



REPUBLIC OF KENYA



KENYA LAW
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**Mito & 2 others v Okombo (Civil Appeal E087 of 2022)
[2024] KEHC 17028 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E087 OF 2022**

RPV WENDOH, J

MAY 30, 2024

BETWEEN

JOSEPH ADERA MUKESA MITO 1ST APPELLANT

DOMNIC ONYANGO POLO 2ND APPELLANT

JOHN CHRISPINE OKUNGU 3RD APPELLANT

AND

CALEB OMONDI OKOMBO RESPONDENT

RULING

1. By a Notice of Motion Application dated 10/8/2023, filed in court on 16/8/2023, Caleb Omondi Okombo (the applicant) seeks the following orders: -
 - a. That the appellants'/respondents appeal herein be dismissed for want of prosecution;
 - b. That the appellants'/respondents be condemned to pay costs of this application and that of the entire appeal.
2. The application is based on the grounds on its face and the supporting affidavit of Everlyne Akinyi Kuke Counsel, who has conduct of this matter. Counsel deposed that the appeal herein was filed on 27/7/2022; that the respondents filed a memorandum of appeal and have neglected to file a record of appeal; that one year has since lapsed yet the respondents have failed to move the court and have this appeal determined; that it is evident that the respondents have lost interest in this suit and it is meant to frustrate the applicant; that the appeal be dismissed for want of prosecution.
3. The application was opposed. Mr. Billy Mumo Ndolo, Counsel in conduct of this matter on behalf of the respondent swore a replying affidavit dated 29/11/2023. It was deposed that they did a letter dated 23/8/2023 requesting for typed proceedings but to date the proceedings have not been typed; that upon further following up on 21st October 2023, they were informed that the proceedings were



pending proof reading; that failure to compile a record of appeal was beyond the respondent's control; that no prejudice will be occasioned to the applicant as the only remaining bit is proof reading to enable the respondents to collect the proceedings and compile a record of appeal; that the respondents pray that this application be dismissed as the same is premature for the reasons advanced.

4. None of the parties filed written submissions. I have considered the application, the grounds upon which it is based and the response thereof. The main issue for determination is whether the appeal is ripe for dismissal.
5. Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules provides: -
 - (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
6. From the above provision, where no step has been taken for one year, the law allows the court to ask the parties to show cause why the suit should not be dismissed or a party may apply for its dismissal.
7. The applicant has moved the court accordingly. The reason advanced by the respondents is that they had requested by a letter dated 23/8/2023 for typed proceedings and they did a follow up on 21/10/2023 when they were informed that the proceedings are pending proof reading.
8. The appeal was filed on 27/7/2022. While it is true that the respondents wrote to ask for the typed proceedings, they did the same on 23/8/2023. This is one year after the appeal had been filed and it was ripe for dismissal then. The respondents allege that they were informed that the proceedings were pending proof reading on 21/10/2023.
9. At the time when this file was placed before this court for further directions on the applicant's application dated 10/8/2023, in the year 2024, there is no indication that the respondents had prepared the record of appeal. This shows laxity and lack of interest on their part. This is indeed prejudicial to the applicant. However, so that the appellant is not shut out of the seat of justice, this court allows the applicant one more chance to comply.
10. In the end, I will proceed to dismiss the applicant's application dated 10/8/2023 and the following orders do issue: -
 - a. The respondents are given 30 days to file and serve the record of appeal failure to which the appeal stands automatically dismissed.
 - b. The respondents to pay the applicant thrown away costs of Kshs. 10,000/= within 14 days hereof.
 - c. Mention on 9/7/2024 to confirm compliance.
 - d. Costs will abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 30TH DAY OF MAY, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Odero holding brief Ms Kuke for the Applicant.



No appearance for the Respondents.

Emma & Phelix - Court Assistants.

