



REPUBLIC OF KENYA



Isaac Kipyegon Langat t/a Kolato Auctioneers v Kibinge (Civil Appeal E042 of 2022) [2024] KEHC 4429 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E042 OF 2022
HI ONG'UDI, J
APRIL 30, 2024**

BETWEEN

ISAAC KIPYEGON LANGAT T/A KOLATO AUCTIONEERS APPELLANT

AND

HARUN WAINAINA KIBINGE RESPONDENT

RULING

1. This is the Notice of Motion dated 25/01/2024 where the respondent/applicant seeks the following orders:
 - i. Spent
 - ii. That the Appeal herein filed on 29th March, 2022 be dismissed for want of prosecution.
 - iii. That the costs of this Application be provided for
2. The same is supported by the grounds of its face plus the applicant's affidavit. The main issue being that the appellant/respondent has taken no steps to prosecute his appeal dated 29th March 2022 and filed on the same day. Further that the appellant/respondent has been filing numerous applications instead of having the appeal heard. He prays for the appeal to be dismissed so that he can enjoy the fruits of his judgment.
3. The appellant/respondent filed a replying affidavit sworn on 23/02/2024. He admits the delay but avers that it is the lower court proceedings that are holding him up. That despite several follow ups the said proceedings are yet to be released to his advocate. He annexed copy of letters by his advocate dated 25th May, 2023 (IKL1) and another dated 6th February, 2024 (IKL2) requesting for the proceedings. That there has been no response from the court.



4. The application was canvassed by way of written submissions. The applicant's submissions were filed by M/s E. Wangari & Company advocates and are dated 27th February, 2024. Counsel referred to the following decided cases and the law urging this court to dismiss the Appeal. These are:
 - i. [*Sultan Omar Hudhefa V Ann Muthoni Ngugi*](#) [2022] eKLR
 - ii. [*Protein & Fruits processors Ltd & anor V Diamond Trust Bank of Kenya Ltd*](#) 2015 eKLR
 - iii. [*Peter Kipkurui Chemoiwo V Richard Chepsergon*](#) [2021] eKLR
 - iv. Order 42, Rule 35 [*Civil Procedure Rules, 2010*](#).
5. The appellant/respondent's submissions were filed by S. M. Omae & Company advocates and are dated 23rd February, 2024. Counsel referred to Order 42 Rule 13 CPR 2010 and submitted that the court cannot allow the appeal to go for hearing without the typed proceedings being on record.
6. In reference to order 42 Rule 35 he argues that the appeal is not ripe for dismissal. Cases referred to are:
 - i. [*Kinge Simon & 2 others V Lucy Njoki Kamau*](#) [2021] eKLR.
 - ii. [*Grace Njeri Theuri V John Mburu Wainaina*](#) [2022] eKLR
 - iii. [*Veronica Mwikali Ndunda V John Mjuthoka Ndunda & 2 others*](#) [2021]
 - iv. [*Daniel Kamau Kagai V Andrew Gitbae Kamau*](#) 2021 eKLR
7. Counsel submits that in the interest of justice the appellant be given a chance to pursue his appeal with timelines of serving the record of appeal to prevent further delays.
8. I have carefully considered the application, response and both submissions and I find the main issue to be whether the application is merited.
9. There is no dispute that the lower court judgment was delivered on 16th March, 2022 and this appeal was filed on 29th March, 2022 which was within the period allowed for filing appeals.
10. It is now over two (2) years since the filing of the Appeal yet it has not been admitted for hearing. The failure is because of lack of the Record of Appeal. The appellant/respondent has availed two copies of letters of communication to the Chief Magistrate (I.K.L 1 & 2) with no response. Without the typed proceedings the Record of Appeal cannot be prepared and filed. Without the Record of Appeal the Appeal cannot be admitted.
11. Besides the writing of the letters there is no other step the appellant/respondent has taken up. It is not even clear as to whether the said letters have been received by the said Chief Magistrate.
12. It is true there has been delay in prosecuting the Appeal and on the other hand the appellant/respondent has not been provided with the required proceedings.
13. I hear the respondent/applicant well, but the court has a duty to take care of the interests of both parties. In this case the appellant/applicant cannot be condemned without considering the delays by the lower court.
14. In the circumstances I decline to grant the prayers sought and direct as follows:
 - i. The Chief Court Administrator Nakuru Law Courts is directed to avail to the appellant/respondent typed proceedings in Nakuru CMCC No. 941 of 2016 Harun Wainaina Kibinge & Isaac Kipyegon Langat t/a Kolato Auctioneers within 14 days from today.



- ii. Upon receipt of the typed proceedings the appellant/respondent to prepare, file and serve the Record of Appeal within 14 days.
 - iii. Mention on 4/6/2024 before the Deputy Registrar to confirm compliance and further directions.
 - iv. Costs in the cause
15. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH APRIL, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

