



**Victonell Academy Limited v Mwangi (Employment and Labour Relations
Appeal E023 of 2023) [2025] KEELRC 326 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2023
AN MWAURE, J
FEBRUARY 12, 2025**

**BETWEEN
VICTONELL ACADEMY LIMITED APPELLANT
AND
FELISTER GATHONI MWANGI RESPONDENT**

RULING

Introduction

1. The Respondent/Applicant filed a Notice of Motion dated 8th November 2024 under certificate of urgency seeking the following orders that:
 1. This appeal be dismissed for want of prosecution.
 2. This Honourable court be pleased to order the release of the sum of Kshs.372,358/= plus interest thereon until fully released, being the total amount held in a joint interest earning account No. 1216063419 at KCB Bank (Njoro Branch) in the name of Raydon Mwangi & Associates and Odhiambo Opar & Co. Advocates as security to the Respondent's Advocate.
 3. The costs of this application and the entire appeal be awarded to the Respondent/Applicant.

Respondent/Applicant's case

2. The Respondent/Applicant avers that the Appellant/Respondent filed a memorandum of appeal dated 22nd August 2023 after being dissatisfied with the judgment of the Senior Resident Magistrate Hon. Dr. Priscah Nyotah dated 26th July 2023 in Nakuru CMERLC No. E91 of 2022.
3. The Respondent/Applicant avers that the Appellant/Respondent filed an application for stay of execution which was allowed vide a ruling dated 8th November February 2024 directing the Appellant



to deposit the decretal sum of Kshs.372,358/= in a joint interest earning account in the names of parties' advocates pending hearing and determination of the appeal.

4. The Respondent/Applicant avers that since filing the memorandum of appeal, the Appellant/Respondent has not taken action to file the record of appeal.
5. The Respondent/Applicant avers that the Appellant/Respondent has refused and/or failed to take steps to prosecute the appeal and has taken one year since it was filed.
6. The Respondent/Applicant avers that no explanation has been given as to why the record of appeal has not been filed nor set down the appeal for hearing or directions.
7. The Respondent/Applicant avers that the Appellant/Respondent's conduct of not filing the record of appeal and prosecuting the appeal is indolent.
8. The Respondent/Applicant avers that the Appellant's actions are against Article 159(2)(b) of *the Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act*.
9. The Respondent/Applicant avers that the prolonged delay of the appeal has placed the Appellant/Respondent in a lot of anxiety and disadvantage as the matter remains pending in court.
10. The Respondent/Applicant avers that the appeal is an abuse of the court process and prays that the application be allowed as prayed.

Appellant/Respondent's replying affidavit

11. In opposition to the application, the Appellant/Respondent filed a replying affidavit dated 3rd December 2024.
12. The Appellant/Respondent avers that it applied for typed proceedings and paid, but the proceedings are yet to be delivered.
13. The Appellant/Respondent avers that its advocates have visited the registry on several occasions to follow up and confirm the status of the proceedings which were yet to be prepared.
14. The Appellant/Respondent avers that it denies the allegations of failing to prosecute the appeal since typed proceedings have not been supplied thus unable to compile the record of appeal.
15. The Appellant/Respondent avers that its advocates confirmed that the proceedings were ready and waiting for certification.
16. The Appellant/Respondent avers that the Respondent/Applicant has instructed auctioneers to attach its movable property and filed a bill of costs which is pending determination.
17. The Appellant/Respondent avers that if the decretal sum is in a joint interest-earning account, the Respondent/Applicant's interests are secure and stand to suffer no prejudice if the appeal is heard and determined as she shall have a chance to challenge the appeal.
18. The Appellant/Respondent prays that the application be dismissed and allows the pursuit of the appeal.

Determination

19. 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.
20. Rule 43(3) of the Employment and Labour Relations Court (Procedure) Rules 2024 provides that any party to the suit may apply for dismissal where no action has been taken within one year.
21. The test for dismissal for want of prosecution is set out in the classic case of *Ivita V Kyumbu* (1984) KLR 441) the court stated 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.”
22. In *Nilesh Premchand Mulji Shah & Premchand Mulji Shah t/a Ketan Emporium V M.D. Popat and others & Dayalal Bhanji & Sons Ltd* [2016] KEHC 6855 (KLR) the court stated as follows:
- “ . . . 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 and likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita V yumbu* [1984] KLR 441 espoused . . . ”
23. This Honourable court has considered the arguments by both parties and noted that indeed the memorandum of appeal dated 22nd August 2023 was filed on 23rd August 2023 and it has been one year and four months since no action has been taken to prosecute the appeal.
24. The Appellant/Respondent seemed to have got the typed proceedings and successfully filed the record of appeal on 6th December, 2024 as per filing receipt in the court file. It was not the fault of the advocate entirely or the litigant that the typed proceedings were not available in time to compile the record of appeal. Delays in obtaining the typed proceedings can sometimes be beyond control of the parties. Therefore, the court finds the appellant has sufficient and reasonable grounds for the delay and so they should be given the chance to prosecute the appeal.
25. Since there is a stay of execution in place and the decretal sum is in a joint-earning account in the names of the parties’ advocates, the said decretal sum is secure and in the interest of justice, no prejudice will be suffered if the Respondent/Applicants proceeds with the appeal.
26. This Honourable Court finds that the Notice of Motion dated 8th November 2024 lacks merit and therefore is dismissed. The appellant to proceed with the appeal.
27. Costs will be in the cause.



28. The case will be mentioned on 4th March 2025 to give further directions on the appeal. Meanwhile the said record of appeal to be served on the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF FEBRUARY, 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.

