REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC APPEAL NO. E009 OF 2022

ESTON NJERU MUNYI .... 1ST APPELLANT

FREDRICK KITHU NJIRU .... 2ND APPELLANT

ANTONY NDII .... 3RD APPELLANT

VERSUS

JAMES NJIRU MWANGARIO .... RESPONDENT

RULING

1. By a motion on notice dated 19.12.2023, the applicant – JAMES NJIRU MWANGARIO – asks for the following orders:

   (1) That the appeal herein be dismissed with cost for want of prosecution.

   (2) That costs of the application be provided for.

2. The application is expressed to be brought under Order 42 Rule 35 of the Civil Procedure Rules. The grounds on which it is anchored are, inter alia, that the memorandum of appeal was filed in court on 8.7.2022; that the appeal was admitted on 16.11.2022 and the appellant was directed to prepare a record of appeal; that the matter was mentioned on 19.12.2022 to confirm whether the appeal record had been filed; that the record had not been filed and there have been several other mentions to confirm the filing but the record has never been filed; and that the delay caused by the respondents is unreasonable and prejudicial to the applicant.
3. The motion came with a supporting affidavit which, in substance, is broadly similar to the grounds on which the application is premised.
4. The application was responded to vide a replying affidavit dated 2.2.2024 filed in court on even date. The respondents denied that they deliberately failed to prosecute the appeal. They deposed, inter alia, that there was an oversight on the part of their counsel which caused the said counsel not to read the court's email dated 16.11.2022. The counsel

therefore remained unaware that the appeal had been admitted. The respondents asked that they be given a chance to ventilate their appeal. The also said they were facing financial constraints at the time.

5. The motion was canvassed by way of written submissions. The appellants' submissions are dated 18.10.2024. According to the appellant's, directions given by the court were not known to them as they have never attended court. To the appellants too, the applicant will suffer no prejudice if the court directs that the appeal be heard. They submitted that they have explained the delay well and the mistake of their counsel in not seeing the email sent should not be visited on them. The appellants cited and quoted the case of **John Njagi Karua vs Njiru Gatumu [2021] eKLR** where, according to them, the court declined to dismiss the appeal for want of prosecution despite prolonged delay. The case of **Kikumu & Another vs Kariuki & 2 others [2024] eKLR** was also cited and quoted. All this was done to emphasize the need to exercise discretion in favour of hearing rather than dismissal.

6. The applicants' submissions are dated 28.3.2024 and were filed on 17.4.2024. It was pointed out that the appeal was admitted on 16.11.2022 and a mention date of 19.12.2022 was given to confirm whether the record of appeal had been filed. There were several other mentions thereafter for the same purpose but all this time the record of appeal was never filed. The appellants were faulted for saying there was no service of the mention notice on them yet the record shows there was service. According to the applicant, the appellants have all along been aware of what has been happening. It was submitted that the appellants themselves should have been making efforts to establish the status of their appeal in court. The applicant was said to have been attending court and has therefore been incurring costs and it would be wrong to say that no prejudice would be occasioned to him. It was stated further that the parties case in the lower court remains unheard because of the pending appeal which the appellants seem not to be interested in. The court was urged to dismiss the appeal.

7. I have considered the application, the response made to it, and the rival submissions. The issues for consideration are whether the merits of the application have been demonstrated and whether the respondents in the application, who are essentially the appellants in this appeal, have explained themselves sufficiently well to justify continuity of their appeal in this court.

8. First, a look at what the court record shows. The memorandum of appeal was received on 8.7.2022. On 16.11.2022, the appeal was admitted and the court directed that the record of appeal be filed. To confirm such filing, the mention date of 19.12.2022 was given. On 19.12.2022 neither the appellants nor their counsel appeared in court. The respondent's counsel sent another counsel to hold brief. The court noted that the record of appeal had not been filed and another mention date – 2.3.2023 – was given. On 2.3.2023, there was again no appearance from the appellant's side and the record of appeal had not yet been filed. On the respondent's side, there was counsel holding brief. The court gave the matter the date of 15.5.2023 and

again on that date there was no appearance from the appellant's side. There was a counsel holding brief on the respondent's side. Still, even on this date, the record of appeal had not been filed. Another date, this time 25.9.2023, was given and when that date came, again there was no appearance on the appellant's side. Counsel for the respondent was in court. There was still no record of appeal. The court gave yet another date, 23.11.2023. That date also arrived. As had now become usual, there was no appearance on the appellant's side and the record of appeal had not also been filed. Counsel for respondent was in court and she intimated her desire to file an application for dismissal of the appeal for want of prosecution. It is against this background that the application now under consideration was conceived and filed.

9. Records show that when the application was filed and served, counsel for the appellant became active and started appearing either by himself or through other counsel. The appellants also started showing up.

10. While the appellants and/or their counsel would wish to create the impression that they were unware of what was going on, court records show well that that is not really the case. For instance, for the mention date of 15.5.2023, the appellant's counsel was served with a mention notice dated 7.3.2023 which is duly stamped as received by counsel's firm. For the mention date of 23.11.2023, the counsel for the appellant was again served. There is a mention notice to that effect dated 27.7.2023 and the notice is duly stamped as received by the counsel's firm. The affidavits of service showing such service are in the court file.

11. The appellant's said they were facing financial constraints. Pertinently, in **Francis Mwai Karani vs Robert Mwai Karani; Civil Appeal No. 246 of 2006 (NYR.14/2006) [2007] eKLR,** the Court of Appeal sitting at Nyeri delivered a ruling that started this way: "*I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason to extend time to lodge an appeal.*"

While the ruling relates to an application to file an appeal out of time, it is to be appreciated that such an excuse can be raised and indeed is often raised, in relation to many court processes. If our courts form the habit of accepting such excuses easily, particularly from parties who are not yet lawfully accepted as paupers, that can become a major cause of delay or even stalling of proceedings. This excuse by appellants does not appear convincing to me and I decline to accept it. They had a counsel on record who could appear in court to explain what was happening. The counsel did not appear.

12. Further, the appellants were duty-bound to be active in following up their matter to know how it was going on. The matter belonged to them, not to their advocate, and they therefore needed to show interest to ensure that all was well. In **Rajesh Rughani vs Fifty Investments Limited & Another: Civil Appeal No. 80 of 2007, Nairobi [2016] eKLR** the appellant was contesting the dismissal of his suit for want of prosecution. The superior court below (O. K. Mutungi, J) had rejected the appellant's argument that seemed to cast

blame on his counsel. In rejecting that argument, the superior court below had observed:

> ***"… The above line of t thinking no longer holds water and in my view it is the duty and right of any litigant to put pressure on his counsel to have the suit prosecuted the earliest possible. If counsel cannot rise to the task, the plaintiff has the power to dismiss such advocate and get services of another… It must always be remembered it is the plaintiff's suit, not the advocates, which risks dismissal for want of prosecution."***

13. While upholding the dismissal in the matter above, the Court of Appeal expressed itself thus:

> ***"There is no evidence on the action taken by the appellant as the litigant and owner of the suit; all the appellant did was to change advocate in May 2005 after the delay; there is no explanation for inaction on the part of the appellant himself as the litigant who took the risk that his suit could be dismissed for want of prosecution."***

14. My considered view is that both the appellants and the counsel manifested dilatory or tardy conduct in handling the

matter. The explanation given by them is inexcusable. The respondent was in fact more active than them in ensuring that the appeal moved forward. In every instance however, the appellants failed him. And as this interlocutory appeal delays here in court, the lower court matter from which the appeal arose also continues to delay. A cardinal requirement of the overriding objective of all court process is expeditious hearing of cases. The appellants have fallen short of this objective.

15. The appellants also sought to justify the desired outcome they are looking for on the basis of this court's decision in a ruling delivered on 22.2.2024 in the matter of **Charity Marigu Kikumu & Another vs Epaphius Kariuki & 2 others [2024] KE ELC 1617 [KLR]**. The ruling related to an application to dismiss a suit for want of prosecution. A crucial consideration in making decision in that matter was that the requisite period of twelve (12) months necessary for an applicant to make an application for dismissal had not yet run its full mile. The court found as a fact that the period that had lapsed was eleven (11) months and fourteen (14)

days. This was some 16 days shy of the required period of twelve (12) months.

16. It is clear therefore that what the appellants are calling *"prolonged delay"* was actually not that kind of delay. It was more correctly what one would call "i*nsufficient delay."* In the relevant part of the ruling, this is how the court expressed itself:

> **"However, I do find that the delay of 11 months though inordinate given that the court had to, on its own motion, move the parties for directions in the matter, it does fall below the time period provided in law."**

17. My considered view therefore is that the appellants herein cannot find succor in that ruling. It is clear from the ruling that time was not yet ripe for application for dismissal to be filed.

18. The upshot, in light of the foregoing is that the applicant has demonstrated well the merits of his application while the explanations given by the appellants, as respondents in the application are insufficient, wishy-washy and/or wanting in

believability. The appeal herein is therefore dismissed with costs to the applicant.

RULING DATED, SIGNED and **DELIVERED** in open court at **Kitui** this **28th day of April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

Court Assistant – Musyoki

Appellant – absent

Respondent – absent

No counsel present

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI