



**S & I Secured Assured v Pamba (Employment and Labour Relations  
Appeal 11 of 2020) [2023] KEELRC 1047 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1047 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 11 OF 2020**

**NJ ABUODHA, J**

**APRIL 28, 2023**

**BETWEEN**

**S & I SECURED ASSURED ..... APPELLANT**

**AND**

**VINCENT ONG'ARIA PAMBA ..... RESPONDENT**

**RULING**

1. By a motion dated October 26, 2022 the respondent/applicant herein moved the court for orders among others, the dismissal of the appeal herein for want of prosecution.
2. The application was premised on grounds *inter alia* that since the filing of the memorandum of appeal dated October 27, 2020 the appellant had failed to set down its appeal for directions and hearing.
3. The application was further supported by the affidavit of Vincent Ong'ara Pamba, the respondent who stated among others that the appellant filed an application for stay of execution in the lower court with its memorandum of appeal has failed to set the appeal for directions and or hearing.
4. The respondent further stated that on October 7, 2022, his counsel wrote to the appellant's counsel informing them that the proceedings had been typed and certified and ready for collection. Despite the notification, the appellant has failed and or ignored to file the record of appeal. Further, the respondent stated that his advocate forwarded copies of typed proceedings and judgment and yet the appellant has never filed the record of appeals and set the appeal for hearing.
5. In response to the application, the appellant filed a replying affidavit through one Fredrick Mwashu who deposed in the main;
  - i. That he is the operations manager of the appellant's company, hence competent and qualified to swear this affidavit.



- ii. That their company and the firm of Mburu Maina & Company Advocates had personal differences which affected the way they conducted this appeal.
  - iii. That their difference escalated to the extent that their erstwhile advocate failed to prepare a record of appeal or inform them on the progress of the appeal at hand.
  - iv. That it came to pass that they were eventually served with an application to cease acting alongside an application to dismiss an appeal.
  - v. That it is clear in their view that the failure to compile a record of appeal is a mistake of his previous advocate and the mistake of the said advocate should not be visited upon them, his client.
  - vi. That the omission by the said law firm ought not to be occasioned upon his client who had no clue on the legal process and procedure of instituting an appeal.
  - vii. That for this reason, the appellant seeks a second chance to comply and compile a record of appeal within the stipulated time this honourable court will grant.
6. In submissions in supporting the application, Mr Kagunza for the respondent submitted that the appellant since the filing of their memorandum of appeal and obtaining an order for stay has refused, failed or neglected to prosecute the appeal.
  7. According to counsel, the respondent herein had judgment entered in his favour by the trial court and the appeal was therefore a delay and an encumbrance against the respondent in accessing the prayers granted in the judgment of the lower court by reason of the stay order which the applicant had been enjoying since 2020.
  8. Counsel premised his application on order 42 rule 35(2) of the *Civil Procedure Rules* which stated that;
 

“If within one year after 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.”
  9. Counsel further submitted that sub-rule 35(1) of the said order empowers the respondent to either set the appeal down for hearing or apply by summons for the dismissal for want of prosecution. According to counsel, the appellants were past requisite timelines for prosecuting their appeal as more than one year had passed after the filing of memorandum of appeal.
  10. The appellant on its part submitted that the application for stay of execution pending appeal was ruled on April 6, 2021 by Hon Lady Justice Wasilwa after which the file was taken for typing. The appellants were then made aware of the readiness of the proceedings on October 7, 2022 without giving the appellants a chance to commence the process of preparing the record of appeal. The respondent filed the present application on October 26, 2022. According to counsel, the time frame of 19 days (between 7<sup>th</sup> and 26<sup>th</sup> October) given by the respondent to the appellant was too short to compile the record of appeal lest the same be dismissed, was too short.
  11. The court acknowledges the guiding principles governing prosecution of cases as captured under section 1A of the *Civil Procedure Act*. That is the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of disputes governed by the Act.



12. These principles empower the court to issue sanctions including an order on costs or dismissal against a party where it is found that such a party's sole intention of involving the court in a matter is to cause delay or pervert justice.
13. The court on the other hand must not be overzealous in invoking the "oxygen" principle. Before invoking the principle, the court ought to be satisfied that the sole intention of the party is to cause delay or misuse the court process to their advantage. I say so because the court is guided by the principle of doing justice to the parties and where reasonable excusing minor infractions of the court process. Straying from the path of rectitude is one of the frequent mistakes of ordinary mortals and must not always be visited upon with the biggest stick in the judicial armory; that is, being denied audience to ventilate a dispute. An award of costs could in most cases assuage the discomfort of the party inconvenienced by these minor hiccups in prosecution of cases.
14. The court has carefully considered this application and the explanations given by the appellant for not being able to file the record of appeal. The court further takes into account submission by counsel that the appellant became aware of the readiness of the typed proceedings on October 7, 2022 and some 19 days later, it got served with the present application and takes the view that the proper order to make would be to preserve the appeal by allowing the appellant to prepare, file and prosecute its appeal.
15. In that regard, the court would disallow the present application but order that the appellant files and serve the record of appeal within 30 days of this order in default the appeal shall stand dismissed. Parties shall thereafter upon service of the record of appeal set the same down for hearing.
16. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF APRIL, 2023**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

.....for the Appellant

..... for the Respondent

