



**Kenya Power & Lighting Company Ltd v Mukinyi (Civil Appeal
17 of 2011) [2023] KEHC 24735 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 17 OF 2011
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPELLANT

AND

JACKSON WANJOHI MUKINYI RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 2nd September, 2021 brought under the provisions of Order 42 Rules 11, 13 & 35(2), Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya. The respondent seeks the following orders -
 1. That this Honourable Court be pleased to dismiss the appeal for want of prosecution; and
 2. That the costs of this application and the appeal be paid to the respondent.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Joseph Karanja Kanyi, learned Counsel for the respondent herein. In opposition thereto, the appellant filed a replying affidavit sworn on 13th October, 2022, by Priscah Kabole, learned Counsel for the appellant.
3. The application was canvassed by way of written submissions. The respondent's submissions were filed by the law firm of Kanyi, J & Company Advocates on 24th October, 2022, whereas the appellant's submissions were filed on 11th November, 2022 by the law firm of Kiarie Kariuki & Company Advocates.
4. Mr. Maundu, learned Counsel for the respondent cited the provisions of Order 42 Rule 35(1) & (2) of the *Civil Procedure Rules*, 2010 and submitted that the Court has inherent power to dismiss an appeal for want of prosecution even where directions have not been issued. He relied on the decisions



in *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd* [2020] eKLR and *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR.

5. It was submitted by Counsel that whereas the appeal in issue was filed on 23rd February, 2011, the Record of Appeal was filed on 24th March, 2017. He referred to the case of *Kenya Nut Company Limited v Justine Musyoka Nkabi* [2018] eKLR, where the Court when dealing with a similar application held that there is no indication that the appellant has any interest in the appeal as it is Counsel and not the appellant who had sworn the replying affidavit. The respondent stated that the appellant itself had not sworn any affidavit to confirm that it was still interested in the appeal after a period of more than 11 years. Counsel stated the appellant had not disclosed what steps it took if any, to prosecute or to remind its Advocate to prosecute the appeal or to even find out the position of the appeal.
6. Mr. Maundu submitted that the appeal herein is against an order for mandatory injunction directing the appellant to reconnect power to the premises let by the respondent and that the appellant has since complied with the said order, and that even if the appeal is heard, it will serve no practical end, and if it is dismissed, the appellant will not suffer any prejudice. Counsel for the respondent contended that the letter dated 15th September, 2017 was not received by the Court as it does not bear the Court's receiving stamp acknowledging receipt, and that in both the file and letter, there is no evidence of a follow up having been made, and that the last action taken by the appellant's Advocate was in September 2017 and no explanation was offered by the appellant for the delay of five years.
7. Mr. Maundu relied on the case of *Peter Kipkurui Chemoiwo v Richard Chepsergon* (*supra*), where the principles for dismissing an appeal for want of prosecution were laid down and submitted that in deciding whether to sustain or dismiss an appeal for want of prosecution, the Court must consider whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay, and whether the rebuttal presumption of prejudice has been disproved by the appellant.
8. On whether the delay in prosecuting the appeal is excusable, Counsel relied on the case of *Kenya Ports Authority v Nassir Mohamed Zimba* [2020] eKLR, where the Court held that there is no maximum or minimum period of delay set out in law. Counsel submitted that in the appeal in issue, the delay is eleven years and eight months since the filing of the appeal, and five years since the last action was allegedly taken and no explanation or excuse had been offered for the delay in either case. Counsel stated that the delay is prolonged and in the absence of an explanation, it is inexcusable.
9. On whether the delay could be excused and justice be done despite the delay, Mr. Maundu submitted that justice cannot be done despite the delay since the pendency of the appeal continues to distress the respondent. He relied on the case of *Tirth Construction Limited v Orion Hotels Limited* [2020] eKLR and submitted that should the appeal be allowed, parties will be required to go back to the subordinate Court and prosecute a 17-year-old case, memory of witnesses will have faded and documents lost, and as such, the respondent's case will suffer prejudice. On whether the rebuttable presumption of prejudice on the respondent if the appeal is not dismissed has been disproved by the appellant, Mr. Maundu asserted that this had not been done.
10. Mrs. Kabole, learned Counsel for the appellant cited the provisions of Order 42 Rule 35(2) of the *Civil Procedure Rules*, 2010 and submitted that the said provisions require the Deputy Registrar to place the appeal before a Judge for dismissal with notice to the parties since the appellant had filed a Memorandum of Appeal and a Record of Appeal. She argued that the application herein does not meet the threshold for the dismissal of the appeal. Counsel relied on the case of *Mutegi Edward & another v David Mugo Njiru* [2018] eKLR and that of *John Njagi Karua v Njiru Gatumu* [2021]



eKLR, where it was held that the Court will not dismiss an appeal on application by the respondent where the appeal has not been admitted and directions issued. Counsel contended that the appellant herein has never been served with a notice from the Deputy Registrar indicating whether the appeal was admitted or rejected.

11. Counsel for the appellant relied on the case of *Pkiech Chesimaya Limakorwai Achipa* [2020] eKLR, where the Court held that it is upon the party making the application to show the Court the prejudice it will suffer as a result of the delay in prosecuting the appeal. She submitted that the appellant will be highly prejudiced as it stands to suffer loss of Kshs.300,818.80 which was for supply of power by the appellant to the respondent for his consumption, with the respondent being a consumer of electricity in premises supplied under account number 442017-02.
12. Mrs. Kabole urged this Court not to dismiss the appeal herein since the delay in prosecuting the same was occasioned by the fact that it had not been admitted for hearing. She submitted that the appellant's Advocate swore the replying affidavit herein having conduct of this matter on behalf of the appellant and was duly authorized, thus competent to swear the said affidavit. She stated that it is noteworthy that the affidavit in support of the application herein was also sworn by the respondent's Advocate.

Analysis and Determination.

13. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the appellant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the appeal should be dismissed for want of prosecution.
14. In the affidavit filed on behalf of the respondent, he deposed that the appeal was filed in the year 2011 and since then, the appellant has not taken any steps to prosecute the same. He stated that it is manifestly clear that the appellant has lost interest in the said appeal and any continued abeyance of the appeal as against the respondent is totally unjust.
15. The appellant's Counsel in her replying affidavit deposed that it is not true that the appellant had not taken any steps to prosecute the appeal. She averred that this matter came up for directions on 20th April, 2017, when the Court noted that the appeal had not been summarily rejected or admitted for hearing. That subsequently, the Court ordered the Deputy Registrar to place the file before a Judge in chambers for summary rejection or admission of the appeal. The Court further ordered the appellant to check the position of the file after the elapse of twenty-one days after which the file could be fixed for directions on the hearing of the appeal.
16. The appellant's Counsel stated that in compliance with the Court's directions issued on 20th April, 2017, she requested for the Court file on 16th August, 2017, and found out that the appeal had not yet been placed before a Judge in chambers for summary rejection or admission of the appeal. That on 15th September, 2017, the appellant wrote to the Deputy Registrar seeking to confirm whether the appeal had been summarily rejected or admitted for hearing but the said letter elicited no response. The appellant's Counsel deposed that the appellant is still very much interested in prosecuting the appeal and urged this Court to give it an opportunity to prosecute the same so that the ends of justice can be met.
17. This Court will first deal with the issue of whether the fact that the affidavit in support of the application herein and the replying affidavit have been sworn by the parties Advocates on record is fatal. Mrs. Kabole submitted that she swore the replying affidavit herein as she had conduct of this matter on behalf of the appellant and was duly authorized, thus competent to swear the said affidavit.



18. It is trite law that Advocates should not enter into the arena of disputes by swearing affidavits on contentious matters of fact, however the law does not bar Advocates completely from swearing affidavits in the course of their duties and/or discharge of their professional mandate in non-contentious matters, where they have been engaged. Provided that such affidavits relate to issues that are borne out of the record of the Court, issues which have been pronounced upon, issues that the Court is to take judicial notice of, settled issues of law and/or issues that are admitted by the adverse party, either in the subject proceedings or any other proceedings between same parties.
19. On perusal of the affidavits filed herein, it is evident that the Advocates have not deposed to any contentious evidential issues since the said affidavits contain issues borne out of the record of the Court, and which are within the Advocates' knowledge which they acquired in the course of discharging their professional duties to their clients and in executing their clients' instructions. Accordingly, this Court finds that the affidavit in support of the application and the replying affidavit herein is not fatal on the ground that they were sworn by the Advocates on record.
20. The relevant provision on dismissal of appeals for want of prosecution is Order 42 Rule 35(1) & (2) of the [Civil Procedure Rules](#), 2010 which states as hereunder:-
- “(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.”
21. The respondent's case is that the appellant filed the appeal herein in the year 2011 and since then, it has not taken any steps to prosecute the same and as such, it is manifestly clear that the appellant has lost interest in the said matter. The respondent contended that the appellant has since complied with the judgment by the Counsel lower Court, and that even if the appeal herein is heard, it will serve no practical end, and if it is dismissed, the appellant will not suffer any prejudice.
22. The appellant's Counsel on the other hand deposed that in view of the fact that directions on the hearing of the appeal have not yet been given, the appeal herein cannot be dismissed for want of prosecution. She stated that the Deputy Registrar had not issued a notice to the parties herein in accordance with the provisions of Order 42 Rule 35(2) of the [Civil Procedure Rules](#), 2010.
23. In [China Road & Bridge Corporation v John Kimenye Muteti](#) [2019] eKLR it was held as follows -
- “It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given” (See also [Abraham Mukhola Asitsa v Silver Style Investment Company Ltd](#) [2020] eKLR).



24. In light of the facts brought out in this application, and the above decision, this Court has the discretion to entertain an application for dismissal of an appeal for want of prosecution even before directions for hearing are taken. Under the provisions of Order 42 Rule 11 of the *Civil Procedure Rules*, 2010, it is the appellant's duty to cause an appeal to be listed for directions in accordance with the provisions of Section 79B of the *Civil Procedure Act*. Order 42 Rule 13(1) of the *Civil Procedure Rules*, 2010 on the other hand provides that on notice to the parties delivered not less than twenty-one days after the date of service of the Memorandum of Appeal, the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers.
25. The appellant contended that the delay in prosecuting this appeal was occasioned by the fact that the appeal had not been admitted for hearing. On perusal of the record, I find that the appeal herein was admitted on 19th June, 2017, it is however yet to be fixed for mention for purposes of taking directions on the appeal. The appellant's explanation is that vide a letter dated 15th September, 2017, it wrote to the Deputy Registrar Mombasa Law Courts inquiring whether the appeal had been admitted or summarily rejected but the said letter elicited no response.
26. Having gone through the said letter it is evident that it does not bear the Court's receiving stamp, as such, there is no way of ascertaining if the said letter was ever received by the Deputy Registrar. It is trite that the burden of proof lies on the person who wishes the Court to believe that a particular fact exists. The appellant has a duty to demonstrate to this Court the efforts it made in following up on its appeal and ensuring that the same had been listed before a Judge for purposes of taking of directions.
27. From the record, it can be seen that this matter was last in Court on 20th April, 2017. On 14th September, 2019, Counsel for the respondent fixed the application herein for hearing on 16th November, 2021. The appellant has not satisfactorily explained the delay in causing the appeal herein to be listed for mention for purposes of taking directions on its hearing, since 20th April, 2017. In *Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others* [2017] eKLR Nyakundi J., when dealing with a similar application stated as follows -
- “ the issue on delay has been well captured in the case of *Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another* [2014] eKLR and in *Ikta v Kyumbu* [1984] KLR 441 by laying down the test to be applied.
- “The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.
- Thus, even 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 the discretion of the court.”
28. On whether the delay is prolonged and inexcusable, the appeal herein was filed on 23rd November, 2011 and it was last in Court prior to the filing of the application herein on 20th April, 2017. It is approximately eleven (11) years since the said appeal was filed and four (4) years since this matter was last in Court. Since then, the appellant has not caused this matter to be listed before a Judge in chambers for purposes of taking directions as to the hearing of the appeal. It is therefore evident that there has been a prolonged delay in listing the appeal for directions.
29. This Court finds that the appellant has not discharged the burden of explaining the delay and/or demonstrating to this Court the efforts it has made towards ensuring that the appeal herein is



prosecuted. Accordingly, I find that the prolonged delay in this particular case of approximately four (4) years from the date the appeal was admitted prolonged, thus inexcusable.

30. In a functional system of justice, the primary concern of Courts is to balance the competing interests and priorities between the parties to ensure the fair administration of justice. In the instant matter, there is a competing interest between the respondent who has obtained a judgement from a competent Court on his claim while the appellant as a result of the judgement has a right to seek redress and challenge the decision of the Trial Court. The respondent submitted that the appellant has already complied with the Trial Court's judgment and that the appeal in issue has been overtaken by events.
31. This Court finds that the application dated 2nd July, 2021 is merited and the same is allowed in the following terms-
- i. That the appeal herein is dismissed for want of prosecution; and
 - ii. That the costs of the instant application and that of the appeal are hereby awarded to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Maundu for the respondent/applicant

Mrs Kabole for the appellant/respondent

Ms B. Wokabi - Court Assistant.

