

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA (P), MUMBI NGUGI & ODUNGA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E359 OF 2023

BETWEEN

**FREDERICK OLONANA TOME.....1ST APPELLANT
MRS. GERISHONE OLE TOME.....2ND APPELLANT**

AND

**SHADRACK OLTETIA OLE TOME.....1ST RESPONDENT/APPLICANT
TABITHA MATEYIAN TOME.....2ND
RESPONDENT/APPLICANT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

*(Being an application for dismissal of the appeal for want
of prosecution in Civil Appeal No E359 of 2023)*

RULING OF THE COURT

1. The respondents' application dated 1st October 2025 is brought under section 3A of the Civil Procedure Act, Order 42 rule 35(2) of the Civil Procedure Rules, rule 49 of the Rules of this Court, Article 159(2) of the Constitution, as well as section 3A and 3B of the Appellate Jurisdiction Act.
2. The respondents seek dismissal and/or striking out for want of prosecution of the appeal due to the appellants' failure to comply with this Court's directions regarding filing of submissions. The respondents also pray that the stay of

execution orders granted by the High Court on 17th
December

2015 in the matter that gave rise to this appeal be vacated forthwith.

3. In the affidavit sworn by the 1st respondent in support of the application, it is contended that the appeal was lodged on 25th May 2023 and it relates to a land dispute that had been before the High Court since 5th October 1981; that the appeal emanates from a judgment that was delivered on 9th June 2015 in favour of the respondents; and that on 17th December 2015 the High Court granted stay of execution of the judgment pending hearing and determination of the appeal.
4. The 1st respondent further states that on 9th February 2024 this Court directed parties to file and serve written submissions within 30 days but the appellants have refused, failed and/or neglected to do so, despite several reminders; that the respondents filed and served their submissions and list of authorities on 10th December 2024; that the inordinate delay on the part of the appellants in filing the submissions has caused the Court not to list the appeal for hearing, which is prejudicial to the respondents. The respondents contend that the continued pendency of the appeal unjustly denies them enjoyment of the fruits of the High Court

judgment. **Ms.**

Omondi, learned counsel for the respondents, urged us to find that the appellants had occasioned inordinate delay in the prosecution of the appeal and grant the orders as sought.

5. The appellants did not file any response to the application, but their advocate, **Mr. Amuga**, made brief oral submissions in opposition thereto. Counsel submitted that the appeal was lodged in the year 2023; that the fixing of hearing dates is a function of the Court; that failure to file written submissions does not constitute a ground for dismissal of an appeal for want of prosecution; that an appeal can be listed for hearing whether or not parties have filed submissions; that there are many other older appeals than the present one that have not been fixed for hearing because of work backlog in the Court; and the appeal remains in the normal queue because it is not yet due for hearing. Counsel cited this Court's decision in **Airtel**

Networks

Kenya Limited vs Nyutu Agrovet Limited [2021] KECA 177 (KLR), where it was held that failure or delay in filing submissions is not a ground for dismissal of an appeal for want of prosecution. He urged us to dismiss the application.

6. We have considered the application and the brief submissions by counsel.

7. For starters, the operations and functions of this Court, including the listing of appeals and applications for hearing, are not guided by the provisions of the Civil Procedure Act and the Rules made thereunder, except where otherwise stated. This Court is guided by the Appellate Jurisdiction Act and the Court of Appeal Rules, 2022. The provisions of the Civil Procedure Act and Rules cited by the respondents are not relevant.

8. Turning to the substance of the application, in **Airtel Networks Kenya Limited vs Nyutu Agrovet Limited**, supra, this Court considered a similar application, and in dismissing the same held, *inter alia*:

“13. ... We are not persuaded by the applicant that delay in filing written submissions against the backdrop of the filed list of authorities on record stood in the way of hearing and determination of the appeal before this Court. We hasten to observe that, from the reading of Rules 100 and 104(d) of the Rules of this Court, written submissions are neither obligatory nor a prerequisite to the hearing and determination of an appeal under the Act and the Rules. Furthermore, it is acceptable, as a matter of practice of this Court, for a party to elect to make oral submissions in person or by counsel at the hearing. On the other hand, written submissions are desirable as a practical option in cases where parties do not wish to appear either in person or by counsel. Accordingly, we find as a fact and hold that the delay on the respondent’s part in filing and serving their written submissions did not in any way prejudice the expeditious hearing and determination of the appeal.

Neither would such delay amount to disinterest or want of prosecution on account of which dismissal may be justified.”

9. We fully endorse the above finding and adopt it entirely in this application. Consequently, we hereby dismiss this application. We make no order as to costs.

Dated and delivered at Nairobi this 23rd day of January 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR.