



**Igunza v Badar Hardware Limited (Appeal E073 of 2021)
[2024] KEELRC 533 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E073 OF 2021**

**AK NZEI, J
MARCH 7, 2024**

BETWEEN

SAMUEL IGUNZA APPELLANT

AND

BADAR HARDWARE LIMITED RESPONDENT

*(Being an appeal against the judgment of Hon. Lesootia Saitabau – PM
delivered on 29th September 2021 in Msa-ELR Case No. 244 of 2020)*

RULING

1. The application before me is the respondent’s notice of motion dated 28/10/2022, expressed to be brought under order 17 rule 2, order 42 rules 11,12, 13 and order 51 rule 1 of the [Civil Procedure Rules](#), and sections 1A, 1B and 3A of the [Civil procedure Act](#). The respondent/applicant seeks the following orders:-
 - a. that the court be pleased to strike out the memorandum of appeal dated October 21, 2021.
 - b. that the court be pleased to dismiss the appeal filed herein for want of prosecution.
 - c. that costs of the application and of the appeal be borne by the appellant.
2. The application is predicated on the supporting affidavit of Omar Yusuf Ahmed, the respondent’s Managing Director, whereby it is deponed that having filed a memorandum of appeal on October 21, 2021, the respondent is yet to file and to serve a record of appeal. That the appellant is yet to list the appeal for directions, and has lost interest in the appeal upon realizing that the same is a non-starter.
3. It is further deponed on behalf of the Respondent/Applicant that the Appellant has not moved the Court for a period exceeding one year and that no efforts to do so have been demonstrated. That under the circumstances, the Appellant ought to show cause why the appeal herein should not be dismissed for offending order 17 rule 2 of the [Civil procedure Rules 2010](#).



4. The application is opposed by the Appellant vide a replying affidavit sworn by himself on 25/7/2023. The Appellant deposes that failure by him to file a record of appeal in time was due to unavailability of the file and inability to obtain certified copies of proceedings, which he has now obtained, though he is yet to obtain a certificate of delay.
5. The Respondent/Applicant filed a supplementary affidavit on 4/8/2023, annexing a copy of the trial Court's judgment delivered on 29/9/2021 and deposing that the Respondent/Applicant was never copied in the letter requesting for proceedings, and that a receipt on payment for proceedings would be proof of when time started running as far as typing of proceedings is concerned. That under this Court's Rules, the Appellant ought to have filed the entire appeal within thirty days, and that this was not done.
6. Both parties filed written submissions for and against the application pursuant to this Court's directions in that regard, which I have considered.
7. It is worthy noting that proceedings in this Court are regulated by the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#), and that rules made under the [Civil Procedure Act](#) apply to such proceedings only when an Act of Parliament, in this case the [Employment and Labour Relations Court Act](#), specifically provides that such Rules shall apply. For example, section 13 of the said Act provides that this Court's judgment, award, order or decree shall be enforceable in accordance with the rules made under the [Civil Procedure Act](#). This position is echoed in rule 32 of this Court's said [Rules](#).
8. In cases where both the said Act and this Court's Rules are silent on a particular procedural issue, this Court has, over the years, reverted to the [Civil Procedure Rules](#) on that particular issue for guidance.
9. This Court's Rules are clear and specific on prosecution of suits, and the word "suit" is defined in rule 2 of the [Rules](#) to mean a claim, petition, application for Judicial review, appeal or any proceedings before the Court for determination. Rule 16 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) provides as follows:-
 1. "In any suit where no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of filing, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
 2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
 3. Any party to the suit may apply for dismissal as provided in paragraph (1).
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Rule."
10. Although the Appellant/Respondent has not shown any reasonable cause why the appeal should not be dismissed for want of prosecution, I have noted that during the pendency of the application herein, the Appellant filed a record of appeal on 26/9/2023. In view of this fact, I will spare the appeal, and will not dismiss it for want of prosecution. Justice of the case demands that the Appellant be granted an opportunity to prosecute his appeal, now that there is a record of appeal filed.
11. The record of appeal shall be served forthwith, if service thereof has not yet been effected, and the appeal shall be fixed for taking of directions on disposal thereof.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH MARCH 2024



AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform.

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

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

