



REPUBLIC OF KENYA



**Airtel Networks Kenya Limited v Nyutu Agrovet Limited (Civil Appeal  
61 of 2012) [2021] KECA 177 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 177 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 61 OF 2012  
MSA MAKHANDIA, AK MURGOR, S OLE KANTAI, HA OMONDI & KI LAIBUTA, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**AIRTEL NETWORKS KENYA LIMITED ..... APPLICANT**

**AND**

**NYUTU AGROVET LIMITED ..... RESPONDENT**

*(Being an application for dismissal of the appeal for  
want of prosecution in Civil Appeal No 61 of 2012)*

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> March 2021, the Applicant, Airtel Networks Kenya Limited, requests this Court to dismiss Civil Appeal No. 61 of 2012 filed by the respondent, Nyutu Agrovet Limited for want of prosecution, and that costs of the application and of the appeal be borne by the applicant. The Motion is made pursuant to sections 3, 3A and B of the *Appellate Jurisdiction Act*, supported by (a) the affidavit of Joy Nyaga the applicant's Director, Legal and Regulatory Affairs sworn on 16<sup>th</sup> March 2021; and (b) her supplementary affidavit sworn on 15<sup>th</sup> July 2021.
2. The applicant's motion is made on 10 grounds, which may be summarized as follows:
  - i. That on 9<sup>th</sup> December 2019 in Petition No. 12 of 2016 – Nyutu Agrovet Limited v Airtel Networks Kenya Ltd and the Chartered Institute of Arbitrators (Kenya Branch), interested party, the Supreme Court directed that the appeal herein be heard and determined by this Court expeditiously;
  - ii. that the appellant has failed or neglected to file its written submissions;
  - ii. that on 24<sup>th</sup> June 2020 when the appeal came up for hearing, the Court directed the respondent to file and serve its written submissions within 14 days, and the



applicant to file its written submissions within 14 days from the date of service by the respondent;

- iii. that, on compliance with the directions aforesaid, the appeal be listed for hearing before a 5-judge bench of the Court on priority basis;
  - iv. that the respondent has since declined or neglected to file and serve its written submissions;
  - v. that the respondent is disinterested in prosecuting the appeal in view of the fact that a period in excess of 1 year and 3 months has lapsed since the order made by the Supreme Court;
  - vii. that the pendency of the appeal is an abuse of the court process and “a gross affront to the constitutional imperatives in Article 50(1) and 2(e) and 159(2) (b) and (c) of the *Constitution* as well as an impediment to the fulfillment of the overriding objectives set out in section 3A of the *Appellate Jurisdiction Act*;”
  - viii. that this Court has both a constitutional as well as a statutory duty to strike out or dismiss the same for want of prosecution; and
  - ix. it is in the interest of justice that the orders sought be granted.
3. The respondent opposes the Motion and relies on the replying affidavits of Muchai Mathare (a Director of the respondent) sworn on 6<sup>th</sup> July 2021, and of Jomo Nyaribo learned counsel for the respondent sworn on 8<sup>th</sup> July 2021. The two affidavits comprehensively set out the sequence of events leading to the delay complained of, and to which we will shortly return. It is notable, though, that there is no reply from the interested party.
  4. In support of the applicant’s Motion, Mr. Fred Ngatia, SC filed his written submissions dated 7<sup>th</sup> July 2021 together with (a) a list of authorities dated 7<sup>th</sup> July 2021; (b) a supplementary list of authorities dated 16<sup>th</sup> July 2021; (c) a further list of authorities dated 24<sup>th</sup> July 2021; and (d) a further supplementary list of authorities dated 27<sup>th</sup> September 2021. The lists of authorities are accompanied by respective case digests and photostat copies of the cited authorities.
  5. In reply, counsel for the respondent filed their written submissions dated 8<sup>th</sup> July 2021 together with their list and digest of authorities dated 20<sup>th</sup> July 2021, as well as the authorities relied on.
  6. Having carefully read the Applicant’s Notice of Motion, the supporting affidavits of Ms. Nyaga, the replying affidavits of the respondent’s Director and counsel aforesaid, the written submissions of counsel for the applicant and counsel for the respondent, the corresponding authorities relied on by both counsel, and having heard counsel for the applicant and counsel for the respondent, we are of the considered view that the applicant’s Motion stands or falls on our findings on four main issues:
    - a. whether the respondent is disinterested in the appeal or, otherwise, is guilty of inordinate delay in prosecuting their appeal;
    - b. whether delay in filing written submissions amounts to delay in or want of prosecution;
    - c. whether this is a proper case for dismissal of the appeal for want of prosecution; and



- d. who should bear the costs of this application.
7. The answer to the first question is informed by the sequence of events following the directions given by the Supreme Court in its judgment delivered on 9<sup>th</sup> December 2019 when it ordered that the appeal be heard on expeditious basis. Having carefully considered the record of proceedings before us together with the corresponding affidavits, we take note of the following events:
- a. when the appeal came up for hearing on 24<sup>th</sup> June 2020, the Court directed the appellant to file and serve its written submissions within 14 days, the respondent to file and serve its written submissions within 14 days next following and, upon compliance, the appeal be listed for hearing before a 5-judge bench;
  - b. on the same date, the applicant requested that the hearing of the appeal be adjourned, and that the same be heard together with Civil Appeal No 81 of 2016 even though the two appeals were not related;
  - c. prior thereto, the respondent had filed its list and bundle of authorities dated 22<sup>nd</sup> June 2020, which were served electronically on the applicant on 23<sup>rd</sup> June 2020, presumably in anticipation of the hearing scheduled for 24<sup>th</sup> June 2020;
  - d. by a letter dated 8<sup>th</sup> July 2020, the respondent requested the applicant to allow them seven more days to file and serve their written submissions, to which the applicant acceded;
  - e. during the period between 31<sup>st</sup> August and mid October 2020, the parties engaged in negotiations in an attempt to settle the appeal out of court, but the negotiations collapsed in mid-October 2020;
  - f. five months later, the applicant filed the Motion dated 16<sup>th</sup> March 2021 seeking dismissal of the appeal for want of prosecution; and
  - g. the respondent filed their written submissions on 4<sup>th</sup> July 2021 and served them on the applicant on 5<sup>th</sup> July 2021, albeit belatedly.
8. In his submissions, counsel for the applicant, Mr. Fred Ngatia SC, argued that 6 months and 16 days had elapsed since the respondent was directed to file their written submissions. According to him, this period demonstrates inertia and inordinate delay on the respondent’s part to have the appeal heard and determined and that, in consequence of delay, the appeal should be dismissed for want of prosecution.
9. In support of the applicant’s Motion, Senior Counsel invoked the overriding objective of the [Appellate Jurisdiction Act](#) and the Rules made thereunder as expressed in Section 3A of the Act, which requires “...just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.” He urged us to dismiss the appeal on the authority of the decision in *Teachers Service Commission v Simon P. Kamau & 19 others [2015] eKLR* in which the Court underscored the principles in Article 159(2) (b) which reads:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



- a. ...
  - b. justice shall not be delayed.”
10. We affirm the Court’s holding that delayed justice amounts to injustice, and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. We agree with counsel for the applicant and conclude that, on the authority of *McGrath v Irish Ispat Ltd (Involuntary Liquidation) Formerly Irish Steel Ltd [2006] IESC p.43* cited by him, it is incontestable that the Court has a duty to ensure that litigation is expeditious. This principle was also enunciated in *Primor PLC v. Stokes Kennedy Crowley [1996] 2 IR p.459 at p.475-6* where, in part, the court observed that “the Court has a duty to protect the reasonable expedition of litigation and has a duty to convey to litigants and their lawyers the necessity to bring cases to hearing with due expedition. This is well settled law: see *Sweeney v Horans (Tralee) Ltd [1987] ILRM 240* at p. 243.”
11. In addition to the foregoing, counsel for the applicant drew our attention to the legal principles as summarised by Hamilton, CJ in *Primor PLC v Stokes Kennedy Crowley [1996] 2 IR p.459 at p.475 – 476* thus:
  - “(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
  - b. it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable ...”.
12. Arising from the principle are two more questions: (a) whether in the case before us the delay in filing written submissions within the specified time is tantamount to inordinate and inexcusable delay in prosecuting the appeal; and (b) whether the interest of justice requires us to dismiss the appeal as sought. Our answer to the two questions is in the negative. In our considered view, the sequence of events outlined above cannot be characterised as indifference or indolence on the part of the respondent. Neither were the corresponding applications and the party’s attempt to negotiate settlement merely idle. With the exception of the five or so months preceding the application before us, the parties were engaged in numerous activities in the proceedings. To us, that cannot fairly be characterized as disinterest on the part of the respondent, whose counsel apologized for not moving the Court to list the appeal for hearing during the 5 or so months preceding the Motion, and for failing to file written submissions as directed.
13. However, and perhaps most important, we are not persuaded by the applicant that delay in filing written submissions against the backdrop of the filed list of authorities on record stood in the way of hearing and determination of the appeal before this Court. We hasten to observe that, from the reading of Rules 100 and 104 (d) of the Rules of this Court, written submissions are neither obligatory nor a prerequisite to the hearing and determination of an appeal under the Act and the Rules. Furthermore, it is acceptable, as a matter of practice in this Court, for a party to elect to make oral submissions in person or by counsel at the hearing. On the other hand, written submissions are desirable as a practical option in cases where parties do not wish to appear either in person or by counsel. Accordingly, we find as a fact and hold that the delay on the respondent’s part in filing and serving their written submissions did not in any way prejudice the expeditious hearing and determination of the appeal. Neither would such delay amount to disinterest or want of prosecution on account of which dismissal may be justified. We find that no justification was in this case established. This answers the third question – whether



failure to file written submissions within the period specified under an order of the Court, as was the case here, constitutes a proper case for dismissal for want of prosecution. In our considered judgment, it does not.

14. In reaching this conclusion, we are mindful of the provisions of Article 159(2) (d) of the Constitution, which mandates courts and tribunals to exercise their judicial authority and administer justice “... without undue regard to procedural technicalities”. To our mind, delay in filing written submissions in proceedings that are punctuated by a series of events by both parties is in the nature of a procedural omission that does not call for dismissal of the appeal for what the applicant views as want of prosecution.
15. It is noteworthy that the application before us is distinguishable from several cases cited by counsel for the applicant in which delay relates to either failure on the part of the respondent to institute their appeal within the prescribed period, or to take appropriate action to prosecute their appeal. We need not address ourselves to each of the cited authorities, save to observe that failure to lodge the requisite record of an intended appeal within the period prescribed under the Rules of this Court, or to take appropriate steps to prosecute an appeal for an inordinately long time without reasonable excuse, is consequential. This Court so held in *Rowlands Ndegwa and 4 others v County Government of Nyeri and 3 others; Agriculture, Fisheries and Food Authority and another (Interested Parties) [2020] eKLR*, citing with approval the decision of the High Court in *Winnie Wanjiku Mwai v Attorney-General & 3 others Nairobi HC Constitutional & Human Rights Division Petition No. 522 of 2015*, where the court observed:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity....”

16. As the court in *Winnie Wanjiku Mwai’s case (supra)* went on to observe, “firstly, there should be inordinate delay. In this regard, there is no laid down tariff as to what is inordinate and the period will depend on the facts and circumstances of each case. Secondly, the inordinate delay ought to be inexcusable. Where there is no credible excuse, the inference is that the delay is inexcusable. Thirdly, it must be evident that the trial of issues between the parties will be seriously prejudiced. The longer the delay, the more likelihood of prejudice.”
17. In our considered view, the case before us is not one in which delay for any period of time in filing written submissions would have seriously prejudiced the trial of the issues between the parties, either of whom could have elected to make oral submissions at the hearing. It only remained for the Registrar to list the appeal for hearing and notify the parties pursuant to Rule 101 of the Rules of this Court. The parties were at liberty to prompt the Registrar to do so at any time after the collapse of negotiations in mid-October 2020 subject, however, to the Court’s calendar. In view of the foregoing, we find and reach the conclusion that:
  - a. failure on the respondent’s part to file written submissions in the face of a list of authorities on record lodged prior to the date initially fixed for hearing of the appeal does not of itself amount to disinterest, inordinate delay or want of prosecution;
  - b. delay in filing written submissions does not by any means prejudice the determination on the merits of the issues between the parties; and



- c. this is not a proper case for dismissal of an appeal for want of prosecution on account of the delay complained of.

18. In view of our findings, the applicant's Notice of Motion dated 16<sup>th</sup> March 2021 fails and is hereby dismissed. Costs of the application be costs in the appeal. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

