



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ahmed v Akuno (Appeal E064 of 2023) [2025] KEELRC 922 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 922 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL E064 OF 2023**

**JK GAKERI, J**

**MARCH 24, 2025**

**BETWEEN**

**SHAKEEL A SHABBIR AHMED ..... APPELLANT**

**AND**

**EMMANUEL OYUKO AKUNO ..... RESPONDENT**

**RULING**

1. Before the court for determination is the appellant's Notice of Motion dated 4<sup>th</sup> October, 2024 filed under Certificate of Urgency on 18<sup>th</sup> November, 2024 seeking Orders that: -
  1. Spent.
  2. Spent.
  3. The Honourable Court be pleased to set aside its Orders made on 27<sup>th</sup> January, 2023 dismissing this appeal for want of prosecution and Order reinstatement of the appeal for hearing.
  4. The costs of this application to abide the outcome of the appeal.
2. The Notice of Motion is expressed under Articles 50 of the *Constitution* of Kenya, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 51 Rule I of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Fundi Lewis Lucheli sworn on 4<sup>th</sup> October, 2024.
3. The applicant's case is that on 2<sup>nd</sup> October, 2024 the affiant was logged in Honourable Lady Justice Baari's virtual court session but there was no activity and later learnt that the Judge was on transfer and the trial Judge was Gakeri J and joined the court session and was notified that the matter had been mentioned in the presence of counsel and dismissed for non-attendance and want of prosecution and hence the mistake ought not to be visited on the appellant.



4. That the failure to file the Record of Appeal was occasioned by failure to obtain typed copies of proceedings despite visits and letters to the Registry as evidenced by letters dated 22/01/2024, 11.07.2024 and 2<sup>nd</sup> August, 2024 and all were received.
5. The appellant deposes that the failure to procure copies of typed proceedings has occasioned the delay in filing of the appeal and its non-reinstatement will occasion irreparable suffering on the appellant and prays for the setting aside of the Orders made on 2<sup>nd</sup> October, 2024 and the appeal reinstated.

### **Response**

6. By a Replying Affidavit sworn by Mr. Emmanuel Oyuko Akuno on 16<sup>th</sup> October, 2024, the respondent deposes that the instant application is incompetent, misconceived and an abuse of the court process as no valid reason had been raised by the appellant and his hands are unclean as the court ordered the appellant to deposit security on 27<sup>th</sup> April, 2024 and has not done so to date.
7. That one 10<sup>th</sup> June, 2024 the Honourable Judge informed the appellant's counsel that proceedings were ready and accorded him 7 days to comply but had not filed by 26<sup>th</sup> June, 2024, and a Notice to Show Cause was issued but lifted on 24<sup>th</sup> July, 2024.
8. That counsel's attendance would not have made a difference as he had not complied with court orders as the last follow up was on 5<sup>th</sup> August, 2024 and had lost interest in the appeal as he has settled most of the decretal sum and only a small amount of costs remain unpaid and had not availed a draft record of appeal.
9. That the application lacks merit and is intended to frustrate the respondent and ought to be dismissed.

### **Appellant's submissions**

10. As to whether the court should review and set aside its order dated 2<sup>nd</sup> October, 2024 the appellant relies on the provision of Order 42 Rule 21 of the Civil Procedure Rules on re-admission of appeal after dismissal and the sentiments of the court in John Nahashon Mwangi V Kenya Finance Bank Ltd (in liquidation) [2015] eKLR on the essence of Article 159 of the Constitution of Kenya, to submit that the appellant had shown why he is yet to file a Record of Appeal.
11. Reliance was also placed on Bernard Muthee & Another v Anita Kamba Mwiti [2021] eKLR to highlight the possibility of filing a supplementary Record of Appeal once proceedings are obtained to urge that he had attached copies of letters requested for typed proceedings.
12. The sentiments of Chesoni J Ivita V Kyumbu [1975] EA 441 were also cited on the test whether delay is prolonged and inexcusable to urge the court to exercise discretion judiciously.
13. Counsel submitted that the appellant had already been supplied with the typed proceedings, Judgment and decree and the Record of Appeal was ready for filing.

### **Respondent's submissions**

14. As to whether the court should exercise discretion to reinstate the appeal, the respondent relies on Order 42 Rule 13(4) of the Civil Procedure Rules on the requirements of appeal and Order 42 Rule 35(2) on notification of the appellant that the appeal is ripe for dismissal if it has not been set down after one year of filing of the Memorandum of Appeal.
15. Reliance was placed on the decision in Elem Investment Ltd V John Mokora Olowama [2015] eKLR on dismissal of appeals as was the decision in Abraham Mukhola Asitsa V Silver Style Investment Co.



Ltd [2020] KEHC 965 (KLR) on the court's power to dismiss appeals for want of prosecution, to submit that the appellant filed a Memorandum of Appeal on 29<sup>th</sup> November, 2023 and the appeal was dismissed as the last follow up was on 5<sup>th</sup> August, 2024, to argue that the appellant had disregarded court orders.

### **Analysis and determination**

16. It is common ground that a court of law has discretion to dismiss an appeal in the circumstances set out under Order 42 rule 35 of the Civil Procedure Rules, either at the instance of the respondent if it has not been set down for hearing after 3 months after directions have been given or on its own motion vide notice by the registrar after one (1) year after service of the Memorandum of Appeal.

17. Additionally, the sentiments of Musyoka J in Abraham Mukhola Asitsa V Silver Style Investment Co. Ltd (Supra) suggest that an appeal can be dismissed for want of prosecution in other instances.

18. According to the learned Judge,

However, I am not persuaded that there is any justification for the party to file appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals Registry for times on end without any action being taken...

An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted yet the courts are being told they cannot dismiss them before directions are taken. This creates unnecessary backlog. If the parties are not moving their cases, the courts should dismiss them. There is no reason for them to clog the system. It is an untenable position.

I believe there is inherent power to dismiss such appeals.

In this case, no action was taken by the appellant after his appeal was filed, for over two years, indeed nearly three years. He did not explain why that was so. I am persuaded that this is a proper case for dismissal of the appeal and I hereby dismiss the appeal with costs..."

19. While the court is in agreement with the sentiments of the learned Judge, each case must be decided on its own merits and circumstances.

20. A brief history of this appeal is necessary in order to contextualize the instant Notice of Motion.

21. The Memorandum of Appeal was filed on 2<sup>nd</sup> December, 2023 and the appeal was mentioned before the Honourable Judge on 6<sup>th</sup> February, 2024 and both counsels were present. Counsel for the appellant requested for more time to file the Record of Appeal as he had received the typed proceedings and was accorded 30 days to file the Record of Appeal. On 6<sup>th</sup> March, 2024 Mr. Menezes for the appellant informed the court that he had not obtained the typed proceedings and judgment and was accorded 30 days to do so.

22. Both on 6<sup>th</sup> February, 2024 and 6<sup>th</sup> March, 2024, the court directed the Deputy Registrar to facilitate issuance of the typed proceedings.

23. The appellant was accorded more time on 9<sup>th</sup> April, 2024 and 7 more days on 10<sup>th</sup> June, 2024.



24. During the mention on 10<sup>th</sup> June, 2024, counsel for the respondent stated that he had information that the typed proceedings were ready but had not been collected, hence the 7 days given by the court. However, the appellant's counsel posited that there was no evidence of counsel's allegations.
25. On 26<sup>th</sup> June, 2024, the court directed the issue of a notice to show why the appeal should not be dismissed but the same was lifted on 27<sup>th</sup> July, 2024 when counsel explained the circumstances to the court and was accorded 14 days to file the Record of Appeal but had not by 2<sup>nd</sup> October, 2024 and was not in court when the appeal was dismissed.
26. The court relied on the court record as no verifiable evidence of letters calls, emails or physical visits had been provided.
27. However, Mr. Fundi Lewis Lucheli's averment that on 2<sup>nd</sup> October, 2024, he logged in Justice Baari's Court and there was no activity is true as the learned Judge was on transferred to Nairobi and made attempts to log into the proper court and was informed of the court's directions and acted promptly by filing the instant application on 4<sup>th</sup> October, 2024.
28. It is not in dispute that availment of typed proceedings for purposes of filing the Record of Appeal has been a challenge in various Registries, Kisumu included and notwithstanding concerted efforts by the court and advocates, the demand outstrips supply by a wide margin to the charging of litigants and concern to advocates and the court, bearing in mind that the overriding objective is the resolution of disputes in a just, expeditious proportionate and affordable manner.
29. The foregoing is fortified by the sentiments of Edward Muriithi J in *Bernard Muethee & Another V Anita Ramba Mwili* (Supra), cited by the appellants on the difficulties in obtaining typed proceedings from the Court Registry at Meru.
30. The judge was advocating for the filing of an initial Record of Appeal and thereafter a supplementary one when proceedings are obtained, an avenue some advocates use as it inter alia demonstrates the appellant's interest in prosecuting the appeal.
31. It is a pragmatic approach but has cost implications and seldom used by advocates.
32. In *Richard N. Charpi Leiyangu V I.E.B.C & 2 Others* the Court of Appeal stated:

We agree with those noble principles which go further to establish that the courts discretion to set aside an ex parte judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice..."
33. See also *Belinda Murai & Others V Amos Wainaina* [1978] LLR 2782 and *Phillip Chemwolo & Another V Augustine Kubede* [1982-88] KAR 1040 on mistake by counsel.
34. Creditably, the Appellant/Applicant attached copies of communication with the Registry in the form of letters sent, the oldest on 22<sup>nd</sup> January, 2024 and the latest on 5<sup>th</sup> August, 2024 about two (2) months before the appeal was dismissed.
35. These letters show that the appellant has been following up on the typed proceedings, a manifestation of his interest to pursue the appeal.
36. In the court's view, the delay, though prolonged is explained through verifiable evidence contrary to the respondent's submission that the delay in prosecuting the appeal was intentional and deliberate.



37. The court is not so persuaded in the absence of evidence to demonstrate that the typed proceedings were obtained earlier or could have been obtained earlier than they did.
38. Relatedly, and contrary to the respondent's contention that the presence of counsel on 2<sup>nd</sup> October, 2024 would not have made a difference the court respectfully disagrees.
39. The presence of an advocate in court on behalf of the client is critical. The advocate is the mouth piece of the client in court and avails all the information and briefs the court on the matter. It demonstrates the client's resolve to prosecute the case to conclusion. This is why advocates endeavour to ensure that a colleague holds their brief if they are not in court.
40. The absence of an advocate has the opposite effect, and in particular where the advocate has not reached out to the colleague on the other side or contacted the court via email.
41. Having found that the prolonged delay in having the Record of Appeal has been explained and largely accounted for, and the respondent has not demonstrated the prejudice he is likely to suffer if the order made on 2<sup>nd</sup> October, 2024 is set aside and the appeal reinstated, to ensure that justice prevails, as held in *Ivita V Kyumbo* (supra), the court is satisfied that the scale of justice is tilted in favour of the applicant and discretion ought to be exercised in his favour.
42. The upshot of the foregoing is that the applicants Notice of Motion dated 4<sup>th</sup> October, 2024 is merited and is accordingly granted as follows:
  - a. The court Order made on 2<sup>nd</sup> October, 2024 dismissing the appeal herein be and is hereby set aside and the appeal reinstated for hearing and determination.
  - b. The applicant/Appellant shall file the Record of Appeal within 14 days.
  - c. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> DAY OF MARCH, 2025.**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

