



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E097 OF 2023

EDWIN MURIITHI KINYUA.....APPELLANT
VERSUS
MARTHA KANINI & CATHERINE NJERI KANINI (Suing as the legal
representatives of the estate of PETER MURIMI NJENGA (Deceased).....
.....RESPONDENT

RULING

[1] The applicant filed the Chamber Summons dated 3rd July, 2024 seeking the following orders:

1. That the Appeal filed herein be dismissed for want of prosecution.
2. That the Costs of this application be provided for.

[2] The application is based on the grounds on the face of the application and the supporting affidavit of the applicant and supported by a supporting affidavit setting out the applicant's case is that the Appellant/Respondent herein filed a Memorandum of Appeal on 21.11.2023. It has been 7 months and 11 days since the Memorandum of Appeal was filed yet the appellant through their advocate has neglected/refused and or failed to take any reasonable steps to have the same fixed for directions and to enable parties herein prosecute the appeal.

[3] The applicant avers that the said Appellant's neglect, refusal and/or otherwise failure to prosecute this Appeal amounts to an abuse of the process of this Honourable Court and is further indication of the Appellant's disinterest in the same. The inordinate delay by the Appellant/Respondent is cultivated towards defeating the ends of justice and is highly prejudicial to the respondent. Lastly, the applicant avers that in the interest of justice that the Chamber Summons application filed appurtenant hereto be allowed and the Appeal be dismissed for want of prosecution.

- [4] The Appellant/respondent deposed to a Replying Affidavit opposing the dismissal of the appeal for want of prosecution for the reason that the delay was occasioned by a delay by the court registry to avail the typed proceedings and a copy of the judgement despite numerous follow up formerly in writing request and protest letters and we pray that the Notice to show cause be vacated and the appeal be canvassed and determined on merit. The Appellants instituted this Appeal **HCCA E097 of 2023** vide a Memorandum of Appeal dated 21/11/2023 against the whole of the judgment of the Honourable F. Mutuku (Ms) Principal Magistrate delivered at Wanguru on the 234 October 2023 in Wanguru CMCC 186 of 2018. The directions on the same had not yet been taken. The file had been handled by previous advocates who have since left the firm and I am catching up and putting our house in order.
- [5] The applicant avers that the appellant is desirous to prosecute this appeal to its logical conclusion. The Appellant contends that the delay and/ or failure to prosecute the Appeal was not deliberate or wilful on the part of the Appellant. Lastly, without prejudice to the forgoing, the Constitution of Kenya 2010 provides for fair administration of justice to all parties irrespective of their status under Article 159(1) and in addition to and without prejudice to the foregoing, the appellant is aware that the appeal is yet to be admitted in accordance with Section 79B of the Civil Procedure Act and without it being so admitted, no step can be undertaken in the appeal by the Appellant.

Respondent submissions

- [6] The Respondents filed the present application to dismiss the appeal. The appellant has not taken any step towards prosecution of the appeal; the only step taken was by the respondents when they filed this application for dismissal of the appeal for want of prosecution.
- [7] The respondent submits that there is no evidence that the appellants and their advocate made any efforts to obtain certified copy of proceedings for preparation of the record of appeal. In addition, there is no evidence that besides the proceedings and the judgment, counsel ever applied for a certified copy of the decree. The appellant is guilty of laches. ***Benjoh Amalgamated Limited & Another v. Kemya Commercial Bank Limited*** (2014) eKLR that a claim maybe barred by unconscionable delay is cited for support on submission that the appellant is guilty of laches.

Issue

[8] Whether the Appeal filed herein be dismissed for want of prosecution.

Analysis

[9] Order 42 Rule 35 of the Civil Procedure Rules provides for dismissal of appeals for want of prosecution. Rule 35(1) permits dismissal where directions have been given and the appellant fails to set down the appeal for hearing within three months. Rule 35(2) empowers the Registrar to list the appeal before a judge in chambers for dismissal if no action is taken within one year after service of the memorandum of appeal.

[10] Further, Section 79B of the Civil Procedure Act requires that an appeal from a subordinate court be placed before a judge for admission and summary rejection, if appropriate.

[11] The Memorandum of Appeal in this case was filed on **21st November, 2023**. The present application was filed approximately seven (7) months thereafter. First, directions under Order 42 Rule 13 of the Civil Procedure Rules have not been taken. Consequently, Rule 35(1) is not applicable since it contemplates dismissal after directions. Second, under Rule 35(2), dismissal is contemplated where one year has lapsed after service of the Memorandum of Appeal without action being taken, which statutory period has not lapsed.

[12] Further, under Section 79B of the Civil Procedure Act, an appeal must first be placed before a judge for admission. The Appellant cannot fix the appeal for directions before compliance with this procedural step.

[13] On the question whether the delay is inordinate, a period of seven months, though not to be condoned cannot in the circumstances of this case be termed inordinate. The explanation given delay in obtaining proceedings and transition of advocates has not been controverted by contrary evidence.

[14] The principles governing dismissal for want of prosecution were articulated in *Ivita v Kyumbu* (1984) eKLR, where the Court held that the test is whether the delay is prolonged and inexcusable, and if it is, whether justice can nonetheless be done despite the delay.

[15] The Court accepts that justice demands that parties be heard on merit unless clear prejudice is demonstrated but in this case, no specific prejudice beyond general inconvenience has been shown. The Court is mindful of its judicial responsibility to

respect and uphold the right to access to justice under article 48 of the Constitution as a rule of law principle in enforcing the right of every person to a fair hearing in accordance with Article 50 of the Constitution. Moreover, Article 159(2)(d) of the Constitution enjoins courts to administer justice without undue regard to procedural technicalities. While this does not excuse indolence, dismissal at this stage would be prejudicial to the appellant right to be heard. The Court does not consider that the threshold for dismissal of the Appeal for want of prosecution has been met.

[16] The prejudice to the respondent for the delay in the conclusion of the case is such as may be compensated by an award of damages.

ORDERS

[17] Accordingly, for the reasons set out above, the application dated 3/7/2024 for dismissal of the appeal is declined.

[18] However, the Respondent/applicant is entitled to costs of the application to be paid by the Appellant.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MARCH 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Msafiri for the Respondent.

Ms. Kanini for Ms. Nyaga for the Appellant.