



REPUBLIC OF KENYA



**Chelule & another v Kuria & another (Appeal E001 of 2022)
[2024] KEELC 88 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 88 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
APPEAL E001 OF 2022
CG MBOGO, J
JANUARY 24, 2024**

BETWEEN

SAMUEL KIPLANGAT CHELULE 1ST APPELLANT

AGNES GACHAGO 2ND APPELLANT

AND

ALICE WANJIRU KURIA 1ST RESPONDENT

SAMUEL KURIA MUREU 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Business
Premises Rent Tribunal at Nakuru (Hon. Gakubi chege, Vice Chair)
delivered on 11th March, 2022 in Nakuru BPRT Case No. 120 of 2019)*

RULING

1. Before this court for determination is the Chamber Summons dated 13th June, 2023 filed by the 1st respondent/applicant herein and it is expressed to be brought under Article 159 (2) of the Constitution, Order 42 Rule 35 (1), (2), Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders: -
 1. That this suit be dismissed with costs for want of prosecution;
 2. That the costs of this application and the entire suit be awarded to the applicant.
2. The application is premised on the grounds inter alia that the respondents have not made steps to prosecute the suit (sic) for over one year, precisely, 14 months.
3. The application is supported by the affidavit of the 1st respondent/applicant sworn on even date. In her affidavit, the 1st respondent/applicant deposed that it has taken the appellants/respondents undue delay of four months to comply with the orders issued on 21st December, 2022 which is a clear



- indication that they were not willing to prosecute the appeal. Further, that since 11th April, 2022, the appellants/respondents have failed to file a record of appeal or set the main suit (sic) for hearing.
4. The applicant deposed that the failure to prosecute this matter for the period stated amounts to an abuse of the court process and the continued existence and uncertainty of the suit (sic) is prejudicial to her.
 5. The application was opposed by the replying affidavit of the 1st respondent/appellant sworn 3rd November, 2023 and filed in court on 22nd November, 2023. The 1st appellant/respondent deposed that the firm of Jonathan Law Advocates, Githui Advocates LLP and George Wakahiu & Njenga Advocates are not properly on record for the 1st respondent/applicant in accordance with Order 9 Rule 9 of the *Civil Procedure Rules*.
 6. The 1st appellant/respondent deposed that the instant application has been overtaken by events for the reason that this appeal has been listed for mention severally before this court and also before the Deputy Registrar. It was also deposed that it would be disingenuous for the 1st respondent/applicant to allege that no steps were taken for fourteen months. Further, that on 13th July, 2023, his advocates on record filed and served both volume I and II of the record of appeal which all the parties acknowledged service.
 7. The 1st appellant/respondent further deposed that on 25th July, 2023, his advocates on record showed cause why this appeal should not be dismissed. Further, there is no requirement in law to file and serve a record of appeal within three months and there is no requirement under the rules of this court for filing a certificate of delay in an appeal from the subordinate court to this court.
 8. Purity Kinya Kaburu, Advocate, practicing in the firm of Jonathan Law Advocates filed a further affidavit in response thereto sworn on 22nd November, 2023. The counsel deposed that on 13th June, 2023, a consent was signed between the firm of Kimani Kimondo Advocates and themselves which was uploaded during the filing of the documents, and they only came to learn later that the consent and the Notice of Appointment of Advocates were not attached during the uploading. Further, that the 1st respondent/applicant should not be made to shoulder the error of an Advocate.
 9. The counsel further deposed that Jepher Kere advocate has been acting alongside Mr. Kamwaro and he has not filed any Notice of Appointment of Advocates.
 10. The application was canvassed by way of written submissions. On 3rd November, 2023, the 1st respondent/ applicant filed her written submissions dated 6th October, 2023 where she raised one issue for determination which is whether the instant appeal ought to be dismissed for want of prosecution.
 11. The 1st respondent/applicant submitted that the 1st appellant/respondent did not seek leave of the court to have the appeal admitted out of the statutory period of time. Further, that the effect or the failure to seek extension of time to file the appeal is that the appeal is not competent, of no legal consequence and ought to be struck out. It was further submitted that the appellants/respondents have been indolent in prosecuting the appeal by filing a record of appeal after 1 year and 7 months after delivery of judgment. The 1st respondent/applicant relied on the cases of *Abraham Mukhola Asitsa v Silver Style Investment Company Limited* [2020] eKLR, *Mwangi S Kimenyi v Attorney General & another*, Civil Suit Misc No 729 of 2009 and *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR.
 12. On 22nd November, 2023, the 1st appellant/respondent filed his written submissions dated 9th November, 2023. The 1st appellant/respondent submitted that unlike appeals from the High Court to the Court of Appeal, there is no prescribed time limit as to when a record of appeal should be filed from the Subordinate Court. Further, that from a reading of Order 42 of the *Civil Procedure Rules*,



- the record of appeal should be filed after the service of the memorandum of appeal and before the appeal is listed for direction before a judge under Order 42 Rule 13 of the [Civil Procedure Rules](#). That in this case, the case of [Aviation Cargo Limited v St. Mark Freight Services Limited](#) [2014] eKLR is inapplicable as it refers to a matter from the High Court to the Court of Appeal.
13. The 1st appellant/respondent submitted that even as parties were appearing in this matter, the 1st respondent/applicant filed Narok High Court Misc Appl. No E005 of 2022 where they managed to obtain an order for a decree to issue from the judgment of the Business Premises Rent Tribunal. Further, that this matter has been in court severally and the only thing preventing the prosecution of the appeal is the instant application.
 14. The 1st respondent/applicant filed further written submissions dated 23rd November, 2023. On whether the failure to file and serve a notice of appointment of advocates is fatal, the 1st respondent/applicant submitted that where a procedural omission arises, such as the present one, the same ought not to be levied on the innocent party but it is curable under Article 159 (2)(d) of the [Constitution](#). To buttress on their submissions, the 1st respondent/applicant relied on the cases of *Shah v Mbogo* [1967] EA 116, *Philip Chemwolo & another v Augustine Kubende* [1982-88] 1 KAR 103 and *Kenya Bankers Association & others v Minister for Finance* [2002] 1 KLR 61.
 15. I have considered the application, replies thereto, the rival submissions as well as the authorities cited by the parties and, in my view, the issue for determination is whether the appeal ought to be dismissed for want of prosecution.
 16. Order 42 Rule 35 of the [Civil Procedure Rules](#), envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the [Civil Procedure Act](#) as is envisaged in Order 42 Rule 11 of the [Civil Procedure Rules](#). The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the Registrar shall on notice to the parties list the appeal before the judge for dismissal.
 17. Section 79B of the [Civil Procedure Act](#) provides as follows:

“Before an appeal from a subordinate court to the high court is heard, a judge of the high court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.
 18. Order 42 Rule 13 of the [Civil Procedure Rules](#) provides as follows:

“1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”
 19. It is evident from the provisions of Section 79B of the [Civil Procedure Act](#) that a judge has to peruse the appeal before he can summarily reject the same. Order 42 Rule 35 (1) and (2) of the [Civil Procedure Rules](#), provides: -

“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.”

20. The legal substratum for dismissal of suits for want of prosecution is founded on the principle that litigation must be expedited and concluded by parties who come to court seeking justice. Upon filing of cases, parties should efficiently and effectively be seen to fast track their hearing and determination. Nonetheless, should there be any delay arising from one substantive and justifiable cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so as that would be doing grave injustice to one side or the other or both and in such circumstance, the court, may in its discretion dismiss the action.

21. In this case, the 1st respondent/applicant contended that since 11th April, 2022, the 1st appellant/respondent has failed to file a record of appeal or set the matter down for hearing. This matter has been listed before this court severally as outlined by the 1st appellant/respondent in his replying affidavit. Most notable are the proceedings of this court dated 16th March, 2023 where the court noted as follows:

“As regards directions on the disposal of the appeal, the BPRT file is yet to be submitted to this court pursuant to the Deputy Registrar’s letter dated 1st March, 2023 to the BPRT Nakuru requesting for the said file. As it were, the appeal is yet to be admitted.”

22. 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, this court takes the view that an appeal cannot be dismissed before directions have been given or before the appeal has been admitted. As there was no indication that directions had been given, the appeal herein could not be dismissed under Order 42 Rule 35 (1) of the *Civil Procedure Rules*.

23. Notably, every person is entitled as envisaged under Article 50 of the *Constitution* of Kenya to have a fair hearing as follows: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

24. I find it necessary to comment on the appearance of the counsel for the 1st respondent/applicant with regard to Order 9 Rule 9 of the *Civil Procedure Rules* as it is fundamental in dealing with the matter before this court. Order 9, Rule 9 of the *Civil Procedure Rules* provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.” (underline with emphasis.



25. Order 9, Rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

26. As per Order 9 Rule 9 the correct procedure to be followed was for the counsel to seek leave to come on record, then file and serve the notice of change of advocates and thereafter file the instant application. Whereas the counsel acknowledges the error on their part to omit the said documents, if at all there were any, the route taken clearly offends the express provisions of Order 9 Rule 9. The procedure set out above is mandatory and thus cannot be termed as a mere technicality. With regard to Mr. Kere, advocate acting alongside Mr. Kamwaro, the same is not fatal for the reason that Mr. Kamwaro has been on record for the appellants/respondents and it is within his right or the appellants/respondents right to choose which advocate should be on record/or act alongside their appointed advocates.

27. The upshot of the above is that the Chamber Summons dated 13th June, 2023 is hereby struck out. The firm of Jonathan Law Advocates and Githui Advocates LLP to formally come on record in accordance with Order 9 Rule 9 of the Civil Procedure Rules. Costs to abide the outcome of the appeal. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JANUARY, 2024.

HON. MBOGO C.G.

JUDGE

