

**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MERU**  
**CIVIL APPEAL NO. E046 OF 2024**

**EDWARD MURIUKI MUTWIRI.....APPELLANT/RESPONDENT**

**VERSUS**

**MYCREDIT LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. For determination is the Notice of Motion dated 27/10/2025 pursuant to **Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 20, Order 42 Rule 35 (1) & (2) and Order 51 of the Civil Procedure Rules**, seeking that:

- 1. The Appeal herein be struck out and/or dismissed for want of prosecution under the Laws.**
- 2. The stay of execution granted in this matter by the lower court be lifted.**
- 3. Leave be granted to the Respondent/Applicant to execute the Decree issued in MCCC/E106 of 2023.**
- 4. The Honourable court make such further orders as it deems fit.**
- 5. The costs of this application be provided for.**

2. The application is predicated on the grounds that the Appellant has failed to take any active steps or directions to prosecute this appeal despite

having filed it on 2/4/2024, and that inordinate and inexcusable delay is prejudicial to the Applicant. The continued pendency and delay of the appeal is an abuse of the court process, and it is in the interest of justice that it is struck out.

3. The Appellant swore a replying affidavit on 17/12/2025 in opposition to the application. He avers that he will file a supplementary record of appeal upon receipt of the decree, which has not been supplied by the lower court, despite numerous follow ups. He is advised by counsel that procedural lapses occasioned by the court registry should not be visited upon an innocent litigant, particularly where no prejudice is shown, and the appeal raises substantive issues for determination. He believes that striking out the appeal in the circumstances would be contrary to Article 159 (2) (d) of the Constitution, which mandates courts to administer justice without undue regard to procedural technicalities. The application is calculated to defeat his rights to appeal, delay the determination of the dispute and unjustly drive him away from the seat of justice.

4. The application was directed to be canvassed by way of written submissions, but none were filed by counsel.

## Determination

5. Having considered the application and the replying affidavit, I find the issue for determination to be whether the appeal ought to be struck out for want of prosecution.
6. The considerations to be made in determining whether or not to dismiss matters for want of prosecution were deliberated in *Ivita v Kyumbu (1975) EA 441, 449*, where Chesoni J. held as follows: “... ***So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.....The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...***”
7. The Applicant contends that the appeal is an impediment to the enjoyment of the fruits of its judgment, whereas the Appellant asserts that the delayed prosecution of the appeal is attributable to the trial court’s failure to supply him with a decree, despite numerous requests.
8. The Appellant filed the Memorandum of Appeal and the Record of Appeal on 2/4/2024 and 3/5/2024, respectively. The delay in prosecuting the appeal is hinged on the unavailability of the trial court’s decree. I note that the impugning judgment has been availed, and the wording of **Order 42 Rule 13 (4) (f) of the Civil Procedure**

**Rules** is permissive in that the Appellant may avail either the judgment, order or decree appealed from.

9. Needless to state, directions on the hearing of the appeal pursuant to **Order 42 Rule 13 of the Civil Procedure Rules** have not been taken.

10. The power to strike out an appeal is draconian and it must only be exercised sparingly in the clearest of cases, because it arbitrarily drives a litigant from the seat of justice, without a hearing. In my candid view, it would be a travesty of justice to summarily strike out the appeal, particularly when the Record of Appeal has been filed.

11. In the spirit of **Articles 50 and 159 (2) (d) of the Constitution** and the overriding objectives under **Sections 1A and 1B of the Civil Procedure Act**, I find that the application dated 27/10/2025 is in want of merit and it is hereby dismissed.

12. Appellant to take steps towards prosecution of the appeal within the next 30 days.

13. Mention for further directions on 20/5/2026

**DATED AND DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF APRIL, 2026.**

**S.M. GITHINJI- JUDGE**

**13/4/2026**

**In the presence of:-**

Ms. Nakandi for the Applicant/Respondent

Mr. Bosire for the Appellant