



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abaye v Julius (Civil Appeal E130 of 2021)  
[2025] KEHC 12147 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 12147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E130 OF 2021  
F WANGARI, J  
MARCH 27, 2025**

**BETWEEN**

**GAFO ABAYE ..... APPELLANT**

**AND**

**PAULINE MUENI JULIUS ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the judgment of Hon. M.L. Nabibya, Principal Magistrate delivered on 19/08/2021 in Mombasa SRMCC No. 789 of 2019. The appeal was on damages only. In the Memorandum of appeal dated 09/09/2021, the Appellant faulted trial magistrate for misdirecting herself in proceeding in the wrong principals when assessing general damages, which were inordinately high and excessive thus occasioning miscarriage of justice.
2. No action was taken by the Appellant thereafter, and the Respondent took it upon herself to file the Record of Appeal dated 16/02/2022 and filed on 17/02/2023. Going by the date of filing of the Record of Appeal, it is assumed the date ought to be 17/02/2023. Either way, the date shall not affect the outcome of this appeal.
3. From the proceedings, I note that from 18/05/2023 when the Respondent's counsel fixed the matter for mention before the Deputy Registrar, the Appellant never attended court for the 6 times the matter was mentioned before the Deputy Registrar. The Appellant through his advocate one Ms. Nassanga attended court only once, when the matter came up on 14/11/2023, for directions on the appeal. During the subsequent mention dates, the Appellant did not attend court.
4. It was directed that the appeal be canvassed by way of written submissions, and both parties compiled by filing their rival submissions. The highlighting of submissions and further proceedings in the matter was to be before the duty judge during the Rapid Results Initiative (RRI) program. In the case, it was



the late Justice D.S Majanja. However, the file was returned for reasons that the Record of Appeal was incomplete.

5. As I sit to write this judgment, the Record of Appeal filed by the Respondent is still incomplete. The certified proceedings, the copy of the judgment and decree are missing from the record. It is not the responsibility of the Respondent to file the Record of Appeal but that of the Appellant. The Respondent cannot take the blame for the missing documents.
6. The Appellant filed this appeal by way of Memorandum of Appeal and went to sleep. It is the Respondent who has been participating in the appeal yet she was dragged into these proceedings by the Appellant. Even though the Respondent did not raise this issue, it is practically impossible for this court to come up with a judgment where the lower court proceedings, judgment and decree which are subject to this appeal are missing. The Appellant had the opportunity to regularize the documentation by filing a Supplementary Record of Appeal.
7. In the case of *Abraham Mukbola Asitsa v Silver Style Investment Company Limited* [2020] eKLR, the court in dismissing the appeal for want of prosecution stated as hereunder;

“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.”

8. This case is no different from the case above. The Appellant filed this appeal and went on slumber mode, leaving the Respondent to take up the Responsibility of filing the Record of Appeal which is incomplete, to the detriment of the Appellant. The court cannot aid and indolent party for equity aids the vigilant and not the indolent.
9. In the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from Snell’s Equity by John MC Ghee Q.C. (31<sup>st</sup> Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

10. From the above, I need not say more. The appeal is hereby dismissed with costs to the Respondent.
11. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. That the appeal is hereby dismissed.
  - b. That costs are awarded to the Respondent.



Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

M/S Nanjira Advocate for the Appellant

M/S Otuya Advocate h/b for Adhoch Advocate for the Respondent

M/S Salwa, Court Assistant

