



REPUBLIC OF KENYA



KENYA LAW
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Nzoia Sugar Company Limited v RM Patel & Partners Limited (Civil Appeal 96 of 2022) [2025] KEHC 414 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 96 OF 2022
JRA WANANDA, J
JANUARY 24, 2025**

BETWEEN

NZOIA SUGAR COMPANY LIMITED APPELLANT

AND

RM.PATEL & PARTNERS LIMITED RESPONDENT

RULING

1. The Appellant is represented by Messrs Chigai & Co. Advocates while the Respondent is represented by Messrs Mathai Maina & Co.
2. This Appeal was filed on 14/07/2022 and the last substantive step undertaken in the matter was the delivery of a Ruling by Hon. E. Ogola J whereof he allowed the Appellant's Application seeking an order of stay of execution of the Judgment appealed against, pending determination of the Appeal. For this reason of dormancy or inaction, the Court, suo motu, fixed the Appeal for dismissal for 27/11/2024 under the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules.
3. On 27/11/2024 when the matter came up before me, Mr. Musiaga holding brief for Ms. Chigai for the Appellant submitted that the Appellant is "in the red" and that to assist it stay afloat, the Treasury has taken up the task of settling its financial obligations on its behalf. He then sought for a period of 21 days to file an Affidavit showing cause why the Appeal should not be dismissed. On his part, Mr. Mathai, appearing for the Respondent submitted that the Appeal should be dismissed forthwith as the Appellant had failed to set it down for hearing and that it is in fact the Respondent who even prepared and filed the Memorandum of Appeal. I then granted the Appellant the 21 days sought, to file and serve the Replying Affidavit and fixed the Notice to Show Cause for 14/01/2025.
4. On 14/01/2025, Mr. Githaiga who held brief for Ms. Chigai for the Appellant, brought it to my attention that they had now filed and served the Replying Affidavit, a fact which Mr. Mathai confirmed. I have also seen and perused the Affidavit.



5. The Affidavit is sworn by one Rita N. Mukhongo who described herself as the Ag. Company Secretary of the Appellant. She basically reiterated the matters earlier submitted upon by Mr. Musiaga, namely, that the Appellant is experiencing financial challenges, and that the Treasury had stepped in to rescue the Appellant and had appointed a Pending Bills Committee to vet outstanding debts and/or financial claims lodged against the Appellant, and which includes the amounts claimed herein by the Respondent.
6. In his brief oral response, Mr. Mathai submitted that the Affidavit does not at all show cause as contemplated. He reiterated that the Appellant had made no efforts to prosecute the Appeal for a long time. He also pointed out that the Affidavit is dated 20/01/2024 yet it purports to address Court proceedings of 27/11/2024, an eventuality which is impossible. He also wondered how the Affidavit could have been sworn in Eldoret and yet commissioned at Migori.
7. In his brief Reply, Mr. Githaiga submitted that the date of 20/01/2024 was mostly probably a mere typographical error. Regarding the issue of the Affidavit being sworn in Eldoret but commissioned in Migori, he submitted that there was nothing wrong with it and that it is a possibility.

Determination

8. The sole issue that arises for determination in this Application is “whether this Appeal should be dismissed for want of prosecution”.
9. Regarding the challenge raised by Mr. Mathai in respect to the fact that the Appellant’s Affidavit purports to address Court proceedings of 27/11/2024 but is itself sworn on 20/01/2024, I agree the same is an impossible eventuality. I however agree with Mr. Githaiga’s assertion that it is most probably a mere typographical error which I will therefore excuse. Regarding the allegation of swearing of the Affidavit in Eldoret and commissioning in Migori, I do not agree with Mr. Mathai’s assertion that the Affidavit indicates that it was commissioned in Migori. The reference to “Migori” is only in regard to the postal address of the Commissioner for Oaths, not the place of swearing.
10. On merits, dismissal of Appeals for want of prosecution is governed by Order 42 Rule 35(1) and (2) which provides as follows:
 - “(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”
11. It is therefore evident that Order 42 Rule 35 envisages two situations for the dismissal of an Appeal for want of prosecution. The first is where an Appellant, after directions have been given as contemplated under Section 79B of the *Civil Procedure Act* and Order 42 Rule 11 of the *Civil Procedure Act*, fails to cause the matter to be set down for hearing within 3 months. The second scenario is where the Registrar lists the Appeal for dismissal where, 1 year after service of the Memorandum of Appeal, the Appeal has not been set down for hearing. In this matter, it is the second scenario that is in play.



12. In the case of *Ivita vs. Kyumbu* [1984] KLR 441, which was followed in the Court of Appeal case of *Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd* (2004) eKLR, the test to be applied when determining whether to dismiss an action for want of prosecution was explained in the following terms:
- “ 3. The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”
13. When delay is established, unless it is well explained, it becomes inexcusable. In *Agip (Kenya) Limited-v-Highlands Tyres Limited* [2001] KLR 630, Visram J (as he then was) stated as follows:
- “Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”
14. In this case, the Appeal was instituted in July 2022. Thereafter, Appellant obtained an order of stay of execution which the Appellant still enjoys. Upon obtaining the order, with the knowledge that it was now safe from execution, the Appellant conveniently went into a “peaceful sleep”. As correctly submitted by Mr. Mathai, it is the Respondent which took it upon itself to even prepare the Memorandum of Appeal, which it then filed on 19/10/2023.
15. Regarding the Affidavit filed by the Appellant, instead of showing cause why there has been delay in prosecuting the Appeal, the Appellant went into a strange narrative, deponing on irrelevant matters touching on the insolvency of the Appellant and how the Treasury had come in to rescue it, matters whose connection to the delay to prosecute the Appeal was not explained. It is therefore clear that the Appellant has offered no explanation whatsoever in respect to the delay and has consequently failed to show cause. I would have therefore right away dismissed this Appeal for want of prosecution save that I have considered that a Record of Appeal having been already filed, albeit by the Respondent, the Appeal is basically ready for hearing, save that the lower Court file has not yet been availed to this Court.
16. In the interest of justice therefore, I will not dismiss the Appeal but shall, instead, give strict timelines within which the Appellant must cause the lower Court file to be forwarded to this Court to enable the Appeal to be determined.

Final Orders

17. In light of the foregoing, I give orders as follows:
- i. The Appellant is given a period of thirty (30) days from the date hereof, to cause the lower Court file to be availed or forwarded to this Court to facilitate the admission of this Appeal and to pave way for its hearing and determination.
 - ii. The Appeal shall automatically stand dismissed should the Appellant fail to comply with order (i) above.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025



WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Appellant

Ms Angweny h/b for Mr. Mathai for the Respondent

Court Assistant: Mr. Kuto

