

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO 43 OF 2020

STEPHANUS PETRUS

KRUGER.....APPELLANT/RESPONDENT VERSUS
CHRISTIAN ROTH AND CLAIRE MATHIJSEN ROTH T/A SOCIETE CIVILE
IMMOBILIERE DES
PHILOSOPHES.....RESPONDENT/APPLICANT

Coram: Before Justice R. Nyakundi
M/s Kalya & Co Advocates
M/s Nyairo & Co Advocates

RULING

1. What is pending before this Honourable Court for determination is a Notice of Motion Application dated 4th December 2024 premised under sections 1A, 3, 3A of the Civil Procedure Act, Order 17 rule 2(1) and 2(3), Order 51 rule 1 of the Civil Procedure Rules 2010 in which the Applicant is seeking the following orders: -
 - a. *The appellant/applicant's suit be dismissed with costs to the respondent for want of prosecution.*
 - b. *The appellant/applicant be condemned to pay costs of this application and for the entire suit.*
2. The Application is premised on the following grounds on the face of it among others: -
 - a) The appellant/applicant filed this suit against the Defendant on 29th June, 2021.
 - b) That this is a fairly old case.
 - c) That prior to this appeal the applicant/appellant had 3 years to file his application for costs, and in the three years he made no efforts to file the same and only decided to file it a day after the matter was

set down for hearing of the main suit and the court rightly dismissed the said application thus this appeal has no chances of success.

- d) This matter has been pending for over three (3) years without any appropriate action from the appellant.
 - e) The appellant/applicant and or their counsel have failed, refused, declined and or otherwise neglected to take any necessary legal steps towards the prosecution of this matter.
 - f) The delay to prosecute this matter is inordinate and inexcusable.
 - g) It is impossible to have a fair trial after such a long and undue delay.
 - h) The failure by the appellant/applicant and or their counsel to take the necessary steps towards the expedient prosecution of this matter is an abuse of court process.
 - i) The pendency of this matter is prejudicial to the respondent.
 - j) It is just, expedient and in the interest of justice that this application be allowed and the Plaintiffs' suit be dismissed for want of prosecution with costs to the Defendant/Applicant.
3. The Application is supported by the annexed affidavit dated 4th November 2024 sworn by Christian Rotich, the Respondent/Applicant herein who deponed as follows: -
- a. That I am one of the respondents herein hence duly authorized and competent to make and swear this affidavit.*
 - b. That the appellant/ applicant filed this suit against the Defendant on 29th June, 2021.*
 - c. That this matter was last in court on 14th December, 2021 before Hon Justice R. Nyakundi, where it was coming up for ruling but the ruling was not delivered as the court was not sitting.*
 - d. That to date, the appellant/ applicant has not moved the court in any way pertaining this matter.*

- e. *That it is now over three (3) years since the suit was last in court and the appellant/ applicant has not taken any steps to prosecute and or set down the case for hearing.*
- f. *That there has been a culpable, flagrant and inordinate delay on the part of the appellant/ applicant's counsel in prosecuting this suit hereby causing extreme anxiety to the Defendant.*
- g. *That it is impossible to have a fair trial after such a long, undue and inordinate delay.*
- h. *That in the circumstances, it is in the interest of justice that litigation has to come to an end.*
- i. *That the delay occasioned by the appellant/ applicant's counsel to prosecute this suit offends the Overriding Objective of this Honourable Court in facilitating the just, expeditious and efficient disposal of cases.*
- j. *That I swear this affidavit in solemn support of the application now before this Honourable Court.*
- k. *That for the reasons aforesaid, I believe that it is only just, fair and expedient that this suit be dismissed for want of prosecution.*
- l. *That from the foregoing and in view of the above, this suit has been rendered an abuse of the process of court hence pray that the same be dismissed with costs to the defendant for want of prosecution.*
- m. *That what is deponed to herein is true to the best of my knowledge, information and belief.*

Replying Affidavit

- 4. The Application is opposed vide a Replying Affidavit dated 22nd November 2025 sworn by Alfred King'oina Nyairo who deponed as follows: -
 - a) *That I am an Advocate of the High Court of Kenya and practicing as such in the firm of M/s Nyairo and Company Advocates who have the conduct of this matter for and on behalf of the Appellant/Respondent hence competent to swear this affidavit.*

- b) *That I have read and understood the contents of the Respondent/Applicants' application dated 4th November, 2024 and I now wish to respond as hereunder;*
- c) *That the Respondent's application seeking dismissal of the appeal for want of prosecution is fundamentally misconceived, it is a waste of precious judicial time and should be rejected.*
- d) *That the application is premature, it is orchestrated with malice with the sole intention of defeating the cause of justice in total contravention of Article 50 of the Constitution of Kenya, 2010 as to the right to be heard.*
- e) *That the application is in total violation of Section 79 of the Civil Procedure Act for want of admission of the appeal and directions by this Honorable court for the appeal to be ripe for such action. That this appeal is yet to undergo the preliminary/administrative stage, and therefore there is nothing capable of being dismissed.*
- f) *That the application is premature and unfounded on the law as the Memorandum of Appeal has not yet been served upon the Respondent because service ordinarily follows admission of the appeal and issuance of directions by the court as is provided under Order 42 Rule 12 of the Civil Procedure Rules, 2010 that;*
- g) *That this court having not admitted the appeal to hearing and directions given as to how the appeal is to be heard, the question of delay in prosecution of the appeal does not arise and therefore the application is premature, misplaced, and seeks to dismiss a matter that has not yet properly crystallised before the court.*
- h) *That the Appellant is still keen on prosecuting the appeal and has indeed been making every effort to have the appeal progressed by pursuing proceedings from the trial court but the Appellant/Respondent's efforts have been rendered futile due to*

pressure of work on the court staff secretaries who type proceedings and the court should take judicial notice of that fact.

- i) That the Appellant/Respondent's counsel has on several occasions made physical visits to the court registry, deputed his staff to following up on the proceedings to no avail as the registry staff have constantly advised us that the proceedings are not ready as the lower court matter, **ELDORET CMCC NO 1308 OF 2016; Christian Roth and Claire Mathijssen Roth T/A Societe Civile Immobiliere des Philosophe VS Stephanus Petrus Kruger**, is still active in court and whenever the file is taken for typing, it is usually removed from the queue when the hearing date approaches and that that we will be notified once the typed proceedings are ready for collection.*
- j) That several letters to court requesting for the typed proceedings and the ruling appealed from for purposes of compiling the Record of Appeal have all elicited no positive response prompting/necessitating physical visits.*
- k) That the failure to progress the appeal even to get to the administrative stage in line with section 79B of the Civil Procedure Act has largely been contributed to by fact that the lower court matter is still active and in fact currently has a mention date for 24th February, 2026.*
- l) That the preparation and/or typing of proceedings is the preserve of the court and the Appellant/Respondent cannot be punished if there is any delay in delivering the typed proceedings and ruling.*
- m) That the situation the Appellant/Respondent and the court is in is an administrative crisis, which any serious legal practitioner should understand and cannot be used to remove the Appellant/Respondent from the seat of justice as purported through an application for dismissal for want of prosecution.*

- n) *That this appeal has been mentioned before the Deputy Registrar on several occasions, on 24th July 2024, 27th November 2024, 20th March 2025, 12th June 2025, 30th September 2025 and 9th October 2025 to confirm filing of the Record of Appeal and the obtaining position has always been communicated to the Deputy Registrar and in fact the Appellant/Respondent sought the Deputy Registrar's intervention to assist in fast tracking the typing of proceedings hence the numerous mention dates.*
- o) *That when Ms. Kemboi attended court on the 30th of September, 2025, the court informed her that the record as to the previous attendances is not clear and/or there are no proceedings recorded in the file for the previous attendances which situation is largely contributed to by the teething challenges of virtual proceedings and which problem is which problem is understandable in the legal world of practitioners, it is not a peculiar situation.*
- p) *That on discovering that there are some missing proceedings, a letter to the court requesting harmonization of the record so that all proceedings are properly captured was done.*
- q) *That the non-reflection of the attendances enumerated herein above on the court record in this matter is not attributable to the Appellant/Respondent but was explained by the court itself on 9th October 2025, when the Deputy Registrar, in the presence of both parties, acknowledged that the appeal appears to have been assigned three (3) separate case numbers, namely; Eldoret HCCA No. 43 of 2020, Eldoret HCCA No. 43A of 2020, and Eldoret HCCA No. 43B of 2020 and chances are that there is a mix-up of the proceedings on account of the existing three appeal files on the same subject matter.*
- r) *That the court indicated that proceedings have been recorded across these files, creating confusion and gaps in the main file, which*

explains why some proceedings when the appeal was mentioned previously do not appear.

- s) That given the existence of multiple appeal files erroneously created/opened by the court, we guess on account of online teething problems considering the year the appeal was filed is understandable and should not be visited on the Appellant/Respondent as purported by the Applicant/Respondent.*
- t) That it would be unjust and prejudicial to dismiss the appeal in circumstances where the Appellant has not been indolent as demonstrated herein above.*
- u) That the appeal to this Honorable court raises weighty legal issues for determination by this court and the Appellant/Respondent ought to be given an opportunity to ventilate the appeal on merit and the move by the Respondent/Applicant is purely crafted to steal a match from the Appellant/Respondent which move this court should frown at considering the circumstances of the matter.*
- v) That the Appellant/Respondent has always been ready and willing to have the appeal progressed and heard expeditiously save that this has been hampered by factors beyond his control and we ask that the court takes judicial notice of the circumstances in exercise of its discretion in the Appellant/Respondent's favor.*
- w) That it will be against the interest of justice to dismiss the appeal without according the Appellant/Respondent a chance to be heard especially on account of administrative lapses on the part of the court as explained which explanation has not been rebutted at all.*
- x) That I swear this affidavit in strong opposition to the application for dismissal of the appeal for want of prosecution and pray that an order be made directing the subordinate court to have the proceedings typed so as to fast track the progress of the pending appeal.*

y) *That what is deponed herein is true and correct to the best of my knowledge, information and belief.*

5. The Application was canvassed by way of written submissions.

Respondent/Applicant's submissions summary

6. The Respondent/Applicant was represented by the firm of Kalya & Co Advocates. The Applicant filed her written submissions dated 9th December 2025 through the learned Counsel Mrs. Kesei. The Learned Counsel for the Applicant submitted that the application dated 4th November 2024 sought the dismissal of the appeal for want of prosecution, as it had remained stagnant for over five years since its inception in May 2020. Counsel critically argued that such delay undermines public confidence in the judiciary and violates the constitutional mandate under Article 159(1)(b) and Article 232(1)(a) and (b), which requires justice to be delivered without delay and through the efficient use of resources. Invoking Order 42 Rule 35(2) of the Civil Procedure Rules, 2022, the learned Counsel Mrs. Kesei asserted that the court is explicitly empowered to dismiss appeals following one year of inaction, a threshold the appellant has exceeded by several years. A central point of the submission by the learned Counsel was the appellant's failure to follow up after a previous application was dismissed on 7th December 2021. The Learned Counsel noted that counsel noted that the appellant's annexed correspondence lacked court stamps, which, according to the precedent in **Josphat Mwambili Mwakau Vs Ruth M Ambaisi and 2 others (2021) KEELC 20237 KLR**, constitutes undue delay.

7. Counsel further offered a sharp critique of the appellant's defense that the appeal cannot be dismissed until the court provides directions labeling this argument as respectfully untenable because it would permit litigants to file appeals merely to keep respondents in a state of perpetual anxiety. To support the court's inherent power to dismiss such appeals that create

unnecessary backlogs, counsel cited **Khavengeha Vs Transline Classic (2024) eKLR**, **China Road and Bridge Corporation Vs John Kimenye Mutteti (2019) eKLR** and **Abraham Mukhola Asista Vs Silver Style Investment Company Limited (2020) eKLR**. Furthermore, the Applicant launched a direct challenge to the appellant's credibility, asserting that the court attendances claimed for 2024 and 2025 are fictitious, as they are absent from the Case Tracking System (CTS) and that the related case files (HCCA 43A and 43B) referenced by the appellant do not actually exist.

8. The learned counsel Mrs. Kesei's submissions emphasized that the burden of moving the case forward rests solely on the appellant, referencing **K. Ventures Limited Vs Peter Olumati (2018) eKLR**, which suggests a 30-day window for seeking directions and **Charity Wangechi Rukwaro Vs Josphat M. Thiongo (2018) eKLR**. Citing the maxim that equity aids the vigilant and not the indolent, the Learned Counsel highlighted the financial prejudice and legal expenses the respondents have endured since 2020 due to the appellant's laxity, indifference and negligence. Finally, relying on **Mutwiwa & Another Vs Martin (2025) eKLR** and **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another (2004) eKLR**, counsel concluded that the appellant must bear the consequences of their inaction and urged the court to dismiss the appeal with costs following the event pursuant to Section 27 of the Civil Procedure Act.

Appellant/Respondents submissions summary

9. The Appellant/Respondent was represented by the firm of Nyairo & Co Advocates. The Respondent filed its written submissions dated 1st December 2025 through his learned Counsel Mrs. Chebet. Counsel argued that under Order 42 rule 35 of the Civil Procedure Rules, dismissal for want of prosecution is only appropriate if an appeal is not set down for hearing within three months after directions are given, or within one year

after the service of the memorandum of appeal. In this instance, the learned counsel submitted that the appeal has not yet been admitted, no directions have been issued by a judge and the Registrar has not issued the mandatory notice to the parties, meaning the appeal is not yet ripe for dismissal.

10. Furthermore, the Learned Counsel submitted that the sources indicate that the delay in prosecution is due to administrative functions within the hands of the court, specifically the failure to provide typed proceedings and the ruling from the lower court. The Appellant/Respondent has demonstrated diligence by attending numerous mentions and writing multiple letters between 2020 and 2025 to fast-track the process. The learned counsel also highlighted a significant mix-up in the court's registry, where three distinct case numbers **ELDORET HCCA NO 43 OF 2020, ELDORET HCCA NO 43A OF 2020 and ELDORET HCCA NO 43B OF 2020** have been assigned to the same matter, leading to missing proceedings and gaps in the main file.
11. The learned counsel further submitted that emphasizing that a party should not be punished for the court's own administrative failures, as dismissing the appeal would violate the right to a fair trial under Article 50(1) of the Constitution of Kenya. To support this position, counsel relied on the following legal authorities: **Njai Stephen Vs Christine Khatiala Andika Civil Appeal No. 248 of 2017 KEHC 11021 KLR** and **Pinpoint Solutions Limited & another Vs Lucy Waithegeni Wanderi (as the legal administrator of the estate of James Nyanga Muchangi) 2020 eKLR.**
12. Consequently, the Respondent prayed for the dismissal of the application and requested that the court instead direct the Subordinate Court to fast-track the typing of proceedings.

Analysis and Determination

13. Having considered the Notice of Motion Application, the Replying Affidavit in opposition and the rival submissions, there is one sole issue manifest for determination by this Honourable Court: -

a. Whether the threshold for dismissal of the appeal for want of prosecution has been met.

14. The law governing dismissal of appeals for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules, which provides as follows: -

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

15. Further, Section 79B of the Civil Procedure Act provides that: -

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse the record of appeal and, if he considers that there is no sufficient ground for interfering with the decree, may reject the appeal summarily.”

16. Mutungi, J commented on the applicability of Order 42 Rule 35 of the Civil Procedure Rules in **Ame W. Chege & Another Vs Peter Kisuna Musasya (2006) eKLR** and stated as follows: -

“The steps preceding the applicability of the above provision is entirely within the control of the appellant, not the respondent. For its the duty of appellant after launching the appeal by filing the memorandum of appeal to; obtain certified copy of the proceedings from the lower

court; prepare the Record of Appeal before the appeal goes for admission by the judge in charge of the civil Appeals.

Once the appeal has been admitted, the file goes back to the Registrar who through a notice, summons parties to the appeal, to appear before the judge for directions. It is only after the directions that appeal can be set down for hearing, as per the above order 41 rule 31(1) of the civil procedure rules”

17. From the above provisions of Order 42 Rule 35 of the Civil Procedure Rules and section 79B of the Civil Procedure Act, it is evident that dismissal of an appeal for want of prosecution is not automatic but is subject to specific procedural milestones, including admission of the appeal, issuance of directions under Order 42 Rule 13, and/or notice by the Registrar under Rule 35(2).
18. In the present case, it is not disputed that the appeal has not yet been admitted under Section 79B of the Civil Procedure Act, nor have directions been issued under Order 42 Rule 13 of the Civil Procedure Rules. Consequently, the timelines contemplated under Order 42 Rule 35(1) have not begun to run. Similarly, there is no evidence that the Registrar has issued a notice under Rule 35(2) to trigger dismissal proceedings. In the absence of these procedural steps, the appeal cannot be said to be ripe for dismissal under the said provisions.
19. The Applicant has also invoked Order 17 Rule 2 of the Civil Procedure Rules, which provides:

*“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed...
(3) Any party to the suit may apply for its dismissal as provided in sub-rule (1).”*

20. While this provision empowers the Court to dismiss suits for inactivity, it must be read in harmony with the specific provisions governing appeals under Order 42 of the Civil Procedure Rules. An appeal is a distinct proceeding with its own procedural regime and dismissal must be guided primarily by Order 42 Rule 35 of the Civil Procedure Rules.
21. This Court has also taken judicial notice of the Case Tracking System (CTS), which confirms the existence of three distinct appeal files, namely: Eldoret HCCA No. 43 of 2020, Eldoret HCCA No. 43A of 2020 and Eldoret HCCA No. 43B of 2020, all relating to the same subject matter. This multiplicity of files has evidently caused confusion in the record, including missing proceedings and inconsistencies in the documentation. Further, the CTS reflects that the Appellant has uploaded several letters addressed to the Chief Magistrate's Court requesting typed proceedings and the ruling delivered on 30th April 2020, for purposes of compiling the Record of Appeal. These letters are dated 28th May 2020, 30th August 2022, 26th July 2024, 22nd March 2025 and 24th October 2025. This correspondence demonstrates sustained effort on the part of the Appellant to obtain the necessary documents and in particular the typed proceedings to progress the appeal.
22. In **Njai Stephen Vs Christine Khatiala Andika [2019] KEHC 11021 (KLR)**, the Court held as follows: -

The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under

Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

23. It is therefore clear that the delay in prosecuting the appeal cannot be attributed solely to the indolence of the Appellant. A significant portion of the delay arises from administrative challenges within the court system, including delays in typing proceedings and the confusion occasioned by multiple case files. It would be unjust to penalize a litigant for circumstances that are largely beyond their control.

24. The Court is also guided by the overriding objective under Sections 1A and 1B of the Civil Procedure Act, which provide as follows: -

“The overriding objective of this Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.....The court shall, in the exercise of its powers... seek to give effect to the overriding objective...”

25. In the case of **Abdirahman Muhumed Abdi Vs Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai 173 of 2010** the Court of Appeal observed as follows: -

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice... The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without

undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

26. Additionally, Article 50(1) of the Constitution guarantees every person the right to have any dispute resolved in a fair and public hearing. Dismissing the appeal at this stage, before it has even been admitted and directions issued, would amount to shutting out the Appellant from the seat of justice without affording them an opportunity to be heard on the merits.
27. While this Court acknowledges the Respondent’s concerns regarding delay and the need for expeditious disposal of cases under Article 159(2) (b) of the Constitution, justice must be balanced and cannot be achieved by sacrificing one party’s right to be heard due to systemic inefficiencies. In the premises, this Court finds that the Application for dismissal of the appeal for want of prosecution is premature and misconceived
28. Accordingly, the Notice of Motion dated 4th November 2024 is hereby dismissed. In order to ensure expeditious progress of the appeal, the Court makes the following further orders: -
 - a) *That the Deputy Registrar shall forthwith liaise with the Chief Magistrate’s Court at Eldoret to ensure that the typed proceedings and ruling delivered on 30th April 2020 are prepared and supplied within thirty (30) days from the date hereof.*
 - b) *That the Appellant shall, within thirty (14) days of receipt of the said proceedings, file and serve the Record of Appeal.*
 - c) *That this matter shall be mentioned thereafter for directions under Order 42 Rule 13 of the Civil Procedure Rules.*
 - d) *Costs of the application shall abide the outcome of the appeal.*
 - e) *It is so ordered.*

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 28TH DAY
OF APRIL 2026**

.....
**R. NYAKUNDI
JUDGE**