



REPUBLIC OF KENYA



KENYA LAW
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**Kanyuga v Charles & another (Civil Appeal E364 of 2023)
[2024] KEHC 7235 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E364 OF 2023
DO CHEPKWONY, J
MAY 31, 2024**

BETWEEN

LILIAN WANJIKU KANYUGA APPLICANT

AND

KANYUGA CHARLES 1ST RESPONDENT

ALICE ATIENO AUKA 2ND RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion application dated 15th February, 2024 which seeks the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to dismiss the appeal herein for want of prosecution.
 - c. That this Honourable Court be pleased to award the costs of this application and those of the entire suit to the Respondent/Applicant herein.
2. The application is based on the grounds set out on its face and in the affidavit of Alice Otieno sworn on 15th February, 2024, wherein she states that Judgment was entered on 10th August, 2023 and a Memorandum of Appeal filed on 21st September, 2023. It is her averment that the Appellant has not taken any step to prosecute the appeal and the court should not be used as a vehicle to delay justice. She has urged the court to dismiss the appeal for want of prosecution so that she is allowed to reap the fruits of her Judgment.
3. The application is unopposed. However, the court is still required to consider it on its merits.



Determination

4. The law on dismissal of appeals for want of prosecution is enshrined under Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:-

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

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.”
5. It is evident that under Order 42 Rule 35(1) of the Civil Procedure Rules, on appeals, starts running after directions have been issued with regard to hearing of the appeal. In this case, it is clear that directions on the appeal have not been issued. It therefore follows that the appeal is not ripe for dismissal as has been correctly noted that the Judgment was delivered on 31st August, 2023 and an appeal filed against it vide a Memorandum of Appeal dated 21st September, 2023. In view of this, the application is still premature since under Order 42 Rule 35(1) and (2) of the Civil Procedure Rules neither have the three (3) months after directions nor a year without prosecution have lapsed.
6. For the foregoing reasons, even though the application is unopposed, the same cannot be allowed since the procedure provided for in law has not been followed. The upshot is that the Notice of Motion application dated 15th February, 2024 be and is hereby dismissed with costs. The court proceeds to direct that:-
- a. The Appellant files and serves a Record of Appeal within fourteen (14) days from the date hereof.
 - b. Mention on 17th June, 2024 before the Deputy Registrar for further directions.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 31ST DAY OF MAY , 2024.

D. O. CHEPKWONY

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Bore counsel for Applicant



M/S Kemuntu holding brief for Mr. Nyang'au counsel for the Respondent
Court Assistant - Martin

