



Kamili Packers Limited v Kitheka & another (Employment and Labour Relations Appeal E021 of 2022) [2024] KEELRC 2431 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2431 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E021 OF 2022**

**MN NDUMA, J
OCTOBER 3, 2024**

BETWEEN

KAMILI PACKERS LIMITED APPELLANT

AND

DOMINIC KILONZI KITHEKA 1ST RESPONDENT

REAP HUMAN RESOURCE SOLUTIONS LIMITED 2ND RESPONDENT

RULING

1. The appellant/applicant filed a notice of motion application dated 14/2/2024 seeking for orders that:-
 1. The order of this court made on 10/12/2023 dismissing the appeal be set aside.
 2. This appeal be reinstated
 3. The court do order a stay of execution of the judgment and decree made in Milimani CM EC No. 2249 of 2019
 4. Costs be provided.
2. The application is premised on grounds (a) to (b) set out on the face of the application and buttressed in the supporting affidavit of Loise Mwaniki, counsel for the applicant which may be summarized that the applicant filed an affidavit to show cause dated 15/12/2023 stating why the appeal should not be dismissed.
3. That the applicant mis-diarised the date set to show cause and the matter was dismissed in the absence of the applicant.
4. The 1st respondent thereafter filed miscellaneous application seeking that the decretal sum of Kshs. 161,346.00 be released to their advocates. The application was allowed on 13/02/2024.



5. The applicant is still desirous of prosecuting the appeal and prays the application be allowed.
6. That appeal will be rendered nugatory if order for stay is not granted. That the decretal sum to remain in the joint interest earning account and the respondent will not be prejudiced pending the hearing and determination of the appeal.

Reply

7. Ms. Karen Kangethe advocate for the respondent filed a replying affidavit dated 22/2/2024 where she deposes that the application lacks merit and is an abuse of the court process.
8. That the applicant has not provided any justification as to why it did not attend court on 19/12/2023 to show cause why the Appeal should not be dismissed for want of prosecution despite being served with the notice to show cause.
9. That the appeal was filed on 22/2/2022 and served on 28/2/2022 and to date the appellant has never filed the record of appeal or taken any other step towards having the appeal heard.
10. That the appellant folded its hands upon obtaining orders of stay of execution of the judgment and decree and depositing the decretal sum in a joint interest, earning current account and it was only jolted to action after the court ordered release of the deposited amount to the 1st respondent.
11. That the appellant is guilty of inordinate delay in filing this application as the appeal was dismissed on 19/12/2023 and this application was filed on 14/2/2024 about three months later.
12. That this application is only meant to delay justice and it be dismissed with costs as if granted will gravely prejudice the respondents.

Submissions

13. The parties filed written submissions which have guided the court well in the matter.
14. Order 42 Rule 35(4) provides

If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar is obligated after giving notice to the parties to list the appeal before a judge in chambers for dismissal.”
15. In this respect, the appeal was filed on 22/2/2022 and a notice to show cause was served on the applicant and the respondent to show cause on 19/12/2023 why the same should not be dismissed for want of prosecution.
16. The applicant had by that date, not filed the record of appeal and not set down the appeal for hearing despite passage of one year and eight months from the date the appeal was filed.
17. The applicant did not attend the hearing on 19/12/2023 to show cause why the appeal should not be dismissed for want of prosecution. Ms. Kangethe for the respondent who was in attendance pursuant to the notice to show cause applied for the appeal to be dismissed for want of prosecution which the court did on the date.
18. The court notes that the applicant has not in the notice of motion and supporting affidavit given any reasons why it had not filed the record of appeal and moved the court to set down the appeal for hearing and/or give directions for the prosecution of the appeal by way of written submissions.



19. The applicant purports to have filed an affidavit to show cause dated 15/12/2023 which affidavit is not attached to this application nor are any reasons for the inordinate delay to prosecute the appeal set out on the face of this application or the supporting affidavit.
20. The applicant casually states that “due to an arising error inadvertently missed the show cause.”
21. It is not stated who mis-diarised the matter nor is a copy of the alleged wrong diarising attached to the application to demonstrate the authenticity of the application.
22. In any event there is no reason why the applicant has not made any attempt at all in this application to explain the reason for the inordinate delay in taking any demonstrated steps to prosecute this appeal upon obtaining an order for stay of execution and depositing the decretal amount which amount was released by the court pursuant to an application by the respondent dated 25/1/2024.
23. The applicant itself, has not demonstrated that upon instructing counsel in the matter, it took any steps itself to ensure that the appeal was prosecuted. whereas the Court of Appeal in *CFC Stanbic Limited v John Maina Gitbaiga and another* [2013] eKLR and the High Court in *Edney Adoka Tsune v Equity Bank Ltd* [2014] eKLR, emphasized that blunders of counsel should not be visited on their clients when the situation can be remedied by costs there is growing jurisprudence that, a party, must demonstrate that it took steps to avoid inordinate delay in having its case prosecuted.
24. In the present matter, not an iota of evidence has been presented to demonstrate that the counsel and or the applicant itself took any steps to have the appeal record filed and the appeal set for hearing and prosecuted.
25. In *Gusii Farmers Rural Sacco Ltd. v Henry Mageto and 2 others* [2005] eKLR, the court held:-

...it is clear that after filing the appeal the appellant went to sleep. He never filed a record of appeal or took any other steps. Order 41 Rule 31(2) *CPR* provides that if appeal is not set down for hearing within one year after memorandum of appeal has been served then the registrar can set it for dismissal. It is obvious that more than a year have passed since memo of appeal was served on 23rd May 2023, no steps have been taken and there is no explanation. This therefore is a proper case of dismissal.”
26. Upon proper consideration of the facts of the case as set out by the applicant and countered by the respondent, this is no doubt a proper case for dismissal. The court was justified to dismiss the application on 19/12/2023 and the applicant has not made any justification to set aside that decision.
27. The application is dismissed with costs.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

M/s. Mwaniki for appellant/applicant

M/s. Kangethe for respondent

Mr. Kemboi – Court Assistant

