



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge & another v Monyo (Civil Appeal 96 of 2021)  
[2024] KEHC 3164 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 96 OF 2021  
SM MOHOCHI, J  
MARCH 26, 2024**

**BETWEEN**

**MICHAEL NJOROGE ..... 1<sup>ST</sup> APPELLANT**

**PETER NJIRAINI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN NGUGI MONYO ..... RESPONDENT**

**RULING**

1. Before me is Notice of Motion filed pursuant to Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 45 Rule 1, Order 42 Rule 6, Order 42 Rule 21, Order 50 Rule 6, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law seeking the following Orders: -
  - a. Spent.
  - b. Spent
  - c. That this Appeal being NakuruHCCA No. 96 of 2021 be and is hereby reinstated for hearing and determination in the normal way.
  - d. That the costs of the application be in the cause.
  - e. That this Honourable Court do make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice.
2. The Application is based on the following nineteen (19) grounds: -
  - i. That, the Appellants instituted this Appeal vide a Memorandum of Appeal dated 4<sup>th</sup> September 2021 against the Judgment of the Honourable Yator, delivered on 26<sup>th</sup> August, 2021 in Molo CMCC 39 of 2017.



- ii. That, despite relentless efforts, the Appellants have not been able to obtain the relevant documents from the lower Court to enable them file their Record of Appeal. and specifically, failure to file the Record of Appeal.
- iii. That, as a result, the Appeal was dismissed on 25<sup>th</sup> January, 2023 for want of prosecution.
- iv. That, the Appeal herein stands dismissed, and this thereby exposes the Appellants to imminent execution hence the urgency of this Application.
- v. That, the delay in filing the Record of Appeal was inadvertent and beyond the Appellants control.
- vi. That, the Appellants are greatly apprehensive that the Respondent may at any time commence execution against them as the Appeal stands dismissed.
- vii. That, the Appellants have complied with stay conditions by paying Kshs 712,650/- to the Respondent's Advocates.
- viii. That, the Appellants contend that the delay occasioned so far in prosecuting the Appeal, in so far as it cannot be attributed to the Appellants, is not so unreasonable and/or inordinate as to prejudice the Respondent and such delay can always be compensated by an award of damages and/or costs,
- ix. That, unless this Application is certified urgent and heard immediately and the orders sought herein granted, the Appellants stand to suffer irreparable loss, prejudice and harm.
- x. That, Under Article 48 of the *Constitution* of Kenya, 2010, access to justice for all is guaranteed and unlimited.
- xi. That, under Article 159 (2) (d) of the *Constitution* of Kenya, 2010, this Honourable Court is enjoined to administer justice without undue regard to procedural technicalities.
- xii. That, the Appellants are keen on prosecuting their Appeal and seek the indulgence of this Honourable Court not to be ousted from the seat of justice.
- xiii. That, the Appellants are desirous and fully committed to ensuring the just and timely disposal of the Appeal herein and as such pray that the Appeal herein be reinstated and set down for Hearing in the normal manner.
- xiv. That, the Appellants humbly believe that they have an arguable Appeal and should be given an opportunity to have the same prosecuted and determined on its merits.
- xv. That, accordingly it is only just, fair and in the interests of justice that the Appeal be reinstated/ re-admitted and the same be heard to a logical conclusion.
- xvi. That, unless the Appeal is re-instated the Appellants stand to suffer irreparable loss, prejudice and damage and their Appeal will be rendered nugatory despite it being meritorious.
- xvii. That, this Application has been made without undue delay.
- xviii. That, this Application ought to be granted in the interests of equity and justice.
- xix. That, what is deponed to hereinabove is true to the best of the Appellants' knowledge information and belief save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief, whereupon the grounds thereof have been given.



3. Directions were issued on the 28<sup>th</sup> of March 2023 on the hearing and disposal of the Application.
4. The Applicants filed a Notice of Motion Application dated 20<sup>th</sup> March, 2023 seeking orders of Court that the Appeal herein be reinstated for hearing in the normal way and for its logical determination on merit.
5. The Applicants contend, there is no likelihood that the Respondent will suffer prejudices any, in the event that they are given time to prosecute their appeal to finalization. Indeed, there is no prejudice at all to be suffered by the Respondent as the conditions for stay of execution pending hearing of the appeal were fully complied with. The sum of Kshs 712,650 was paid to the Respondent's Advocates in fulfillment. The Respondents interests are thus secured.
6. The Applicants submit that, they have not obtained the requisite documents in order to file their Record of Appeal and have attached evidence of follow-up. On the other hand, the gist of the matter is that the Applicants stand to suffer prejudice in the event that the appeal is not heard on merit since they would have lost their Right to Appeal.
7. The Applicants contend that, the appeal has merits as demonstrated in the Memorandum of Appeal, and in the event that the Appeal is not heard to completion, they stand to lose their Constitutional Right to Appeal and the right to have their case heard and determined on its merits. Indeed, this Honorable Court has on diverse occasions pronounced itself on striking a balance between the competing rights of the rival parties as the scenario herein.
8. In the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR the Court opined that every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial and held;

“It therefore follows that every person ought not to be shut out from accessing Court or having his day in Court.

Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access Court to have his dispute heard and determined by a Court or tribunal of competent jurisdiction.”

9. That in view of the foregoing, it is the Applicants submissions that, the Appeal was not yet ripe for dismissal for want of prosecution. The Applicants rely on the case of *Jurgen Paul Flach v Jane Akoth Flach*, Nakuru Civil Appeal No.119 of 2012, the Court rightly stated that where directions had not been issued. Dismissal of an appeal for want of prosecution cannot be granted. Moreover, in *Kirinyaga General Machinery v Hezekiel Mureithi Ireri* [2007] eKLR, Kasango J. ruled as follows:

“It is clearly seen from that rule before the Respondent can move the Court either to set the appeal down for hearing or to apply for dismissal for want -of prosecution directions ought to have been given- as provided in Rule 8B. Directions have never been given in this matter. Directions having not been given the orders sought by the Respondent cannot be entertained.”

10. The Applicants further rely on the case of *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR, the Court held as follows; -

“It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this Court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the



respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal...

In the circumstances, I shall invoke the overriding objective principle in order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay that it is in the interest of justice that the appeal should not be struck out as the Respondent can adequately be compensated by an award of costs."

11. In *Elem Investment Limited v John Mokora Otwoma* [2015] eKLR, Aburili J noted as follows;

"..in my view, the Court will not dismiss an appeal for want of prosecution unless directions are issued...

In addition, the prejudice that the Appellant is likely to suffer if this Appeal is dismissed is likely to be graver than the prejudice that the Applicant/ Respondent would suffer if the Appeal is ordered to proceed, given that the Appellant has deposited the decretal amount in Court and settled some of the undisputed costs. In arriving at that conclusion, I am enjoined by the Court of Appeal decision in *Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR, *Civil Application No. Nai. 173 of 2010* where the Court stated:

"The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the Court strikes out it's document. The Court in that regard exercises judicial discretion.

.... I think it would be appropriate and in the wider interest of justice' to allow the Appellant a chance to take appropriate steps to ensure the Appeal is set down for directions and hearing expeditiously."

12. From the foregoing, it is clear that the Courts have been consistent when interpreting Order 42 Rule 35 and the same principle enunciated in the above cases also apply to this Appeal as directions have not been issued yet.
13. In view of the above, it is the Applicants submissions that the hardship and prejudice likely to be occasioned to them in this matter is greater than the hardship to be occasioned to the Respondent since the Applicants will lose their opportunity to prosecute their Appeal and have the same determined on its merits. Further, Article 159 of the *Constitution* of Kenya 2010 requires the Court to be more concerned with substance justice where possible instead of giving undue regard to technicalities and if this Appeal is not heard on merit, the Applicants would have been denied the benefit of substantive justice.
14. In view of all the foregoing, it is the Applicants submissions that the Appeal herein should be reinstated and time granted to file their Record of Appeal.
15. Further, it is the Applicants submissions that it is in the interests of justice that the Appeal is heard in the normal way with the Applicants being granted the chance to regularize the same so that directions may be given.



## Respondents Case

16. The Application is opposed by Respondents written submissions filed on 9<sup>th</sup> of November 2023. As to whether the Court should uphold the orders issued on 25<sup>th</sup> January 2023 dismissing the appeal for want of prosecution? The Respondent contends that; Order 42 Rule 11 provides that;

“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*”

17. That the Appellants filed this appeal on the 6<sup>th</sup> September 2021 and from the Court record they have never filed any record of appeal. Other than the Appellants claiming that they have not gotten all the documents to compile the records of appeal, nothing has been filed in Court to proof whether they requested and paid for the proceedings at Molo Law Court. It is well known that parties have to pay for the proceedings but the Appellants never annexed any receipt(s) to proof payment for the said proceedings.

18. That it is admitted by the Appellants advocates that, they complied with the order of depositing half of the decretal sum in a joint interest-earning account but no proper explanation has been given as to the selective compliance of the Court Orders other than that blaming the registry at Molo Law Court, the Appellants should explain what efforts they made to secure the proceedings and comply with the necessary procedures of the Court. The appeal was never placed before the judge for directions. That, Article 159 (2) (b) provides that;

“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

“justice shall not be delayed”

19. That the accident which led to the filing of the suit at the Lower Court occurred on the 2<sup>nd</sup> December 2015 and the Appellant filed the appeal herein on 6<sup>th</sup> September 2021, they slept on the appeal and failed to move the Court until the appeal was dismissed by the Court on 25<sup>th</sup> January 2023. That it is clear from the foregoing that the Appellant's have a deliberate intention of delaying justice. Further during the dismissal of the appeal herein on 25<sup>th</sup> January 2023, the Appellant were represented in Court by their counsel and no sufficient cause was shown to the Court therefore the appeal was dismissed again the Appellant slept on the file only to file the application to re-instate the appeal two months after the dismissal. We submit that a deliberate intention of delaying the respondent the fruits of a just judgement.

20. That, Order 42 Rule 35 (2) of the *Civil Procedure Rules* provides:

“If, within one year after the service of memorandum of appeal, the appeal 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”

21. The Respondent submit that, the appeal herein was filed on 6<sup>th</sup> September 2021 and nothing has been shown to the Court why it took the Appellants more than one year to fix the appeal for directions. This delay causes backlog of cases in Court and should not be entertained, the Court needs to stampits authority on indolent parties and uphold the order dismissing the appeal for want of prosecution.

22. The Respondent rely on the cases of;



23. As to whether the amount in the joint account should be released to the respondent/ applicant's advocates? The Respondent, submits that, the parties herein opened a joint interest earning account for the purposes of safeguarding their interests therefore it is our submissions that the Respondent having proofed that the appeal should be dismissed he is entitled to the money deposited herein together with the interest in the said account.
24. The Respondent submit that, the money Kshs 712,650/= together with the interest earned on the said account be released to the firm of Omonywa Mamwacha & Co. Advocates.
25. As to whether the Respondent is entitled to costs of the appeal he posits that, he has successfully proved that the appeal needs to be dismissed with costs, however if the Court is inclined to re-instate the appeal the Respondent pray that costs of the application be awarded to him and the appellants to pay thrown away costs of Kshs 50,000/=.

### **Analysis and Determination.**

26. After careful analysis, the main issue for determination is whether the appeal ought to be dismissed for want of prosecution.

### **The Law**

#### **Whether the Appeal ought to be dismissed for want of prosecution?**

27. Order 42 Rule 35 (1) & (2) of the *Civil Procedure Rules* provides: -
  - i. 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.
  - ii. 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
28. Therefore, Order 42 Rule 35 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails 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 the memorandum of appeal the appeal would not have been set down for hearing, the registrar shall on notice of the parties list the appeal before the judge for dismissal.
29. This principle has been enunciated in the case of *Pinpoint Solutions Limited & Another v Lucy Waitibegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR where the Court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying: -
  - a. "The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per *Order 42 Rule 11 and Rule 13 of the Civil Procedure Rules, 2010*.
  - b. This Court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not



be dismissed under *Order 42 Rule 35(1) of the Civil Procedure Rules*. In any event, there was also no evidence that the Registrar had issued a notice under *Order 42 Rule 12 of the Civil Procedure Rules*. There was also no indication that the lower Court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

30. Similarly, on the principles governing dismissal for want of prosecution, the Court in *Mwangi S. Kimenyi v Attorney General & Another*, Civil Suit Misc. No. 720 of 2009 held that: -

i. “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 act straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all 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. 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 delay is one that gives rise to a substantial risk to a 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.”

31. The Respondent’s/Appellants did not also follow-up with the Court to set down the Appeal for Admission.

32. Further, as discussed above, it would appear that an appeal cannot be dismissed for want of prosecution before directions are taken. However, a party is not allowed to file an appeal and then go to sleep. The Court is persuaded by the case of *Abraham Mukhola Asitsa v Silver Style Investment Company Limited* [2020] eKLR where the Court stated:

“However, I am not persuaded that there is any justification for the party to file an appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files an appeal and goes to sleep and takes no action on it for a long time, cannot hide above the provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to act on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the Courts are being told that they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the Courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals.”



33. No prejudice at all to be suffered by the Respondent as the conditions for stay of execution pending hearing of the appeal were fully complied with. The sum of Kshs 712,650 was paid to the Respondent's Advocates in fulfillment. The Respondent's interests are thus secured. The delay in filing the Record of Appeal was inadvertent and beyond the Appellants' control. The justification of the delay has adequately been explained in response.
34. In exercise of my discretion and in the interests of justice, this Court finds the Notice of Motion Application dated 20<sup>th</sup> March 2023 to be of Merit and the same is accordingly allowed on the following terms;
- i. The Appeal Nakuru HCCA No. 96of2021 is hereby reinstated.
  - ii. The Appellants shall set down the Appeal for Directions/Hearing within sixty (60) days from the date hereof.
  - iii. The Applicants/Appellants shall pay the Respondent throw-away costs ksh 50,000/-.

It is so Ordered.

**DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 26<sup>TH</sup> DAY OF MARCH, 2024.**

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**S. MOHOCHI**  
**JUDGE**

