



**Mwananchi Credit Limited v Cheruiyot & another (Civil Appeal
E002 of 2023) [2025] KEHC 12063 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 12063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E002 OF 2023**

**F WANGARI, J
APRIL 30, 2025**

BETWEEN

MWANANCHI CREDIT LIMITED APPELLANT

AND

STANLEY KIPYEGON CHERUIYOT 1ST RESPONDENT

DANIEL KARISA KARABU 2ND RESPONDENT

RULING

1. The Notice of Motion dated 15/04/2024 filed by the 2nd Respondent, seeks to dismiss to dismiss the Appeal herein for want of prosecution.
2. The Application is brought under the provisions of Order 42, Rue 35 (1), (2), Order 51 Rule 1 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*. It is supported by the Affidavit of Derrick Odhiambo Advocate and materially based on the following grounds:
 - a. That the Appellant had lost interest in the appeal.
 - b. More than one year has lapsed since the matter was in court for hearing.
 - c. That the Appellant had neglected to set the suit down for hearing for over one year.
 - d. That the suit be dismissed for wand of prosecution.
3. The Appellant filed the Replying Affidavit dated 26/07/2024 stating that after the ruling of the court dated 22/03/2023, the Appellant complied with the directions of the court to have the Record of Appeal filed within 45 days after the ruling. The Appellant states that the Record of Appeal was filed within 38 days and the written submissions within 44 days of the ruling. The Appellant having complied with the directions have always been ready to proceed with the hearing of the appeal.



4. The Appellant stated that the appeal ought to be heard and determined since the Record of Appeal and the submissions are already on record and having compiled over one year ago.
5. The application was canvassed by way of written submissions and both parties complied by filing their rival submissions.

Analysis

6. The single issue for my determination is whether the Appeal herein should be dismissed for want of prosecution.
7. The test on dismissal of suits for want of prosecution was laid in *Mwangi S. Kimenyi v Attorney General and Another*, [2014] eKLR, when the court restated the test as follows: -
 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
 2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”
8. Order 42 Rule 35(1) of the *Civil Procedure Rules* stipulates as follows: -

“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.”
9. Order 42 Rule 35(2) of the *Civil Procedure Rules* stipulates as follows: -

“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”.
10. I note from the e-filing platform, the Appellant filed the Record of Appeal on 03/05/2023 and the written submissions filed on 04/05/2023 in compliance with the court’s directions on the appeal. The Appellant has done its part and all that remains is to have the matter fixed for judgment.
11. The Application by the 2nd Respondent is therefore premature. The court shall immediately after this ruling direct for expeditious disposal of the Appeal. In the circumstances, I am inclined to disallow the Application. It is prematurely made before me. Instead I prefer to direct for expeditious hearing of the Appeal.



Determination

12. In the upshot, I make the following Orders:

- a. The Notice of Motion dated 15/04/2024 is hereby dismissed.
- b. The Respondent to file written submissions within the next 14 days
- c. Costs to follow the outcome of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of:

M/S Bwire Advocate for the Appellant

N/A by the Respondent.

M/S Norah, Court Assistant

