



REPUBLIC OF KENYA



Kabare Farmers Co-operative Society Limited v Muriithi (Environment and Land Appeal E033 of 2022) [2025] KEELC 799 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E033 OF 2022
JM MUTUNGI, J
FEBRUARY 26, 2025**

BETWEEN

KABARE FARMERS CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

NANCY NJOKI MURIITHI RESPONDENT

(Being an appeal against the Judgment and decree of the Honourable Alex Ithuku (MR) CM made on 15th November 2022 at Kerugoya Law Courts)

RULING

1. The Respondent, Nancy Njoki Muriithi, by an application dated 4th July 2024 has moved the Court for orders that the Appellant's Appeal be dismissed for want of prosecution and that costs be provided for. The application is predicated on the grounds set out on the body of the application and on the Applicant's Affidavit sworn in support dated 4th July 2024.
2. In support of the application the Applicant states that the Appellant filed a Memorandum of Appeal on 1st December 2022 and since then has made no effort to have the matter listed for directions. That the delay in having the Appeal disposed is prejudicial to the Applicant as she cannot freely utilise her parcel of land when there is a pending Appeal whose outcome she was awaiting.
3. The Appellant/Respondent filed a Replying Affidavit through their Advocate Ms. Wangui Mugoro sworn on 23rd August 2024 in opposition to the application. The Appellant's Counsel depones that upon delivery of the Judgment on 15th November 2022 the Appellant applied for typed proceedings and further applied for stay of execution and that the application for stay was determined on 9th March 2023. She further depones that after the application for stay was determined they have made numerous visits to the Court Registry to follow up and inquire on the status of the typed proceedings and the Lower Court file was unavailable.



4. The Appellant's Advocate further depones that they wrote to the Court various times and encloses a bundle of Letters marked "WM-2" dated 23rd May 2024, 18th July 2024, 26th July 2024 and 9th August 2024 all seeking assistance to have the Lower Court file retrieved and for them to be furnished copies of typed proceedings for purposes of preparing the record of Appeal. Counsel further depones that on his last visit to the Court Registry on 20th August, 2024 their Court Clerk was advised that the Lower Court file had been forwarded to the ELC Court but had not been placed in the ELC Court file respecting the present Appeal. Counsel avers that their Law Firm has been keen to prosecute the Appeal but were hampered owing to the non availability of the typed proceedings and the Lower Court file.
5. The Applicant filed a Supplementary Affidavit sworn on 30th September 2024 in response to the Replying Affidavit by Counsel to the Respondent. In the Supplementary Affidavit the Applicant clarified that the order of stay was issued on 9th February 2023 and not 9th March 2023 as deponed in the Respondent's Counsel's Affidavit. The Applicant averred the annexures exhibited in the Counsel's Affidavit did not carry a Court stamp. Further the Applicant averred that on or about 15th February 2023 she applied for a copy of the Judgment and was supplied one together with typed proceedings which were all certified on 23rd March, 2023. The Applicant reiterated the Appellant did not diligently do any follow up and had not furnished the Court any valid reason for the delay.
6. The Court on 30th September 2024 invited the parties to canvass the application dated 4th July 2024 by way of Written Submissions. Both have complied with that direction. Both parties submissions are dated 18th October 2024. I have reviewed and considered the application, the Affidavits in support and the Affidavit in opposition. Equally I have considered the submissions made on behalf of the parties.
7. In the present matter the Applicant is urging the Court to exercise its discretion and dismiss the Appeal if it is satisfied the delay in prosecuting the same is unexplained, inordinate and/or inexcusable. The Applicant contends the Appellant/Respondent has not offered any viable explanation for the delay in prosecuting the Appeal and the Court in the interest of Justice should dismiss the Appeal so that the Applicant can fully reap the fruits of the Judgment from the Lower Court.
8. For their part the Appellants state that their efforts to move the Appeal were frustrated because they could not obtain certified proceedings and Judgment from the Lower Court and that the Lower Court file was not available. The Applicant discounts their explanation for the delay and crucially she states she applied for a copy of the certified Judgment much later than the Appellant in February 2023 and she was readily supplied with the Judgment and copy of the proceedings. There lies the quagmire. How does the Court resolve the conflicting positions of the parties?
9. The Court record shows that a Memorandum of Appeal was filed on 1st December 2022. On 15th May 2023 the ELC Deputy Registrar wrote to the Chief Magistrate's Court notifying the Court that an appeal against their Judgment had been filed and requested that the original record with certified copies of Judgment/Ruling and proceedings or any be forwarded to the ELC for purposes of the Appeal. The original file apparently was not transmitted. A skeleton file containing the letter to the Chief Magistrate's and a copy of the proceedings and Judgment are all there is in the skeleton file with no proceedings, handwritten notes or exhibits. There is in the skeleton file a letter from the Chief Magistrates Court to the ELC dated 11th July 2023. The letter is stamped with the ELC Court stamp indicating it was received. As per the content of the letter the original Lower Court record plus two (2) certified copies of proceedings and Judgment were forwarded. The original Lower Court record is not on the Appeal file as ought to be the case.



10. On the basis of the record that I have, it does appear the averments on the part of the Appellant are credible as there is no explanation why the original record is not part of the Appeal record before the Court yet the Court requested that the original file be forwarded for Appeal purposes.
11. The Appellant filed the Record of Appeal on 15th October 2024 which they must have served on the Respondent. If the parties agree the Record of Appeal is in order, in view of what I have said regarding the original Record of the Lower Court, the Court can give directions on the disposal of the Appeal.
12. Given the circumstances I have outlined herein above, I cannot hold the Appellant to be wholly responsible for the delay. The Appellant has adduced plausible reasons as to why they could not escalate the Appeal to hearing. In the premises I will exercise my discretion against dismissing the Appeal to enable the Appeal to be heard on its merits in the interest of fairness and Justice.
13. So that the matter is escalated to finalisation I direct that the appeal be mentioned for directions on hearing on 14th April 2025.
14. The costs of the application will abide the outcome of the Appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 26TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE

