions.

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**JANET MULWA**

**JUDGE**

