



REPUBLIC OF KENYA



KENYA LAW
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**Khavengeha v Transline Classic (Civil Appeal E065 of 2022)
[2024] KEHC 1410 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E065 OF 2022
TA ODERA, J
JANUARY 25, 2024**

BETWEEN

MILDRED AYUMA KHAVENGEHA APPELLANT

AND

TRANSLINE CLASSIC RESPONDENT

RULING

1. The Appellant filed a Memorandum of Appeal dated 8.9.2022. She appealed against the Judgment/ Decree by Hon. P.K. Mutai, Senior Resident Magistrate (SRM) delivered on 7.9.2022 in Kisii CMCC No. 444 of 2021.
2. On 23.11.2023, Miss Mugo holding brief for Mr. Ndolo for the Respondent prayed that the appeal be dismissed for want of prosecution. It is that application that is the subject of this ruling.
3. The Appellant was not present in Court and is therefore unaware of the said application. There is no response to the said application.

Determination

4. I have considered the Application herein. The only issue for determination is whether the Appeal herein should be dismissed for want of prosecution.
5. I would at the outset like to note that the instant appeal was not dismissed under Order 42 Rule 11 of the Civil Procedure Rules, 2010. These directions are found in Section 79B of the [Civil Procedure Act](#) which provides thus:

79B. Summary rejection of appeal

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.

6. The law on dismissal of appeals for want of prosecution is found in the [Civil Procedure Act](#) and the Civil Procedure Rules.

7. Order 42 Rule 35 of the Civil Procedure Rules, 2010 provides thus:

35. Dismissal for want of prosecution [Order 42, rule 35]

(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.

8. Order 42 Rule 13 of the Civil Procedure Rules, 2010 provides thus:

13. Directions before hearing [Order 42, rule 13]

(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum the registrar 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 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].
9. It then follows that an appeal may only be dismissed under 2 circumstances: 1) where the appellant has not set down the appeal for hearing within 3 months of taking directions under rule 13, and 2) if within one year, the appeal has not been set down for a hearing. In the first situation, the respondent may set down the appeal for dismissal or apply by summons for its dismissal. In the second situation, the notice for dismissal emanates from the Court.
 10. This was elaborately explained in the case of *Grace Njeri Thuku v John Mburu Wainaina* [2022] eKLR; *John Njagi Karua v Njiru Gatumu* [2021] eKLR; *Pinpoint Solutions Limited & Another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR; and *Daniel Kamau Kagai v Andrew Githae Kamau* [2021] eKLR. I am in agreement with the said explanations.
 11. However, over time, courts have also held that an appellant cannot and will not be allowed to file an appeal and keep it pending for years on end and hide behind the fact that directions have not been taken. See *China Road & Bridge Corporation vs John Kimenye Muteti* [2019] eKLR where the Court (Odunga, J. (as he then was)) held as follows:
 19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal where no directions have been given....” (See also *Abraham Mukhola Asitsa vs. Silver Style Investment Company Ltd.* [2020] eKLR)
 12. The test is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. See *Ivita v Kyumbu* [1984] KLR 441; *Peter Kipkurui Chemoiwo v Richard Chepserson* [2021] eKLR.
 13. Does the instant situation meet the same? The answer is in the negative. The instant appeal was filed on 9.9.2022. The Record of Appeal was filed on 1.2.2023. On 3.7.2023, the appeal was admitted and directions were to be taken on 22.11.2023. However, the directions were not taken on 22.11.2023 but were to be redirected to 23.11.2023. Notably, the Appellant’s Counsel was present on 22.11.2023. On 23.11.2023, the Appellant was absent and that is when the Respondent orally applied for dismissal of the appeal for want of prosecution.
 14. As it stands, directions under Order 42 Rule 13 of the Civil Procedure Rules, 2010 have not been taken to date. In addition, the notice was short. The Appellant’s Counsel was in Court on 22.11.2023. It would be very ruthless and unjust of the Court to dismiss the appeal on account of an ex-parte oral application made a day later.
 15. In addition, the Respondent is required to apply, by way of summons, for the appeal to be dismissed. What the Respondent did was make an oral ex-parte application thereby violating Section 42 Rule



35]1] of the Civil Procedure Rules and the Appellant's right to be heard under Article 51[1] of *the Constitution*.

16. A fair hearing encompasses audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case). See Par. 257 Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others SC Pet. No. 18 of 2014 as consolidated with SC Pet. No. 20 of 2014 [2014] eKLR.
17. It also demands that an opportunity of hearing must be given and that opportunity must be reasonable. See Par. 258 Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others SC Pet. No. 18 of 2014 as consolidated with SC Pet. No. 20 of 2014 [2014] eKLR.
18. There is nothing indicative of the fact that the Appellant is aware of the application for dismissal. It would be unjust in the circumstances for this Court to proceed to dismiss the appeal.
19. The application lacks in merit and also technically cannot be allowed. I proceed to dismiss it.
20. In the interests of justice, I hereby set down the matter for directions on 9.5.24 when the Parties shall be present and directions shall be taken in the matter. DR to notify parties of the date.
21. Costs shall abide the outcome of the Appeal.
22. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 25TH DAY OF JANUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Parties Absent

Oigo - Court Assistant

