

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E063 OF 2023

LABAN KAMUNYA.....1ST APPELLANT
DAVID MUGADIA.....2ND APPELLANT

VERSUS

SAMUEL MAKONYI MACHANI & HARRIET MUTONYI
(Suing as legal representative of the estate of
JAMES BARASA MACHANIRESPONDENT

RULING

1. The Appellants are represented by **Messrs Muma Nyagaka & Co. Advocates** while the Respondent is represented by **Messrs Alwang'a & Co. Advocates**.
2. This Appeal file was opened on 19/04/2023 after the Appellants, by the Ruling rendered by **R. Nyakundi J** in **Eldoret High Court Miscellaneous Civil Application No. E031 of 2023** on 30/03/2023, obtained leave to file the appeal out of time, and also orders of stay of execution pending Appeal. No substantive step has however been undertaken to prosecute the Appeal since then. For this reason of dormancy or inaction, the Court, *suo motu*, fixed the Appeal for dismissal under the provisions of **Order 42 Rule 35(2)** of the **Civil Procedure Rules**. When the Notice to Show Cause (**NTSC**) came up in Court on 26/06/2025, the Appellant's Counsel, **Mr. Muma Nyagaka**, pleaded with the Court to spare the Appeal, and allow the same to be prosecuted. I then directed that the parties to file Affidavits on the issue of want of prosecution.
3. **Mr. Nyagaka** then filed the Affidavit to Show Cause sworn on 25/06/2025. He deponed that his law firm, after lodging this Appeal challenging the decision rendered in **Senior Resident Magistrate's Court in Eldoret CMCC No. 519 of 2019**, on 6/06/2023, wrote a letter to the Eldoret Law Courts requesting for typed copies of proceedings, and it duly paid the deposit for Court fees as requested. He deponed that his Court Representative has repeatedly made a number of visits to the Court Registry for purposes of confirming completion of typing of the proceedings to enable them prepare and file the Record of Appeal but with no success, that the Representative, in all the occasions, has kept on being informed that the file is at the typing pool, and that their frustration has been compounded by demands of "facilitating" the typing

process to enable them jump the queue of the awaiting files, something his client is not prepared to do.

4. He deponed further that in the meantime, they have prepared a skeleton Record of Appeal containing the pleadings, which if leave is granted, same can be filed without the proceedings. He added that on 4/04/2025, they wrote a letter to the Deputy Registrar and copied it to the Respondent's Advocates expressing the frustration they are facing in obtaining the typed proceedings. He urged that it is clear from the above sequence of events that the Appellants have not lost interest in the Appeal matter but the non-action has been due to the failure to obtain proceedings, a process which is not within the Appellants' control.

5. In response, the Respondent filed the Affidavit sworn on 1/08/2025 in which he deponed that the Appellants having obtained stay orders, sat on their right to appeal until awakened by the threat of dismissal of the Appeal. He contended that the letter dated 6/06/2023 exhibited by the Appellants requesting for typed proceedings was never copied nor served upon his Advocates, and neither does it have the Court stamp and therefore, there is no way to verify whether it reached the Court. He also observed that despite the Appellants being invoiced to pay for typed proceedings on 26/06/2023, the same was never paid for until 17/10/2023, and there is also no further evidence by way of letters to Court, to demonstrate any follow up of the typed proceedings. He deponed that it is not sufficient for the Appellants to claim that their representative attended the Court registry, and pointed out that if no results were forthcoming, then it would be expected that for the 2 ½ years that the appeal has been pending, the Appellant would have moved the Court formally. He deponed further that before the Court listed this appeal for dismissal, he had already instructed his Advocates to file an application for dismissal of the appeal for want of prosecution, which his Advocate did on 21/03/2025, albeit that it was erroneously filed in the said **High Court Miscellaneous App No. E031 of 2023**, the file in which leave to file the appeal was granted. According to him, it is that Application that triggered the Appellant to write the letter dated 4/04/2025 addressed to Court. He averred that had the Appellant been keen on prosecuting the appeal, he would have moved the Court with the skeleton Record of Appeal and/or an application for the Court to rely on hand-written proceedings or to give further directions. He deponed further that “*equity aids the vigilant and not the indolent*”, and whoever comes to equity with indolence is not deserving of exercise of the Court's inherent powers in his favour, that the Appellants have not demonstrated vigilance in

prosecuting the appeal, probably because they were enjoying orders of stay of execution, and that, on the other hand, the Respondent has been prejudiced and denied the right to enjoy the fruits of the judgment entered in his favor since 26/10/2022.

6. I have seen a Supplementary Affidavit from the Appellants in the Court file, again sworn by Counsel **Nyagaka**. The same was obviously filed without seeking or obtaining leave. I would have therefore swiftly expunged it from the record but in the interests of justice, I will not do so.

7. In any event, the Supplementary Affidavit simply repeats the matters already deponed in the Appellants' initial Affidavit to Show Cause. The only relevant matter sought to be clarified therein is that that contrary to the Respondent's averment, the Appellants did not sit on their right to appeal until awakened by the threat of dismissal, but that in the Ruling dated 30/03/2023, granting leave to file the appeal out of time, the Court deemed the Memorandum of Appeal annexed to the Application as duly filed upon payment of the requisite fees, which fees was paid on 19/04/2023, meaning that the Memorandum of Appeal was deemed to have been filed on the date of that Ruling. Counsel thus denied that there was undue delay in filing the appeal after grant of leave, and also denied that the Memorandum of Appeal was filed out of time, clarifying that the invoice to pay for the typed proceedings raised on 17/10/2023, was paid on the same date. He deponed that the copy of the invoice dated 26/06/2025 was inadvertently exhibited to the initial Affidavit to Show Cause, and he prayed that the Court disregards it. He also denied that the letter dated 4/4/2025 was in any way triggered by filing of the Application for dismissal of the Appeal, and averred that the same was a follow-up on the delayed supply of the typed proceedings which delay is due to no fault of the Appellants, and has been caused by circumstances that are beyond the Appellants' control. He thus urged that the Appellants should not be prejudiced and denied justice due to the delay, and that it will be unjust if the Appeal is dismissed on that ground.

Determination

8. The issue for determination herein is **“whether this Appeal should be dismissed for want of prosecution”**.

9. Dismissal of Appeals for want of prosecution is governed by **Order 42 Rule 35(1) and (2)** of the **Civil Procedure Act** which 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”

10. It is therefore evident that **Order 42 Rule 35** envisages two situations for dismissal of an Appeal for want of prosecution. The first is where an Appellant, after directions have been given as contemplated under **Section 79B** of the **Civil Procedure Act**, and **Order 42 Rule 11** of the **Civil Procedure Rules**, fails to cause the matter to be set down for hearing within 3 months. The second scenario is where the Registrar lists the Appeal for dismissal where, 1 year after service of the Memorandum of Appeal, the Appeal has not yet been set down for hearing. In this matter, it is the second scenario that is in play.

11. In the case of **Ivita vs. Kyumbu [1984] KLR 441**, which was followed in the Court of Appeal case of **Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd [2004] eKLR**, the test to be applied when determining whether to dismiss an action for want of prosecution was explained in the following terms:

“3. The test applied by the Courts in an 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 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 in the discretion of the Court.”

12. In this case, the Appeal file was opened in April 2023. To date, more than 2 ½ years later, not even the Record of Appeal has been filed. The Appellants’ excuse for failing to cause prosecution of the Appeal, is alleged delay by the lower Court to supply typed proceedings. The Appellants’ Counsel has annexed a copy of the letter dated 6/06/2023 as evidence of his efforts to follow-up on the proceedings. However, I note that there is no evidence that the Appellants made any follow-up until the second letter 4/04/2025, almost 2 years later. It is also clear,

although the Appellants deny it, that this second letter was triggered by the Respondent's application seeking dismissal of the Appeal for want of prosecution, which Application was however inadvertently filed in a wrong file, and was the letter was clearly only written to shield the Appellant from the Appellant's anticipated imminent filing of the Application in this proper Court file.

13. It is therefore clear that the Appellants have offered no convincing explanation for the delay to prosecute the Appeal. Upon obtaining the order of stay of execution pending Appeal, with the knowledge that they were now safe from execution, the Appellants conveniently went to sleep and deliberately refrained from taking any steps to expedite prosecution of the Appeal. I would have therefore right away dismissed this Appeal for want of prosecution save that in the interest of justice, I will not do so at this stage and will give the Appellants' one last chance. I shall, instead, give strict timelines within which the Appellants must file their Record of Appeal, and cause the lower Court file to be forwarded to this Court to enable the Appeal be determined.

Final Orders

14. In the premises, I order as follows:

- i) The Appellants are given a period of **sixty (60) days** from the date hereof, to file the Record of Appeal, and to also cause the lower Court file to be availed or forwarded to this Court to facilitate admission of the Appeal so as to pave way for its hearing and determination.
- ii) The Appeal shall automatically stand dismissed, without any further reference to the Court or to the parties, should the Appellants fail to comply with order (i) above.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Muma for the Appellant

Eldoret High Court Civil Appeal No. E063 of 2023

Ms. Muriithi for the Respondent
Court Assistant: Brian Kimathi