



Pyrethrum Board of Kenya & another v Gichure (Suing as the legal representatives of the Estate of Joseph Wambugu Kenyatta (Deceased)) (Civil Appeal 95 of 2019) [2023] KEHC 22599 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 95 OF 2019
TA ODERA, J
SEPTEMBER 25, 2023**

BETWEEN

PYRETHRUM BOARD OF KENYA 1ST APPELLANT

JOHN KIPNGETICH 2ND APPELLANT

AND

TERESIAH WANJA GICHURE RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
WAMBUGU KENYATTA (DECEASED)**

RULING

1. The applicants/respondents filed the notice of motion dated March 1, 2023, seeking dismissal of the appeal herein with costs for want of prosecution.
2. The application is premised on the grounds that no action has been taken on the appeal since it was filed 4 years ago and hence it is prejudicial and vexatious. The application is supported by the annexed affidavit of George Kirumba Mbiyu advocate of the applicants /respondents who deponed that the appeal has been inactive for 4 years since its inception and that his firm wrote to the appellant/respondent's advocates on January 10, 2023 seeking that they set down the appeal for directions but they did not and hence the instant application.
3. He annexed a copy of the said letter ("GKM"). He deponed that the applicant is suffering anxiety, uncertainty and huge expenses as a result of the appeal being dormant. He sought dismissal of this appeal. Respondent/appellant filed a notice of preliminary objection dated April 12, 2023 filed on April 13, 2023 on the ground that order 42 rule 13 of the *Civil Procedure Rules* has not been complied with and hence the application is premature. Esther Kabalika Inzahuli advocate for the respondent / appellant swore a replying affidavit dated April 12, 2023 filed on April 13, 2023 in which he termed



the application herein as premature, oppressive, without merit and an abuse of the process of the court. Also that the impugned judgment was delivered on May 8, 2019 the respondent applied for proceedings and they applied for certified copies of the judgment and decree on May 17, 2019 *vide* the letter -“EK1”. Further that they paid typing deposit of Kshs 1000/= as per the receipt dated May 22, 2019 – “EK2”. They thereafter made several visits to the registry to find out whether the proceedings were ready but the answer was negative. On November 21, 2021 they wrote to the executive officer enquiring about the proceedings but they were told they were not ready due to shortage of typists –“EK3”.

4. She deponed that they cannot prepare a record of appeal without the proceedings and this is the reason for the delay in prosecution of the appeal. She said the appellant cannot be blamed for the delay of the appeal.
5. She further told the court that the application is premature and lacks merit as he record of appeal is yet to be filed and directions have not been taken under order 42 rule 35 of the *Civil Procedure Rules*. She continued to state that no prejudice will be occasioned to the applicant if the appeal is heard and determined on merit and that on the contrary the respondent will suffer irreparably if the appeal is dismissed as the delay to supply proceedings is on the part of the court. Also that respondent had already paid half of the decretal sum to the applicant.
6. Counsel also deponed that the appellants are willing to prosecute the appeal and undertook to compile the records of appeal once the proceedings are ready. She sought dismissal of the application herein.
7. The application was canvassed by way of written submissions. The applicants/respondents submitted that though the respondents/appellants say that they applied for proceedings which are yet to be supplied, the last letter they wrote to court is dated November 21, 2021 and no further steps have since been taken towards the said proceedings. Also that it would be unfair to say that a party can do nothing but only letters unless proceedings are typed.
8. Further that the respondents/appellants have a duty to ensure that the appeal is prosecuted without delay and that they failed in this duty and that the delay is inordinate as there is no logical explanation for the same. Counsel cited the case of *Safina Limited v Jammadas (K) Limited* (2006) eKLR and *Dickson Miriti v Commercial Bank* (2006). Also the case of *K. Ventures Ltd v Peter Olumati* (2018) eKLR where it was held that “For an appeal to be liable for dismissal for want of prosecution under the proper provision rule 35(1) directions must have been issued under order 42 rule 13 and three months lapsed without any action being taken by the appellant. Such directions have not been issued in this matter. That said, it is the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions. Rule 11 of order 42 requires that once an appeal has been filed, the appellant should, within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act. Rule 13(1) of the same order also directs 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.”

9. It is not in dispute that it has been slightly over one year since the memorandum of appeal was filed on July 29, 2016. A perusal of the file shows that following the filing of the memorandum of appeal, a request was made by the Deputy Registrar of the High Court on July 29, 2016 for the record of proceedings of the lower court. No action has been taken by the appellant. From a reading of the provisions of order 42 cited above, it is the appellant’s duty to set the appeal in motion by having it listed for directions. This ought to have been done within 30 days of filing the appeal. The appellant



- did not take any such step and has not provided any reasons for such failure. I am therefore inclined to find that this application bears merit, and therefore the appeal is dismissed with costs to the applicant.
10. Also the case of *Patrick Parmisa Morera v Jasmiel Ndungu Kangethe* (2018) where Hon Githua J held “ 8. The law governing dismissal of appeals for want of prosecution is found in order 42 rules 35 (1) and (2) of the *Civil Procedure Rules* (the Rules). Order 42 rule 35 (1) and (2) provides as follows:
- “(1) 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.
- (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.”
11. It was submitted that the above provisions envisage 2 situations when an appeal can be dismissed for want of prosecution; one , where an appeal has been admitted for hearing but 3 months down the line after directions under order 42 rule 13 of the *Civil Procedure Rules* have been taken it has not been set down for hearing or where the appellant has failed to set down the appeal for hearing one year after service of memorandum of appeal . it was submitted that the respondent neither listed the appeal for directions under section 79 B of the *Civil Procedure Act* or order 42 rule 13 of the *Civil Procedure Rules* .
12. It was submitted that this court has inherent jurisdiction to make orders necessary to meet the ends of justice under section 3A, 1A & 1B of the *Civil Procedure Act*. Further that the overriding objective of the Act enjoins the court to determine matters in a just, expeditious , proportionate and affordable manner .
13. Also that the respondents/ appellants lost interest in the appeal and that this was also exhibited in the lower court as the case proceeded *ex parte* for non- attendance by the respondents/ appellants. The respondents urged the court not to exercise its discretion of the appellants who clearly sought to obstruct the course of justice. They urged the court to find merit in the application and allow the same.
14. The respondents/appellants submitted that they rely on order 42 rule 35 of the *Civil Procedure Rules* which provides that “(1) 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.”
15. They submitted that the application lacks merit as directions must be given before the court must give directions before an appeal can be dismissed for want of prosecution. Further that under order 42 rule 13 (4) of the *Civil Procedure Rules*, the appeal cannot proceed to hearing unless the record of appeal has been filed. Also that the appeal is yet to be admitted and so it could not be set down for hearing .they submitted that the delay in typing proceedings also caused stalling of the matter.
16. Appellants submitted that justice could still be served despite the delay as was held in the case of *Eastern Province Kenya Limited v Rongai Workshop & Transporters Ltd & another* 2014 eKLR where it was held “ However the courts have held that this is not on its own sufficient to warrant the dismissal of a suit for want of prosecution. In the case of *Ivita v Kyumbu* [1984] KLR 441, Chesoni, J held-
- “The test to be applied in an application for dismissal 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 available time. It is a matter in the discretion of the court.”

17. They said that they have already paid half of the decretal sum to the respondents as on condition for stay of execution.
18. They submitted that they were unable to fix the matter for directions as per the request by counsel for respondents as the proceedings were not ready.
19. They submitted that their appeal has high chances of success and so dismissal would prejudice the respondents/appellants.
20. I have carefully considered the application the replying affidavit, the replying affidavit and the submissions.

The issues for determination are:

- a. Whether the application is premature in view of the provisions of order 42 rule 13 of the [Civil Procedure Rules](#).
 - b. Whether the application has satisfied conditions for dismissal of the appeal for want of prosecution.
21. On whether the application is premature by dint of order 42 rule 13 of the [Civil Procedure Rules](#), this was raised by the applicants /appellants in the preliminary objection dated April 12, 2023. They argued that since directions had not been taken they could not set down the appeal for hearing and the same cannot also be dismissed for want of prosecution for the same reason. The applicants / respondents replied that it was the duty of the respondents /appellants to set down the appeal for directions under rule 13 within 21 days after service of the memorandum of appeal and this was not done. It is indeed the duty of an appellant to set down an appeal for directions within 21 days from the date of filling of memorandum of appeal. They went ahead and submitted that order 42 rule 11 of the [Civil Procedure Rules](#) also provides that an appellant shall within 30 days from the date of filling of the appeal cause the appeal to be listed before a judge for admission under section 79 B of the [Civil Procedure Act](#).
 22. I have seen the said provisions of the law, order 42 rule 11 of the [Civil Procedure Act](#) provides that

“ A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

Section 79 B of the [civil procedure Act](#) provides that

“ Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

Order 42 rule 35 of the [Civil Procedure Rules](#) which provides that

“(1) 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.”



- (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.”

Order 42 rule 13 of the *Civil Procedure Rules* provides that “

- (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.”

23. It is clear from the foregoing that the first step after service of the memorandum an appeal is for the registrar to list the appeal for directions within 21 days from the date of the said service. The appeal herein was filed on May 31, 2019 and the appeal was listed for directions on March 2, 2023. The directions were not taken on that date and the record does not indicate any reasons for the same. It is now over 3 years since the appeal was filed and the mistake was clearly on the part of the registrar who failed to kick start the process of directions which would have paved way for listing the matter for hearing. In the cited case of *K. Ventures Ltd vs peter Olumati* (2018)eKLR (supra), it was held that directions under order 42 rule 13 of the CPR must be taken before an appeal can be dismissed for want of prosecution under order 42 rule 35 of the CPR. I totally concur the position in he said case. I find that order 42 rule 13 of CPR was thus not complied with and thus the application herein is pre-mature.
24. In any event , the appeal has also not been admitted under section 79B of the *Civil procedure Act* and order 42 of the rules 11 was also not complied with. The respondent/appellants also argued that the proceedings of the lower court have not been supplied of them and thus they are unable to file the record of appeal. Though respondents/applicants accused them of delay, this court takes judicial notice of the backlog in the typing pool due to inadequate number of staff. The delay herein cannot thus be attributed to the respondent/appellant. The matter is not ripe for dismissal under order 42 rule 35 of the *Civil Procedure Rules*.
25. I thus uphold the objection that the application dated April 12, 2023 is pre-mature as the provisions of order 42 rule 13 of the CPR are yet to be complied with and it is thus struck out. Each party will bear it’s own costs.
26. I order that;
- a. The proceedings of the lower court be supplied to the appellants within 30 days from today.
 - b. The appellant to file and served the record of appeal be filed and served within 14 days from the date of service of the proceedings.
 - c. Deputy registrar to place the file before the judge for directions on admission within 7 days of receipt of the record of the lower court.
 - d. Mention on November 27, 2023.

RULING DELIVERED VIRTUALLY ON 25TH DAY OF SEPTEMBER VIA TEAMS PLATFORM

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T.A. ODERA

JUDGE

