



**Egerton University v Mwanzia (Employment and Labour Relations Appeal
E001 of 2023) [2025] KEELRC 170 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 170 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023
AN MWAURE, J
JANUARY 31, 2025**

BETWEEN

EGERTON UNIVERSITY APPELLANT

AND

ZABLON MUSYOKA MWANZIA RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 26th September 2024 seeking orders that:
 - i. Spent
 - ii. The Appellant/Respondent's appeal filed on 6th February 2023 be dismissed for want of prosecution
 - iii. The costs of the application be provided for.

Respondent/Applicant's case

2. The Respondent/Applicant avers that he instructed the firm of Ndeda & Associates to act for him and the appeal was filed by the firm of Sheth and Wathigo Company on 6th February 2023 up to date exactly 19 months after has not moved the court in any way for mention or hearing.
3. The Respondent/Applicant avers that the Appellant/Respondent is not interested in prosecuting the appeal.
4. The Respondent/Applicant contends that the Appellant/Respondent's failure to move court has resulted in an abuse of the court process, serving no purpose.
5. The Respondent/Applicant avers that it is only just and fair that the appeal be dismissed with costs for want of prosecution.



Appellant/Respondent's replying affidavit

6. In opposition to the application, the Appellant/Respondent filed a replying affidavit dated 8th November 2024 sworn by the Respondent's legal officer.
7. The Appellant/Respondent avers that Order 17 Rule 2 of the Civil Procedure Amendments 2020 provides that a suit will be dismissed for want of prosecution if the same is not prosecuted within 2 years.
8. The Appellant/Respondent avers that the delay in prosecuting the appeal was occasioned by the delay in the court registry in availing a certified copy of the proceedings to compile the record of appeal for prosecution herein.
9. The Appellant/Respondent avers that it followed up through its advocates by visiting the registry and writing letters requesting that the proceedings be made available.
10. The Appellant/Respondent avers that the typed proceedings were delayed due to the typing pool department being understaffed.
11. The Appellant/Respondent avers that the proceedings have been availed and the record of appeal filed on 6th November 2024.
12. The Appellant/Respondent avers that the instant appeal is excusable and prays that the Honourable Court does uphold substantive justice over technicalities by allowing the determination of the appeal on merit.
13. The Appellant/Respondent avers that no prejudice will be occasioned on the Respondent/Applicant if the instant appeal is determined on merit as the Respondent/Applicant enjoys security following the deposit of the entire decretal sum of Kshs.2,337,260/= in a joint account in the name of advocates for both parties.
14. The Appellant/Respondent avers that the application is premature, incompetent and an abuse of the court process thus the application should be dismissed with costs.

Respondent/Applicant's submissions

15. The Respondent/Applicant submitted that the Appellant/Respondent has filed numerous applications which are in bad faith denying him to enjoy the fruits of his judgment and the appeal is an abuse of the court process.
16. The Respondent/Applicant submitted that the appeal has taken 20 months to be prosecuted and the Appellant/Respondent has dragged the matter by filing unnecessary applications and eventually appealing.
17. The Respondent/Applicant relied on the case of Chairman Co-operative Tribunal and 8 others ex-parte management committee Konza Ranching and Farming Co-operative Society Ltd (2014) eKLR Justice Odunga cited the case of Stephen Somek Takwenyi and other V David Mbutia Githere and 2 others Nairobi (Milimani) HCC No. 363 of 2009 where it stated that the court has inherent jurisdiction to maintain the integrity of the judicial process and prevent its abuse. This power is used to ensure that the court's machinery is not misused for ulterior motives or collateral advantages. Abuse of process can occur in various ways and is not exhaustively listed. It can be identified through the steps taken or extrinsic evidence. When abuse is evident, the court must intervene to stop it and such abuses, but the inherent jurisdiction of the court exists independently to prevent misuse and ensure justice.



18. The Respondent/Applicant relied on Order 42 Rule 35 of the Civil Procedure Rules 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.
19. The Respondent/Applicant submitted that Order 51 Rule 3 of the Civil Procedure Rules provides for special jurisdiction and power of the court stating that nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.
20. The Respondent/Applicant urges this Honourable Court to dismiss the Appellant/Respondent's appeal for want of prosecution with costs.

Appellant/Respondent's submissions

21. The Appellant/Respondent submitted that the Respondent/Applicant has not satisfied the requirements for such orders as set out in Order 17 Rule 2(5) of the Civil Procedure Rules which provides for dismissal of a suit after two years of non-prosecution. The Appellant/Respondent submitted that the two-year period has not lapsed to prosecute the appeal.
22. The Appellant/Respondent submitted that the delay in prosecuting the appeal was occasioned by the delay by the court registry to prepare the necessary proceedings to enable it to compile the record of appeal.
23. The Appellant/Respondent contended that the typed proceedings are prepared by the court registry which was not within its control and the solution was to follow up with the registry on the said typed proceedings.
24. The Appellant/Respondent submitted that the typed proceedings were made available on 5th November 2024 and the record of appeal was prepared and filed on 6th November 2024. The Appellant/Respondent urges this Honourable court not to dismiss the appeal for want of prosecution on grounds of technicality and the Appellant/Respondent is desirous to prosecute the appeal.
25. The Appellant/Respondent relied on the case of Nilesh Premchand Mulji & another t/a Ketan Emporium V MD Popat and others & another [2016] eKLR where the court stated as follows:

Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita V Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether



justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

26. The Appellant/Respondent submitted that the Respondent stands to suffer no prejudice if the instant appeal is determined on merit as there is a security of Kshs. 2,337,260/=the decretal sum, has already been deposited in a joint account and the same continues to accrue interest. In *Jetlink Express Limited V East African Air Express Limited* [2012] eKLR the court found that there being a security in place, no prejudice will be occasioned on the decree holder.

Analysis and determination

27. The court has considered the application, replying affidavit and submissions by both parties, the main issue for determination is whether the application is merited.
28. Order 42 Rule 35 of the Civil Procedure Rules provides for want of prosecution for appeals which is reiterated hereinbefore.
29. In *Rajesh Rughani V Fifty Investments Limited & Kembi & Muhia Advocates* [2016] KECA 829 (KLR) the court cited the case of *Ivita V Kyumbu* (1984) KLR 441) which set out the test for want of prosecution as follows:
- "The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."
30. In the instant case, the delay in not prosecuting the appeal is that the record of appeal was not filed due to the delay in obtaining the typed proceedings from the court's registry which is beyond the Appellant/Respondent's control.
31. The Appellant/Respondent had already applied for typed proceedings and the Deputy Registrar had written requesting the Chief Magistrate to supply the same as early as 7th February 2023. The appeal record was filed on 6th November 2024 and the appellant claims he got the proceedings on 5th November, 2024. In *Tome & another V Attorney General & 2 others* [2021] KECA 150 (KLR) the court echoed the views of the Supreme Court in *Hassan Nyange Charo V Khatib Mwashetani & 3 others* (2014) eKLR stating as follows:
- "Counsel for the respondent has been diligent in his pursuit to get the proceedings, but to no avail- indeed the last effort is the letter dated June, 2021. The applicant is not at fault and she cannot be driven from the seat of justice empty-handed by denying her an opportunity to exercise her undoubted right of appeal."
32. The appellant filed the memorandum of appeal on 1st February 2023 but obviously the record of appeal could not be filed until the proceedings were provided.



33. It is also worthy to note that the appellant deposited the decretal amount of Kshs.2,337,260/= in a joint interest earning account of the respective parties as early as 16th January 2023.
34. Flowing from the foregoing the court would find it unjust to lock out the appellant out of the seat of justice due to no fault of theirs. The application dated 26th September 2024 is therefore not merited and it is dismissed.
35. Since there is a duly filed record of appeal, this Honourable Court directs the Appellant/Respondent to serve the said record of appeal upon the Respondent/Applicant within 14 days from today's date and the parties can proceed to canvass the appeal with no further delay.
36. Case to be mentioned on 13th February 2025 to give further directions on the appeal.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JANUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

