



**Kwambai v Board of Management, Moi Kapsowar Girls Secondary School
(Appeal 13 of 2020) [2023] KEELRC 956 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 956 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL 13 OF 2020
NJ ABUODHA, J
APRIL 28, 2023**

BETWEEN

WILSON KWAMBAI APPELLANT

AND

**BOARD OF MANAGEMENT, MOI KAPSOWAR GIRLS SECONDARY
SCHOOL RESPONDENT**

RULING

1. The Applicant through a motion dated August 1, 2022 sought for the striking out of the memorandum of appeal dated October 23, 2022 and filed on November 4, 2020.
2. The application was premised on the grounds *inter alia* that since the filing the appeal on November 4, 2020 the Appellant had not taken any steps in the matter. The application was further supported by the affidavit of Joan Too sworn on August 1, 2022. The deponent stated among others that:
 - i. I am the Principal of Moi Kapsowar Girls Secondary School in Elgeyo Marakwet County and the Applicant herein hence competent to swear this affidavit.
 - ii. I know on my own personal knowledge that the Judgment being appealed against was delivered on the October 19, 2020.
 - iii. My Advocate on record has informed me that on the November 6, 2020, they were served with a Memorandum of Appeal.
 - iv. I am being advised by my Counsel on record, whose advice I believe to be true that the Appellant filed the Appeal herein on the November 4, 2020 and a year has lapsed since then and despite this, the Appellant has not taken any steps on the matter.



- v. I am further advised by my advocate on record which advise I believe to be true that pursuant to Order 17 Rule 2 of the Civil Procedure Rules 2010 in any suit in which no application has been made or step taken by either party for one year, any party to the suit may apply for its dismissal.
 - vi. The Appeal has stalled for over a year and no steps has been taken by the Appellant to that effect and hence the same is ripe for dismissal.
 - vii. The Appeal is thus incompetent and/ or defective and should be struck out
3. The application was opposed by the Appellant/Respondent who filed a replying affidavit on November 11, 2022 and stated among others that:
- i. I am the appellant in the instant appeal having filed the memorandum of appeal on 4th of November 2020.
 - ii. I further requested for the proceedings to be typed *vide* a letter dated 21st of October 2020.
 - iii. The typed proceedings were not ready until late 2021 March upon receipt of the proceedings, we proceeded and filed the record of appeal and served upon the respondent on April 8, 2021.
 - iv. My advocate then made attempts at fixing the matter for mention before the Honourable Court.
 - v. I am informed by advocate which advise I verily believe to be true that visits to the registry did not bear any fruits prompting issuance of several letters to the deputy registrar and both magistrates' court registries.
 - vi. On July 8, 2021 my advocate issued a letter to the deputy registrar asking the process of calling for the lower court files be fast tracked
 - vii. Despite several follow up on the progress of the matter there was no response from the deputy registrar or the registries.
 - viii. On 4th May 2022 another letter was sent out to the deputy registry citing the challenges in prosecuting the appeal.
 - ix. Soon thereafter a notice was issued that the files from the lower court has been transferred and my advocate could take steps to fix the appeal for mention for directions.
 - x. The matter was then slated for mention before the judge on October 17, 2022 when the court was not sitting. This date was served upon the respondent.
 - xi. The respondents then fixed matter for mention on November 14, 2022 and served the same upon us.
 - xii. Upon receipt of mention notice dated August 1, 2022, the respondents were the prompted to file the application dated August 1, 2022 but filed in court October 14, 2022.



- xiii. The grounds of the application and all facts set out in the affidavit therefore marked with untruthfulness and conceding of facts.
4. An order dismissing a suit for want of prosecution is discretionary. The Court can in an appropriate case make the order by its own motion or upon being moved by a party to the suit. Before issuing the order the Court must be satisfied that the delay has been deliberate and inordinate. The prosecutor of the suit to be dismissed must be shown not to have any reasonable cause or explanation why they have not taken steps to prosecute the suit and for inordinate period of time.
 5. The Appellant before me has reasonably explained the delay in prosecuting the appeal. The reasons were matters beyond the Appellant. They were matters to do with the Court and the processing of proceedings from the lower court to enable the Appellant complete and prepare the appeal for hearing. The Court has considered the explanation and is reasonably persuaded that the delay was not deliberate and inordinate.
 6. The Court will therefore reject the application but direct that the matter be mentioned before Appellate Court within 30 days of this ruling for the purposes of setting the appeal down for hearing.
 7. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA J. N.

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent

