



**Njeru v Kamau & 5 others (Environment and Land Appeal
E035 of 2024) [2025] KEELC 5726 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E035 OF 2024
EC CHERONO, J
JULY 31, 2025**

BETWEEN

ESTHER WANJIRU NJERU APPELLANT

AND

SLOME KAMAU 1ST RESPONDENT

BEATRICE WANYONYI 2ND RESPONDENT

VERONICA WANGARE 3RD RESPONDENT

BENJAMIN BARASA WAFULA 4TH RESPONDENT

ALFRED MANDU TERA 5TH RESPONDENT

WALUMOLI WALUKELA MUSUNGU 6TH RESPONDENT

RULING

1. The 5th and 6th Respondents moved this Court vide a Notice of Motion dated 12th May 2025 seeking the following orders;
 1. That the Appellant’s appeal be dismissed for want of prosecution.
 2. That the Appellant bears the costs
2. The application is supported by the affidavit of Walumoli Walukela Musungu and grounds apparent on the face of the said application. According to the Applicants, the Appellant filed a Memorandum of Appeal on 29/7/2024 but failed to file and serve record of appeal as ordered by the Court. The deponent deposed that on 1.4.2025, this Court granted the Appellants leave to file a proper Record of Appeal within 14 days and the Appellants failed to file the same as ordered. They further stated that the leave granted by the Honourable Court to file and serve a supplementary Record of Appeal expired on



- 15.04.2025 and the Appellant has not taken any steps to set down the appeal for directions pursuant to order 42 of the Civil Procedure Rules.
3. The Applicants stated that the Appellant has a duty to prosecute the appeal to final conclusion within a reasonable time but they have demonstrated that they are disinterested in prosecuting the appeal considering that they have all important documents needed to prepare the record of appeal. In conclusion, the Applicants stated that the prolonged delay is prejudicial to them since they have been denied the benefits of their judgment delivered on 8/7/2024
 4. By way of a joint Replying affidavit, the 1st, 2nd and 3rd Respondents through Beatrice Wanyonyi, the 2nd Respondent herein deposed that on 8/6/2023 when the appellants' case came up before the trial court, Counsel for the Appellant filed a further list of documents and a further list of witness statements out of time and without leave of the court and the same were struck out and expunged from the court record but the plaintiff/Appellant did not appeal against the expungement order and the case proceeded until judgment was delivered on 8/7/2024. She stated that the Memorandum of appeal was filed 9 months ago and on 30/1/2025 this Court issued orders directing the Appellant to file and serve the record of appeal within 45 days and on 11/3/2025, the Appellant had not complied.
 5. The deponent further deposed that when the matter came up next on 12/3/2025, counsel for the 5th and 6th Respondents asked for more time to peruse the record of appeal and establish its completeness and adequacy. That on 1/4/2025, Counsel for the 5th and 6th Respondents informed the court that the record of appeal was incomplete as it contained documents which had been struck out and some relevant and primary documents missing and that the impugned judgment was not paginated and the same had not been signed. She stated on the same date, the Court directed the Appellant to prepare and serve a proper record of appeal within 14 days.
 6. The deponent also deposed that on 13/5/2025, the Appellant filed a supplementary record of appeal, 28 days outside the time given by the court without leave and no explanation given for the delay.
 7. The 4th respondent also filed a Replying affidavit and grounds of opposition in response to the said application. In his Replying affidavit, the 4th Respondent raised scandalous and irrelevant issues to the application under and I need not delve into it.
 8. When the said application came up for directions, the parties agreed to have the same canvassed orally.

Legal Analysis and Decision

9. I have considered the application and the supporting affidavit, the replying affidavits and grounds of opposition as well as the applicable law. The 5th and 6th Respondents have moved this Court seeking to have the appeal herein dismissed for want of prosecution. Order 42 Rule 11 of the Civil Procedure Rules provides as follows'

“Upon filing of the appeal the Appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 78B of the Act.”
10. The Applicant also cited Section 78 of the Civil Procedure Act which spells out the powers of the appellate court as follows;

“78 powers of appellate court;

 1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-



- a. To determine a case finally;
 - b. To remand a case;
 - c. To frame issues and refer them for trial;
 - d. To take additional evidence or to require the evidence to be taken;
 - e. To order a new trial
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
11. It is not in dispute that the Appellant preferred this appeal vide a Memorandum of Appeal dated 29/07/2024 and in a Notice of motion application dated 12/08/2024, the Appellant/Applicant moved this court seeking orders for *inter-alia* stay of execution of the judgment issued on 8/7/2024 at Kimilili SPM-ELC No. E026 of 2019 pending hearing and determination of the appeal herein. That after hearing the said application inter-parties, this Court rendered itself on 23rd January 2025 allowing the said application on terms, inter-alia that the Applicant/Appellant to compile, file and serve the record of appeal within 45 days. When the matter came up for directions on 12/3/2025, Mr Oira Advocate for the Appellants confirmed that he had filed the record of appeal as ordered by this court. Mr. Maloba Advocate for the 5th and 6th Defendants confirmed that he had been served with the record of appeal and needed time to peruse and confirm that they were proper. The application was allowed and the matter was rescheduled to 01/04/2025 when Mr. Maloba Advocate informed the court that the record of appeal was not complete as the same was neither paginated nor signed. The learned Counsel also stated that the record of appeal did not contain the Respondents documents and that the record contains documents which were expunged by the trial court and asked that the Appellant prepares a proper record of appeal. Mr Oira, Counsel for the Appellant admitted that he excluded a copy of the plaint and defence in the record of appeal. This Court noted the discrepancies and granted leave to the Appellant to file a proper and complete record of appeal within 14 days from the date thereof.
12. When the matter came up for mention for compliance on 14/5/2025, Mr. Oira advocate informed the court that he had filed the supplementary record of appeal as ordered by the court. Mr Maloba for the 5th and 6th Respondents told the court that the supplementary record of appeal was filed outside the 14 days period given by the court and that he had filed an interlocutory application to have the appeal dismissed for want of prosecution.
13. It is not in contention that the Appellant was granted leave to file a proper record of appeal within 14 days from 01/04/2025. It is not also in dispute that the Appellant filed the supplementary record of appeal on 12th May 2025, almost 28 days later. Though the Appellant did not seek and obtain leave to file the supplementary record of appeal out of time, she explained in her replying affidavit sworn on 19th May 2025 that she had to make arrangements for the file to be returned to the trial court to be certified and was not until 9th may 2025 when the proceedings were certified and the file returned to the ELC registry. She stated that the removal of any documents from the record of appeal is a discretionary power reserved for the judge under order 42 Rule 13(f) CPR and not the Applicant. A certified copy of the proceedings dated 09/05/2025 is annexed to the replying affidavit.



14. Whereas the Appellant filed the supplementary record of appeal outside the timelines given without leave of this court, the explanation given in the Replying affidavit that she had to make arrangements for the original file to be returned to the trial court for certification, in my view, is reasonable and indeed excusable.
15. In view of the foregoing, I find the Notice of Motion application dated 12th May 2025 without merit and the same is hereby dismissed. Costs shall be in the cause.

READ, DATED and DELIVERED AT BUNGOMA THIS 31ST DAY OF JULY, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Maloba for the 5th and 6th Respondents/Applicants.

Mr. Oira for the Appellant/Respondent

1st, 2nd and 4th Respondents-absent

3rd Respondent-present.

