



REPUBLIC OF KENYA



**Mugo & another v Ngugi (Civil Appeal E316 of 2021)
[2023] KEHC 20718 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20718 (KLR)

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

CIVIL

CIVIL APPEAL E316 OF 2021

JN MULWA, J

JULY 25, 2023

BETWEEN

DAVID MUGO 1ST APPELLANT

PATRICK NJERU NJUE 2ND APPELLANT

AND

FREDRICK GACHUI NGUGI RESPONDENT

RULING

1. The Memorandum of Appeal in this case was filed on June 8, 2021. On November 30, 2022, the Deputy Registrar issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution.
2. The Appellants opposed the Notice to show Cause through a Replying Affidavit sworn by Victor Ng'ang'a, an Advocate from the firm of Messrs Kimondo Gachoka & Company Advocates who have the conduct of this matter on behalf of the Appellants. Counsel averred that the delay in prosecution of the appeal had been occasioned by factors beyond their control, as the lower court had not furnished them with typed proceedings, annexing two letters written to the Executive Officer of the Court in that regard. Further, counsel averred that any prejudice caused to the Respondent by the delay can be compensated by an award of costs. She has also expressed the Appellants' willingness to abide by any orders that may be issued by this Court regarding the progression of the appeal.



3. The Notice to Show Cause was issued pursuant to Order 42 Rule 35 (2) of the *Civil Procedure Rules* which states:

“(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.”

4. The test of dismissal for want of prosecution was set out in the case of *Ivita v Kyumba* [1984] KLR 441 where the court stated that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

5. Earlier, the Appellants filed the Memorandum of Appeal on June 8, 2021 and obtained a conditional stay of execution of the impugned judgment of the lower court pending the hearing and determination of the appeal. Notably however, the Appellants have never filed the Record of Appeal.

6. The court has considered the reasons given for the delay in prosecution of the appeal. It is clear from the letters addressed to the Executive Officer of the Lower Court (annextures “VN2a” and “VN2b”) that the appeal had not been prosecuted for good reasons as the proceedings have never been availed to enable the Appellants to prepare the Record of Appeal. Indeed, the court record shows that the High Court has also written to the lower court on four occasions asking for the certified copies of the proceedings and other documents but this has never been complied with. It is therefore clear that the delay has been adequately explained and cannot be attributed to the Appellants but to the lower court registry.

7. In any case, it is noteworthy that the Respondent’s interests have already been partly secured as the Respondent was paid half the decretal amount through his Advocates as evidenced by the remittance advice from DTB Bank (annexture “VN1a”) and the other half was secured through a bank guarantee from Family Bank (annexture “VN1b”). The court therefore concurs with the Appellants averment that minimal prejudice will be caused to the Respondent by the delay, though inordinate.

8. In the premises, it will not serve the ends of justice if this appeal is to be dismissed at this stage. If that was to happen, the Appellants would be deprived of the right to have their day in court contrary to the provision of Article 50(1) of the *Constitution of Kenya* which provides that:

“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.”

9. For the foregoing, the Court makes the following Orders:-

- a. The Deputy Registrar of this Court shall secure the lower court record within 45 days from the date of this ruling.
- b. Thereafter, the Appellants shall file and serve the Record of Appeal within 60 days from today’s date after which the file shall be placed before the judge for directions.



10 Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE

