



Mathenge & 28 others v Attorney General & 2 others (Civil Application 144 of 2020) [2024] KECA 1405 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1405 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 144 OF 2020
JW LESSIT, DK MUSINGA & LA ACHODE, JJA
OCTOBER 11, 2024**

BETWEEN

MICHAEL MURJI MATHENGE & 28 OTHERS & 28 OTHERS & 28 OTHERS & 28 OTHERS & 28 OTHERS & 28 OTHERS & 28 OTHERS APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE CABINET SECRETARY DEFENCE 2ND RESPONDENT

THE DEFENCE COUNSEL 3RD RESPONDENT

(Being an application to strike out the appeal from the Ruling of the Employment and Labour Relations Court at Nairobi (Makau, J.) dated 20th September, 2019 in ELRC Petition No. 43 of 2015)

RULING

1. By a Notice of Motion dated February 21, 2024 the applicants, Michael Murji Mathenge & 28 Others, approached this Court seeking orders that:
 - a. The appeal that was filed on March 23, 2020 be struck out for want of prosecution.
 - b. Judgement be entered for the applicants.
 - c. The costs be to the applicants.
 - d. Any other relief that this Court deems fair be granted.
2. The background to this appeal was that the Petitioners, now applicants, Michael Murji Mathenge & 28 Others, separately filed petitions to the Environment and Labour Relations Court (ELRC), at Milimani, seeking damages for what they termed as illegal arrests. The arrests at their respective



workplaces by the Kenya Defence Forces then, (Kenya Army Soldiers) resulted in: torture, illegal detention, denial of access to advocates, relatives and friends, among other violations of their constitutional rights during the attempted coup of 1982. The petitions were consolidated into the Employment & Labour Relations Petition No. 43 of 2015. Judgement was entered in favour of the petitioners on 20th September 2019, and as a result the respondents appealed to this Court.

3. The grounds of the application are that the matter was filed on 23rd March 2020 and has been in this Court for over 3 years, which forms a basis for its dismissal. That since the filing of the appeal, the respondents have taken no action to list it for prosecution. Further, that the respondents are now old people in their seventies.
4. The application was disposed of by way of written submissions. The applicants filed their submissions through the firm of Agina & Associates Advocates, while those of the respondents are dated 26th July 2024 and were filed by the Attorney General.
5. The applicants urge that the appeal should be dismissed for want of prosecution, since the matter commenced on 23rd March 2020 and the respondents had not taken any further steps to prosecute it. They further contend that the respondents did not respond to the application that was served upon them a while ago. They rely on Order 17 rule 2(1) of the *Civil Procedure Rules* (which is not applicable before this Court), and the decision in *Ivita v Kyumbu* [1984] KLR 441 (which is also inapplicable) to buttress their case. They submit that a delay of 4 years is inordinate, unreasonable and inexcusable and therefore, the application has merit.
6. The respondents oppose the application. In their submissions, they state that it is an abuse of court process; is bad in law; and is not premised on any specific law. They contend that the application is time-barred by dint of rule 86 *Court of Appeal Rules*, 2022 and that rule 104 places the onus of setting down an appeal for hearing upon the Registrar of this Court.
7. The respondents have urged the Court to invoke the overriding objective principle of the *Appellate Jurisdiction Act*, Cap 9 and dismiss the application with costs. For their arguments, they rely on the decisions in *Abdirahman Abdi v Safi Petroleum Products Ltd & Six Others*, Civil Application No. Nai, 173 of 2010, [2011] eKLR and *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates*, Civil Appeal 161 of 1999, [2013] eKLR.
8. Rule 86 clothes this Court with the jurisdiction to strike out an appeal in the following terms:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

 - a. that no appeal lies; or
 - b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”
9. This rule cannot be invoked to strike out an appeal for want of prosecution, even in instances where the delay in prosecuting the appeal is attributable to the appellant. The rule can only be applied in the two instances stipulated therein, that is, where no appeal lies as a matter of law, or where the respondent has



failed to take an essential step in the proceedings, like failing to file the record of appeal in time. Where the delay in listing or prosecution of an appeal is attributable to the appellant, the Court can only be moved to strike out the appeal under sections 3A and 3B of the Appellate Jurisdiction Act that spell out the overriding objective of the Act and the duty of the Court to include expeditious determination of proceedings.

10. On the applicants' contention that the appeal should be struck out because the respondents failed to take steps to prosecute it, we agree with the respondents' assertion that it was the duty of the Registrar of the Court of Appeal to provide them with a date for the hearing of the appeal as required under rule 104(1). The said rule stipulates that:

(1) The Registrar shall give all parties to an appeal not less than fourteen days' notice of the date fixed for the hearing of an appeal except where a matter has been certified urgent or the Court, for good reason, directs that a matter be served within a shorter period:

Provided that it shall not be necessary to give such notice to any party with whose consent the date for the hearing was fixed."

11. Consequently, it is our finding that the blame for the delay does not lie with the respondents for failing to list the appeal for hearing. That duty lies squarely on the Registrar to issue a hearing date for the appeal. It is common knowledge that due to the exceedingly high number of appeals that are filed in this Court, compared to the low number of judges available, most of the appeals end up remaining unheard for a number of years. Whereas this delay is unfortunate and often occasions undue prejudice and suffering to parties, a respondent cannot bear any blame, as long as the respondent has done all that is required of them under the Court's Rules and Practice Directions.

12. In light of the foregoing, the Notice of Motion dated February 21, 2024 has no merit and is hereby dismissed. Costs of the application are awarded to the respondents.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

