



REPUBLIC OF KENYA



**Kipsang & another v Mbarwa (Civil Appeal E001 of 2023)
[2025] KEHC 18845 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E001 OF 2023
E OMINDE, J
DECEMBER 19, 2025**

BETWEEN

ELLY KIPSANG 1ST APPELLANT

LYDIA KIRWA 2ND APPELLANT

AND

ALAN MUGISA MBARWA RESPONDENT

RULING

1. By a Notice of Motion dated 25/11/2024, the Applicant seeks the following orders:
 1. That this Honourable Court be pleased to strike out the present appeal and all consequential orders and proceedings thereto for want of prosecution.
 2. That the costs of this application and of the entire suit be awarded to the Respondent/Applicant.
2. The Application is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 35(1) of the Civil Procedure Rules and “all other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the undated Affidavit sworn by the Applicant.
3. The Applicant deposed that he is the Decree-holder in the lower Court matter preceding this appeal having successfully instituted the civil suit against the Appellants in Kitale Chief Magistrate's Civil Case No. E397 of 2022, that the Appellants being dissatisfied by the consent judgment dated 11/10/2022 lodged the Memorandum of Appeal on the 26/01/2023 and that to date, the Appellants have failed to take necessary steps to prosecute the appeal diligently, that the Appellants have chosen to institute various applications rather than prosecute the appeal and that the Appellants were declared litigious by the Court due to the various applications placed before the Court by the parties.



4. He maintained that his Advocates on record have all along been pro-active in prosecuting the appeal, that ever since which is more than one (1) Year down the line, the Appellants have never taken any relevant steps and/or measures to have the appeal prosecuted to its finality and that neither him nor his Advocates have ever been served with any directions in as far as prosecution of the appeal is concerned.
5. He contended that the delay in prosecuting the appeal, which has been and remains unexplained, is inordinate, unreasonable and prejudicial to the interests of justice, that the prolonged pendency of this appeal has caused and continues to cause him significant prejudice and hardship and that the Appellant's lack of diligence indicates an abandonment of the appeal/ disinterest in pursuing it to conclusion.
6. He urged that it is in the interest of justice and fairness that the appeal be struck out for want of prosecution to prevent further delay and prejudice to him. He urged that there is no justifiable ground for such delay, refusal and/or neglect and that the Appellants have persisted in this neglect, refusal and/or failure to prosecute the appeal resulting in an abuse of the process of Court.
7. According to the Applicant, it is only just, fair and expedient that this suit be dismissed with costs to him.

Replying Affidavit

8. The application is opposed by the 1st Respondent vide her Replying Affidavit sworn on 29/11/2024.
9. She deposed that she filed an Appeal against the Judgment and Decree of Chief Magistrate Court at Kitale (Hon Duncan Kiptoo Mtai) Senior Principal Magistrate's Court delivered on 19/10/2022 in Kitale CMCC 397 of 2022 in Kitale High Court which suit was allocated the case number Kitale HCCA E001 of 2023 Elly Kipsang vs. Allan Mbarwa and that subsequently she filed an Application seeking stay of execution by way of committal to civil jail which was allowed by the Ruling of the Hon. Justice A.C. Mrima dated 1/02/2023.
10. She further deposed that the Memorandum of Appeal, Record of Appeal and the Application for stay was promptly served upon the Respondent's Advocates and that pursuant to an order by Hon. Justice A.C. Mrima made on 5/03/2023 the matter was transferred from Kitale High Court to Eldoret High Court.
11. She maintained that her Advocates wrote to the Deputy Registrar in efforts to have the file placed before the duty Court for directions on the appeal itself and an Application that had been made for Lydia Kirwa to be struck off the suit prior to its transfer to Eldoret, that the file was slated for mention before the Court on 27/03/2023 but the file was not availed in Court prompting her Advocate on record to write yet another letter requesting for a mention and that the said letter did not elicit a response prompting her Advocate on record to physically trace the file in the Eldoret High Court Registry upon which they were informed that the file was registered as Eldoret High Court Civil Appeal No.1 of 2024.
12. She further deposed that the registration of the transferred file to Eldoret occasioned a lot of confusion for reasons that: the Judiciary sometime in 2020 introduced the Judiciary E-filing system for the creation and submission of case documents electronically (online) to Court registries, that the cases filed online from 2020 bear the prefix (E) to their case numbers and can be tracked online through this number on the Court tracking system and the case presently registered as Eldoret HCCA No.E001 of 2023 is a different case from the matter herein.



13. She contended that the file transferred to Eldoret High Court registry from Kitale on 18/03/2023 did not bear the prefix E leading her Counsel on Record to believe that the file number KITALE E001 OF 2023 was the correct file number as ELDORET E001 of 2023 did not exist in the system. She contended further that contrary to the Respondent's assertions that she has not shown any intent of prosecuting the Appeal her Advocates on record did make diligent efforts to have the Appeal placed before the duty Court for directions on the Appeal as witnessed above in the movement of the file.
14. She further deposed that upon realizing the error that the Appeal is in fact registered as Eldoret HCCA 1 of 2023 they have made haste and filed their submissions and authorities and are waiting for the directions of the Court as to the hearing of the appeal.
15. She urged that any delay in the prosecution of this Appeal was wholly inadvertent and occasioned by circumstances beyond her control and that the present Application by the Respondent will only serve to delay the hearing and determination of this present appeal.
16. She further deposed that she is ready and willing to abandon all interlocutory applications filed by her in the view of expediting the hearing and determination of the appeal and added that this Honorable Court is called upon by *the Constitution*, Article 159 to do substantive justice without undue regard to technicalities.

Submissions

17. The Application was canvassed vide written submissions. The Applicant filed Submissions dated 10/07/2025 while the 1st Respondent filed Submissions dated 4/07/2025.

The Applicant's Submissions

18. Counsel for the Applicant cited Order 42 Rules 35(1) and (2) of the Civil Procedure Rules and submitted that the above provisions do envisage two scenarios for the dismissal of an appeal for want of prosecution, that the first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules and that the second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, and the registrar shall on notice to the parties list the appeal before the judge for dismissal. Counsel added that the current application relies on the second limb.
19. Counsel further submitted that it is not in doubt that the Memorandum of Appeal was filed on 26/01/2023 by the Appellants and that the same was never served upon the Respondent. Counsel pointed out that the Respondent came to learn of the same when the same was served upon him as a Record of Appeal on 28/03/2023.
20. Counsel questioned whether this delay has been sufficiently explained. According to Counsel, what has been elaborated are but only excuses that are meant to delay the matter further. Counsel argued that as a matter of fact, the Appellants in quick haste and as a knee-jerk reaction rushed to file submissions in respect to the main appeal. Counsel why the Respondents were unable to move the Court appropriately is yet again for this Court's speculation.
21. Counsel observed that Appellants vide the replying affidavit dated 29/11/2024 at paragraph 7 do contend that they moved the deputy registrar vide a letter dated 17/04/2024 to set down the appeal for directions. Counsel added that this was done a record one year later after the Memorandum of Appeal was filed.



22. Counsel further observed the Appellants at paragraph 10 do aver that the confusion was brought about by the improper registration of the Eldoret suit, having been transferred from Kitale High Court. Counsel questioned whether this means that the Appellants having filed a Memorandum of Appeal on 26/01/2023 had improperly filed the same and also questioned how then the Appellants were able vide the letter dated 17/04/2024 to capture the correct file number and move the deputy registrar for directions.
23. Counsel also questioned how the Appellants were able to file this appeal and yet they did not know what number it was. Counsel urged that as the Appellants, it is assumed that they had duly paid for the Appeal and that an invoice for the same generated from the Judiciary E-filing system; the same system which they seek to fault at paragraph 10 of the Replying Affidavit.
24. From the above, Counsel urged that the Appellants have not clearly demonstrated why the delay and that what has been presented by way of Affidavit is only but lamentations against the Judiciary E-filing system. Counsel maintained that being a Court of record, this Court is only guided by issues of fact buttressed by the law.
25. Counsel contended that the Appellants by their own conduct have demonstrated dishonesty before the Court while under oath. According to Counsel this Affidavit is improper, bad in law and amounts to perjury. In this regard Counsel relied on the case of Lucy Wanjiru Njunge & 2 others vs. Job Mwangi Macharia & 9 others (2005) eKLR.

The 1st Respondent's Submissions

26. Counsel for the 1st Respondent submitted that contrary to the Applicant/Respondent's assertions that there has been no intent at prosecuting the Appeal, the Respondent/Applicant did make diligent efforts to have the Appeal placed before the duty Court for directions on the Appeal. Counsel urged that the Respondent/Appellant was only an unwitting victim of circumstances as enumerated above and as supported by the evidence placed before the Court.
27. Counsel submitted that the Respondent/Appellant upon realizing the error that the Appeal is in fact registered as Eldoret HCCA 1 of 2023 they has made haste and filed their submissions and authorities and are waiting for the directions of the Court as to the hearing of the appeal.
28. Counsel maintained that any delay in the prosecution of this Appeal was wholly inadvertent and occasioned by circumstances beyond the control of the Appellant. Counsel argued that draconian measure such as the striking out of the Appeal would unjustly remove the Appellant from the altar of justice and occasion prejudice on the Appellant and Interested Party. Counsel urged that Appeal raises very cogent issues on how a party not a party to the suit could enter into a consent on the same and the same irregular consent adopted as a judgement of the Court.
29. Counsel further submitted that in considering whether to dismiss this Appeal for want of prosecution the Court should be guided by the fundamental principles of justice as are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution* that Courts should endeavour to do substantive justice to parties without undue regard to procedural technicalities.
30. Counsel added that Article 50 coupled with Article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court. Counsel relied on the case of John Nahashon Mwangi vs Kenya Finance Bank Limited (in Liquidation) [2015] eKLR.



31. In determining whether this Appeal has met the threshold to warrant it being dismissed for want of prosecution, Counsel urged that the Honourable Court to be persuaded by the words of Chesoni J (as he then was) in the case of *Ivita v Kyumbu* (1984) KLR 441 quoted with authority in the case of *Mwangi aias Lydia Njeri Ndichu v Kibui & another* [2025] KEELC 4907 (KLR).
32. Counsel further submitted that Sections 1A and 1B of the *Civil Procedure Act* also provide for the overriding objective of the *Civil Procedure Act* which is the just, expeditious, proportionate and affordable resolution of civil disputes. Counsel urged that certainly, it is conceivable that this suit can be disposed expeditiously in a manner that would be just to both parties. Counsel added that Appellant, mindful of the delay, has filed and served its memorandum of appeal, record of appeal, submissions and digest of authorities.
33. Counsel maintained that any likely prejudice to the Applicant arising from any further delay can be mitigated through appropriate directions as to the expeditious prosecution of the case, as well as an award of costs.
34. Counsel urged that the Appellant has sufficiently explained the delay in prosecution of the appeal, that removing a litigant from the seat of justice is a draconian measure to be used sparingly and lastly that if the appeal is struck out the Appellant would suffer prejudice. Counsel submitted that as such the application for dismissal of the appeal is unmerited and should be dismissed. Counsel added that in tandem the Court should issue directions for expeditious disposal of the appeal.

Determination

35. The sole issue that arises for determination in this Application is whether this Appeal should be dismissed for want of prosecution and having considered the depositions made by both parties as well as the attendant submissions, I now hereby give the following orders in the interest of the substantive justice of this case. As has been undertaken by the Appellant that she is ready to and willing to abandon all interlocutory applications filed by her in the view of expediting the hearing and determination of the appeal, all and every pending interlocutory injunctions in this matter are now hereby marked as abandoned. It is noted that it is common ground that the Appellant has already file submissions with respect to the main appeal. In this regard, these submissions if not already served upon the Respondents are to be served within the next 21days. The Respondent is to file and serve their submissions within 14 days of service. The matter is to be mentioned on 19th February 2026 to fix a Date for Judgement.

READ DATED AND SIGNED AT ELDORET ON 19TH DECEMBER 2025

E. OMINDE

JUDGE

