



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugo v Mbiti (Environment and Land Appeal E001 of 2020)  
[2023] KEELC 22561 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22561 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E001 OF 2020  
A KANIARU, J  
NOVEMBER 2, 2023**

**BETWEEN**

**MIKE NJUNJA MUGO ..... APPLICANT**

**AND**

**EMILIO NYAGA MBITI ..... RESPONDENT**

**RULING**

1. The focus of this ruling is a Notice of Motion dated 14.07.2022 and filed on 23.09.2022. It is expressed to be brought under Order 42 Rule 35 (1) and (2) of the *Civil Procedure Rules* and Sections 1A, 1B, and 3A of the *Civil Procedure Act*. The applicant – Mike Njunja Mugo – was the Plaintiff in the lower court case while the respondent – Emilio Nyaga Mbiti – was the Defendant.
2. The Applicant in the application is seeking to have the Respondent’s Notice of Appeal, Memorandum of Appeal and a Notice of motion application dated 26.08.2020, which is seeking orders of stay of execution of the lower court’s judgement, dismissed for want of prosecution. The Applicants grounds for seeking the orders are that the Respondent has failed to file or serve the record of appeal and/or take any steps to prosecute the application for stay of execution and that it has been over a year since the Memorandum of Appeal was filed.
3. The Respondent filed a response to the application vide a Replying Affidavit dated 01.12.2022 and filed on 05.12.2022. He explained that the reason for delay in prosecuting his application and the appeal was occasioned by the transfer of the resident ELC Judge in Embu who was hearing his matter and the prevalence of the Covid 19 pandemic during the period in question. The covid 19 pandemic is said to have created a temporary paralysis of prosecution of matters in court. He also averred that in the month of September 2021, he lost his wife due to Covid 19 and was in mourning and had therefore requested his advocates on record to allow him time to grieve.



4. The application was canvassed through written submissions. The Applicant's submissions were filed on 03.05.2023 whereas the Appellants submissions were filed on 27.04.2023.
5. The Applicant submitted that judgement in the lower court case, being case No. MCL & E No. 56 of 2018, was delivered on 29.07.2020. The Respondent, being aggrieved by it filed a Memorandum of Appeal as well as an application for stay of execution of the judgement pending appeal on 02.09.2020, which application and appeal have not been prosecuted to date. That an order for *status quo* was issued by the court pending the hearing of the Application on 12.10.2020. He submitted that the Respondent has chosen to ride on the interim order of status quo as opposed to prosecuting the appeal and this has considerably delayed and prevented the Applicant from enjoying the fruits of his judgement.
6. He submitted further that he continues to be prejudiced by being denied possession of the land he owns on the basis of stay orders pending the hearing of an application for stay, which the Respondent has never set down for hearing. That the Respondent has been indolent and that the refusal and delay to prosecute the Appeal is long, inexcusable and remains unexplained. He further contends that the world recovered from the pandemic in August 2022 and the courts were in session and that therefore that explanation cannot hold water. He urges that the rules of natural justice provide for an end to litigation and therefore prays that his application be allowed as prayed.
7. The Respondent on the other hand in his submissions sought to rely on the content of his replying affidavit in opposition to the Applicant's Notice of Motion. He thereafter gave an analysis of the law on the issue whether the Appeal as well as the Respondent's Application for stay of execution pending appeal should be dismissed for want of prosecution. It was his submission that the law, under Order 17 Rule 2 of the [Civil Procedure Rules](#), is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceeding the presentation of the application seeking dismissal of the suit. He submitted further that that the Respondent has tendered evidence to show that he has been taking steps to prosecute the Application and the appeal and those steps have however been curtailed by reasons beyond him which makes the same reasonable and excusable in the circumstances.
8. He urged the court to exercise discretion and serve substantial justice by being guided by the reasons tendered by him to show that the delay was not intentional and was excusable. That it was not contemptuous of the dignity of the court and that he is keen to prosecute the application and appeal and also that no substantial prejudice has been caused. He cited the cases of [Naftali Opondo Onyango v National Bank of Kenya Ltd](#) (2005) eKLR, Civil Appeal No. 26 of 2018 ([Rose Makoka Mteka v Oserian Development Company Ltd](#) (2022) eKLR.
9. I have considered the Application, the response filed to it, as well as the rival submissions. The issue for determination is whether the Applicant's Notice of Motion has merit.
10. The law on dismissal of an appeal for want of prosecution is provided for under Order 42 Rule 35 (1) and (2) which provides as follows;

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.

The principles to be considered while considering an application for dismissal of appeal were restated in the case of *Ivita v Kyumba* [1984] KLR 441 as cited by the Court of Appeal in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR. They include whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and whether justice can be done despite the delay.

11. It is clear from the above that the Respondent in an appeal can make an application for dismissal of an appeal for want of prosecution if within three months after the giving of directions by a judge on the appeal, the same is not listed for hearing. The law also provides that the Registrar may list the appeal before a judge for dismissal if within one year after the service of the memorandum of appeal, the appeal is not listed for hearing. In this case the Memorandum of appeal was filed on 02.09.2020, which is about three years ago and since then the appeal has never been listed for hearing nor has the Respondent filed his record of appeal. The Respondent also filed an application for stay of execution similarly on 02.09.2020, which application was listed for hearing on 12.10.2020. The application was stood over to 16.11.2020 as the court was on transfer and on that same day the Respondent claims that the matter was not placed before any judge as at that time, a new judge had not yet been posted. Since then, the Respondent has not made any effort to prosecute the application or file the Record of appeal. He explained that the same was due to the Covid -19 pandemic, the transfer of the resident judge of the Environment and Land Court at the time, the fact that he was in mourning after the death of his wife in 2021, and also the unavailability of typed proceedings from the subordinate court.
12. This court takes judicial notice of the issues of the pandemic and the transfer of the judge but wishes to point out that despite the pandemic, directions were issued by the Honorable Chief Justice on the e-filing of matters. Therefore the respondent cannot blame the closure of court registries for failure to file his record of appeal to date when in fact he is represented by an advocate. Also, it is clear that the Respondent did request for typed proceedings on 05.08.2020 which is also a long time ago. He should have made an effort for the same to be expedited. I also take note that the Environment and Land Court has been currently active and therefore the Respondent ought to have fixed his application for hearing by now. It is not fair to the Applicant that the respondent has been enjoying status quo orders to the detriment of the Applicant who is unable to enjoy the fruits of his judgement.
13. Consequently, I do find that the delay herein is prolonged. However, I will not dismiss the appeal as the court is of the view that justice can still be done despite the delay. Dismissing the appeal before it is heard is a draconian action which the courts only take sparingly. This also means that the application for stay of execution will need to be prosecuted. However, I am of the view that the Respondent should bear responsibility for the delay in prosecuting the application and he should not get away with it. He ought to be made to feel his mistake. I therefore direct that he pays the Applicant the sum of Kenya shillings 10,000 as a gesture of atonement.
14. Ultimately, I do dismiss the Notice of Motion dated 14.07.2022 but make the following orders;
  - a. The Respondent do file the Record of Appeal within 30 days from the date of this ruling.
  - b. Thereafter, the appeal be listed for directions within 30 days after filing of the Record of Appeal.



- c. The application dated 26.08.2020 be listed for hearing within 30 days from delivery of this ruling.
- d. The Respondent do pay the Applicant the sum of Kenya shillings 10,000/= as costs before the hearing of the application dated 26.08.2020.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

In the presence of Kirwa for respondent and Mureithi Muriuki for Rose Migwi for applicant.

Court assistant: Leadys

Interpretation: English/Kiswahili

**A.K. KANIARU**

**JUDGE**

**02/11/2023**

