



**Diamond Trust Bank (K) Limited v Botto Solar Limited (Civil Appeal
126 of 2016) [2025] KEHC 1047 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 126 OF 2016
SM MOHOCHI, J
FEBRUARY 27, 2025**

BETWEEN

DIAMOND TRUST BANK (K) LIMITED APPLICANT

AND

BOTTO SOLAR LIMITED RESPONDENT

RULING

1. On the 26th January 2024 this court dismissed an Application for dismissal of the Appeal for want of prosecution giving the Respondent an opportunity to prosecute its Appeal.
2. In my Ruling I ordered the Appellants to set-down the appeal for admission, directions and hearing within the next sixty (60) days from the date hereof.
3. Any Default and/or failure to comply with a) above by the Appellant automatically resulted to the dismissal of the appeal and any other consequential orders.
4. Before me is a Notice of Motion filed on the 12th September 2022, under Order 27 Rule 9, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all enabling provisions of the law, an application for the following three (3) Orders:
 - i. That this Honourable Court be pleased to dismiss the Appeal herein for want of prosecution.
 - ii. That the order of stay of execution granted on 29 March 2018 be vacated and the sum of Kshs. 1,755,482/= deposited by the Appellant in a joint interest earning account to wit Absa Bank Kenya Plc (Formerly Barclays Bank of Kenya Limited) Account No. 2039xxxxxx in the name of Kimatta & Mohamed Madhani & Company Advocates be released forthwith to the Respondent's advocates.
 - iii. That the costs of the suit and this application and of the Appeal be borne by the Appellant.



5. The Application is supported by the annexed Affidavit of Joram Kilwanda and is based inter alia on the ten (10) grounds that:
- i. That, aggrieved with the judgment delivered on 21st September 2016 in Nakuru CMCC No. 1130 of 2011, the Appellant commenced this Appeal vide a Memorandum of Appeal dated 19 October 2016.
 - ii. That, additionally, vide its application dated 26th September 2016, the Appellant sought a stay of execution of the Trial Court's judgment pending the hearing and determination of the appeal.
 - iii. That, in its ruling dated 29 March 2018, this Honourable Court granted the stay of execution, provided that the Appellant deposits the decretal sum of Kshs. 1,755.482.00 in a joint account in the names of the parties advocates on record,
 - iv. That, the joint account no. 2039xxxxxx was opened at Barclays Bank of Kenya Limited in the joint names of Mohamed Madhani & Company Advocates & Kimatta & Company Advocates and the Appellant deposited the sum of Kshs 1.755.482.00 therein.
 - v. That, however, the Appellant did not take any steps to prosecute the appeal for over seven (7) years, prompting the Respondent to file an application dated 16th September 2023, seeking orders dismissing this appeal for want of prosecution and vacating the stay of execution orders issued on 29th March 2018.
 - vi. That, in its ruling delivered on 26 January 2024, this Honourable Court allowed the Appellant's application on the following terms:
 - a. The Respondent/Appellant shall set-down the Appeal for Admission, directions and hearing within the next sixty (60) days from the date hereof.
 - b. Default and/or failure to comply with a) above by the Respondent/Appellant shall automatically result to the dismissal of the Appeal and any other consequential order(s).
 - c. Costs assessed at Kshs. 40,000/-awarded to the Applicant/Respondent.
 - vii. That, contrary to the Court's foregoing Orders, the Appellant failed to set the appeal down for admission, directions and hearing by 26 March 2024 as a result of which, this appeal and stay of execution issued on 29 March 2018 stand automatically dismissed
 - viii. That, the Respondent/Appellant lodged a Memorandum of Appeal in the year 2016 challenging the judgment of the magistrate court in Nakuru CMCC No. 1130 of 2011 and since the filing of the Appeal, the Respondent/Appellant has failed to take any steps to prosecute the Appeal and up to date the same has not been set down for directions and hearing.
 - ix. That, the Applicant/Respondent had in a letter dated 7th December 2018 requested the Deputy Registrar to list the Appeal for directions but to date the Appeal has never been listed for directions.
 - x. That, the Appeal has been pending determination for over nine (9) years which delay is inordinate and inexcusable on the part of the Respondent/Appellant and that, it is apparent that the Respondent/Appellant is no longer interested in getting the Appeal heard and determined and the same only remains an unnecessary burden on the Applicant/Respondent.



- xi. That, the continued pendency of this Appeal is not only an affront to the principles of justice but also highly prejudicial to the Applicant/Respondent who has been unable to enjoy the fruits of his judgment since 2016.
6. That, it is the Respondent/Appellant's responsibility to prosecute the Appeal by ensuring that the same is listed before a Judge for directions but the Respondent/Appellant has failed to do so which omission is an abuse of the court process.

Respondent's Case

7. The Application was opposed vide the filed Replying Affidavit Fredrick Kairu Maina, an Advocate on record wherein he depones;
 - i. That, the order and/or ruling relied upon by the Applicant has not been annexed to the application and the application is therefore unfounded and misleading.
 - ii. That, Appellant has conducted due diligence and acted in good faith in prosecuting the Appeal in that the Record of Appeal has already been filed, dated 22nd March, 2024 despite there being some inordinate delay occasioned by the Court's backlog in its typing pool.
 - iii. That, as at the filing of the same, the Appellant had made numerous requests to be furnished with the certified copies of typed proceedings and the filed copy was filed in compliance with the Court's directions, despite the same being incomplete and evidenced a copy of the letter marked FKMI.
 - iv. That, it is also prudent to note that a Certificate of Delay has not been issued rendering the Applicant's application immature.
 - v. That, the delay has not been occasioned and/or contributed to by the Appellant and despite the same being unfortunate, we urge the Court to extend the timeline granted herein to enable the Appellant prosecute the Appeal.

Analysis and Determination .

8. After careful analysis, the main issue for determination is whether the Application for release of security for costs has any merit.
9. In the case of Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR, the Court of Appeal held that:

“From our own assessment of the matter, the learned Judge did not err. The Appellant filed his memorandum of appeal on 15th September, 2021, filed an application for stay of execution on 2nd October, 2012, obtained interim orders maintaining status quo on 3rd October, 2012 pending hearing and determination of the application and filed the record of appeal on 5th July, 2013. Thereafter, the Appellant made no effort to prosecute his appeal and was only roused from slumber when the Respondent filed his application to dismiss the appeal for want for prosecution.” (underlining ours)
10. However, the steps leading to dismissal of an appeal for want of prosecution are demonstrated hereunder.



11. In the case of Stephen vs Christine Khatiala Andika [2019] eKLR, Kirinyaga General Machinery v Hezekiah Mureithi Ileri [2007] eKLR amongst other cases where the common holding was that an appeal could not be dismissed if directions had not been given.
12. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fail to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.
13. Section 79B of the *Civil Procedure Act* provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.
14. Order 42 Rule 13 of Civil Procedure Rules provides as follows:
 - “1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
 - 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
 - 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
 - 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a) the memorandum of appeal;
 - b) the pleadings;
 - c) the notes of the trial magistrate made at the hearing;
 - d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—



- i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”
15. It is evident from the provisions of Section 79B of *Civil Procedure Act* that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows:

“Upon filing of the appeal, the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.
16. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.
17. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty-one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the Civil Procedure Rules.
18. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another.
19. The Response by the Appellant of “pointing fingers” or “kicking the can down the road” by claiming it is “common knowledge” of delay emanating from courts in obtaining certified typed proceedings and as such they are straight jacketed, thus cannot prosecute their Appeal nine years after filing the Appeal is unacceptable does not inspire any public confidence in the administration of justice.
20. Aspersions cast upon the court being the cause of delay in prosecuting an Appeal nine years later would presuppose the typing of proceedings is running late for nine (9) years! This is impossible but calls for some deeper scrutiny by this court.
21. I have considered the Respondent’s Appellant filed copy of letter dated 7th March 2024 addressed to the Chief Magistrate’s Court Nakuru and referenced as HCCAPP/205/BSL/2022.
22. I note the same to be an application to be certified with the typed proceedings, it does not bear a receipt stamp from the court and no one can be sure that such a letter was ever delivered. The letter is not copied to the counterparts as is cardinal in civil practice. The letter is not a follow-up letter but rather an initiating letter. No other effort is demonstrated at obtaining the certified typed proceedings and it would thus be unprofessional and unfair to blame the court in a “willy nilly” fashion.
23. If this court was to allow such an excuse, then any efforts by the judiciary to clear all backlog cases will be only sweetly sounding slogans further abusing the Kenyans that we serve. The practice of yore in filing Appeals and allowing them to lay stealth and converting court registries as “parking bays” while enjoying stay against execution orders, is now a thing of the past, practitioners must recalibrate their practice in tandem with the principals of discharge of the donated judicial authority which statutorily flows into the legal practitioners.



24. The Respondent further alleges in submissions that they not only Applied for the certified proceedings but paid the requisite fees. No evidence of such fees paid is demonstrated.
25. Coming back to the Ruling dated 26th January 2024 this court afforded the Appellant an opportunity to prosecute the Appeal by setting the same down for directions, admission and hearing within sixty days failure of which the Appeal shall automatically be dismissed.
26. In this instance I feel constrained to expound what this meant?
27. Setting-down a matter for direction can in a simple way be achieved by listing the matter for a mention before the judge. It would be during such a mention where any difficulty in complying with the court orders would be raised. In this instance the Appellant did not move the court and allowed the time provided to runout and file the incomplete record of Appeal on the last day provided.
28. It is unfortunate for any party to be presumptuous of any court unless the court thus makes the requisite pronouncement. The decision of the court on the 26th January 2024 was written in plain English and as such the Appellant cannot be allowed to stretch the same to suit undisclosed reason, that partial compliance is compliance and that the court should then wait for an indeterminate period when this Appeal shall be considered.
29. There is no inordinate delay occasioned by the court's backlog in its typing pool demonstrated by the Respondent.
30. There is nothing subsisting since the 26th March 2024 when the Appeal automatically stood dismissed to extend as urged by the Respondent.
31. Consequently, I find merit the Application dated 12th September 2022 which is allowed as follows;
 - i. An order of stay of execution granted on 29th March 2018 is hereby vacated.
 - ii. The Security for costs of a sum of Kshs. 1,755,482/= together with interest, deposited by the Appellant in a joint interest earning account to wit Absa Bank Kenya Plc (Formerly Barclays Bank of Kenya Limited) Account No. 2039xxxxxx in the name of Kimatta & Mohamed Madhani & Company Advocates be forthwith released to the Mohamed Madhani & Company Advocates
 - iii. The costs of the suit and this application and of the Appeal be borne by the Appellant.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 27TH DAY OF FEBRUARY, 2025

MOHOCHI S. M.

JUDGE

