



**Odhiambo v Muasya (Civil Appeal E229 of 2023)
[2024] KEHC 12722 (KLR) (Civ) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12722 (KLR)

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

CIVIL

CIVIL APPEAL E229 OF 2023

JN MULWA, J

OCTOBER 24, 2024

BETWEEN

JARED OTIENO ODHIAMBO APPELLANT

AND

SAMUEL MUASYA RESPONDENT

RULING

1. This Appeal was filed by a Memorandum of Appeal dated 25/03/2023. The record of appeal dated 11/09/2023 was eventually filed but it lacked crucial documents to wit a certified copy of the decree and the Judgment of the trial court thus it was incomplete for failure to file all the necessary documents in terms of Order 42 Rule 13(4) of the [Civil Procedure Rules 2010](#).
2. Numerous court orders were issued granting the appeal opportunities to file a Supplementary record of Appeal notably court orders dated 14/05/2024 and 20/05/2024.
3. By a Motion dated 7/03/2024 the Respondent sought that an order of dismissal of the appeal for want of prosecution citing the Appellant's failure to comply with Order 42 Rule 13(4) of the [Civil Procedure Rules 2010](#), supported by an affidavit of its Advocates sworn on an even date stating the numerous opportunities granted to the Appellant to file a complete Record of Appeal, by orders dated 31/07/2023, 11/09/2023, 14/05/2024 and 7/03/2024 complete record of appeal was not filed the Respondent/Applicant thus sought that the application be allowed.
4. On 14/05/2024 the Appellant filed grounds of opposition to the Motion stating that the appellant is keen on prosecuting the Appeal; and filing of the Record of Appeal was demonstration of the appellant's interest in the appeal, and that the Record of Appeal lacked requisite proceedings due to hardship in obtaining the trial court's proceedings.



5. Parties argued the motion orally on 4/07/2024. The court has considered the pleadings and submissions.
6. The judgment subject of the appeal herein was delivered on 10/03/2023 in Milimani Civil Suit No. E 887 of 2021. It is evident, and admitted by the Appellant that the Record of Appeal filed on 3/11/2023 was incomplete and the court on two occasions directed the appellant to file a Supplementary Record of Appeal including the missing documents notably the decree and certified copy of the judgment.
7. In defending its failure to file the complete Record of Appeal nothing was placed before the court to show reasons for the inordinate delay or its hardship to obtain the proceedings. Only oral argument were advanced with nothing to support the same; not even a letter to the Executive Officer requesting for the decree and the judgment.
8. From the above, the question that begs an answer is why the Appellant failed to file a Supplementary Record of Appeal as directed by the court the initial record being incomplete and whether the delay or inaction by the appellant has been sufficiently explained to the court.
9. Order 42 Rule 35 (i) of the Civil Procedure Rules provides that;-

“ 35

- (1) unless within three months after giving directions under Rule 12 the appeal shall have been set down for hearing by the Appellant the respondent shall be at liberty to either set the appeal for hearing or to apply by summons for its dismissal for want of prosecution”

10. The Appellant had been given sufficient opportunities as earlier on stated but for no stated reasons failed to file the Supplementary Record of Appeal.

In the classic test suit of Ivita v Kyumbu [1984] KLR 441, the principles for dismissal of suits for want of prosecution (including appeals) were set:

“ That justice delayed without explanation defeats equity that discretion must be exercised on the basis that it is in the interest of justice regard to whether the party instituting the suit has lost interest in it or whether the delay in prosecuting the suit is inordinate, unreasonable, in excusable and is likely to cause serious prejudice to the defendant on account of that delay.....”

The above test was reiterated in the matter of Mwangi S. Kaimanyi v. Attorney General & Another Misc. Civil Suit No. 720 of 2009 and Kenya Power & Lighting Co. Ltd v Joshua Simiyu Wasike [2023] eKLR.

11. It is trite that an appeal or suit belongs to the Appellant/Plaintiff. Inaction of the appellant is clear indication of lack of interest in the same.
The respondent is without a doubt prejudiced by the delay more so when he cannot and or is locked out of enjoyment of his judgment fruits.
12. To grant or not to grant an order of dismissal of an appeal is discretionally and depends upon circumstances of each case.
13. In this case there is clear lack of interest and in action by the appellant and its advocates, shown by failure to apply for the decree and or proceedings from the trial court of a judgment delivered on



10/03/2023. The court is persuaded to exercise its discretion in favour of the Applicant/Respondent herein and dismiss the appeal for want of prosecution with costs to the respondent. The application dated 7/03/2024 is allowed as prayed.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

