



Macharia & another (Suing as the Legal Administrator (Ad Lite) of the Estate of Daniel Maina Ngendo) v Macharia & 2 others (Environment & Land Case 5 of 2021) [2024] KEELC 5744 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 5 OF 2021**

JG KEMEL, J

JULY 30, 2024

BETWEEN

JOYCE MUTHONI MACHARIA 1ST APPELLANT

DANIEL MAINA NGENDO 2ND APPELLANT

SUING AS THE LEGAL ADMINISTRATOR (AD LITE) OF THE ESTATE OF DANIEL MAINA NGENDO

AND

DUNCAN NJORA MACHARIA 1ST RESPONDENT

RUIRU LAND REGISTRAR 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Coming up for determination is the 1st Respondent/Applicant's Notice of Motion dated 9/9/2022 expressed under Order 42 Rule 20 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#). In the main the 1st Respondent urges this Hon Court to dismiss the Appellant's appeal and Notice of Motion both dated 11/1/2021 for want of prosecution incidental costs thereto. The Motion is premised on grounds that the Appellant filed her appeal dated 11/1/2021 against the trial Court Judgment delivered on 3/12/2020. That simultaneously she also filed a Notice of Motion of even date seeking stay of execution of the impugned Judgment. That despite the forgoing the Appellant has failed to attend Court and comply with this Court's directions to prosecute the appeal, an indication of laxity and lack of interest in her appeal.
2. The Application is not opposed.
3. On 6/6/2024 directions were taken to canvass the Application by way of written submissions.



4. None of the parties filed any submissions.
5. The singular issue for determination is whether the Application is merited.
6. Order 40 of the *Civil Procedure Rules* contemplates two scenarios of dismissing an appeal namely dismissal of appeal for Appellant's default and dismissal of appeal for want of prosecution. The relevant Rules are outlined below;

“ 20. Dismissal of appeal for Appellant's default [Order 42, rule 20.]

(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the Appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the Court may make an order that the appeal be dismissed.

(2) Where the Appellant appears, and the Respondent does not appear and has not filed a declaration under rule 16(3), the appeal may be heard ex parte.

...

35. Dismissal for want of prosecution [Order 42, rule 35.]

(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.”

7. In the instant case, the record shows that the Appellant was aggrieved by the trial Court Judgment delivered on 3/12/2020. In her Notice of Motion dated 11/1/2021 she inter alia sought leave to file her Record of Appeal out of time. Determining the aforesaid motion, the Hon. Court on 30/6/2021 allowed the Appellant to file her Memorandum of Appeal and Record of Appeal within 30 days. The Record of Appeal was filed over 45 days later on 16/8/2021 albeit out of time granted by the Court. Consequently the 1st Respondent averment that the Notice of Motion is pending determination is not correct.
8. A perusal of the Court record shows after filing the Record of Appeal, on 27/9/2021 Learned Counsel Mr. Kinyua holding brief for M/S Kuria Advocates intimated to the Court that the firm no longer had instructions to act for the Appellant. The subsequent Mention dates namely 4/11/2021, 6/12/2021, 2/3/2022, 4/5/2022, 14/6/2022, 21/7/2022, 8/9/2022, 1/11/2022, 5/12/2022, 14/2/2023, 27/3/2023, 29/5/2023 and 28/9/2023 the Appellant has never appeared in Court.
9. Applying order 42 rule 35 of the Civil Procedure Rules above, before an appeal is dismissed, directions must have been given for its prosecution. A perusal of the record does not contain any directions for hearing the appeal.



10. Order 42 Rule 20 of the Civil Procedure Rules however is applicable noting that the Appellant has failed to attend Court either in person or through Counsel to canvass her appeal. The 1st Respondent has invoked the oxygen principles under the *Civil Procedure Act*. The Appellant herein filed an appeal and went into slumber, this Court can invoke its inherent powers under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court process and further the provisions of Article 159(2) (b) of *the Constitution* to do justice without undue delay.
11. The principles to be considered while considering an Application for dismissal of appeal were restated by the Court of Appeal in Peter Kipkurui Chemoiwo Vs. Richard Chepsergon [2021] eKLR and include whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. (See also *Ivita Vs. Kyumba* [1984] KLR 441). It is clear from the instant case that the delay being a period of 3 years, herein is indeed prolonged. No explanation has been tendered by the Appellant for this Court to consider.
12. Ultimately, I find that the Application is merited and it is allowed with no orders as to costs.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent

Kariuki G. E for 1st Respondent

2nd and 3rd Respondents – Absent

Court Assistants – Phyllis/Oliver

