



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PROBATE & ADMINISTRATION APPEAL NO. 10 OF 2019

IN THE MATTER OF THE ESTATE OF PAUL MWAIMBOTO (DECEASED)

JENNIFER WANJIRU MWAI.....APPLICANT/RESPONDENT

VERSUS

ELENA WANGARI KAMAU.....APPELLANT/RESPONDENT

RULING

1. The applicant has brought this application dated 15th July 2020 under **Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 11 and 35 of the Civil Procedure Rules and Rules 49 and 73 of the Probate and Administration Rules** seeking for orders for dismissal of this appeal for want of prosecution.

2. In opposition to the application, the respondent filed a replying affidavit dated 10th February 2021 and filed in court on 16th February 2021.

The Applicant's Case

3. The judgment in Othaya SRM Succession Cause No. 41 of 2017 was delivered on 24th May 2019 to which this appeal was lodged. The applicant states that this appeal was admitted on 17th October 2019 which was almost two(2) years at the time of filing this application. Since then, the appellant has not set down the appeal for directions with a view of preparing the same hearing. The applicant states that the appellant has neglected to serve the applicant with the Record of Appeal as envisaged by Order 42 rule 12 of the Civil Procedure Rules.

4. The applicant contends that the respondent is guilty of inordinate delay in prosecuting this appeal and seems to have lost interest. As such, the applicant contends that this is prejudicial to her as it continues to cause her anxiety and causes waste of the estate of the deceased leading to accumulation of advocate's legal fees for the parties. In this regard, the applicant prays that the appeal be dismissed for want of prosecution.

The Respondent's Case

5. The respondent contends that she has not lost interest in prosecuting the appeal but the reason for the delay is because of the Covid 19 pandemic experienced last year and that the lower court file was transferred to High Court before she could obtain copy of the proceedings and the decree.

6. The respondent further contends that the applicant does not stand to suffer any prejudice because she continues to be in occupation of the parcel of land.

7. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

Applicant's Submissions

8. Pursuant to **Order 42 Rules 11, 12, 13 and 35 of the Civil Procedure Rules**, the onus is upon the appellant to move the court to progress the hearing of an appeal.

9. The applicant submits that there has been an unreasonable delay in pursuing the appeal and the appellant has not given any satisfactory reasons to justify the delay. The applicant relies on the case of **Haron E. Ongechi Nyaberi vs British American Insurance Co. Ltd [2012] eKLR** to support her contention. Despite been served with the notification that the appeal was admitted on 22nd October 2019, no record of appeal has been prepared and no effort to list the appeal for directions has been made. The respondent states that due to the pandemic in

2020, she experienced difficulties in pursuing the matter but the applicant contends that the first case of Covid 19 reported in Kenya was on 12th March 2020. Therefore since the notification letter was sent on 22nd October 2019, there is no justifiable excuse by the respondent as to why she did not serve the applicant with the record of appeal and list the appeal for directions within 21 days which fell within the 4 months before the reporting of the first case of Covid.

10. The applicant submits that pursuant to **Order 42 Rule 35(2) of the Civil Procedure Rules**, the appeal should be dismissed as more than one year has lapsed since the appellant lodged her memorandum of appeal. The applicant contends that the filing of the memorandum of appeal was only meant to delay the matter and keep the applicant away from enjoying the fruits of the judgment.

11. The applicant further submits that the appellant is not deserving of the court's discretion under **Order 42 Rule 13(1) of the Civil Procedure Rules** because it is the sole responsibility of the appellant to ensure that the appeal is listed for directions which the appellant has been indolent about. As such, the applicant submits that the appeal should be dismissed because the appellant has been indolent and the applicant has proved her case that the Registrar issued a notice under **Order 42 Rule 12 of the Civil Procedure Rules** and that the lower court file and proceedings were forwarded to the High Court for the Registrar to proceed as aforesaid. The applicant relies on the case of **John Wachenga Kiama vs Daniel Kiboro Muchai Eldoret High Court Civil Application No. 53 of 2013** to support her contention.

12. The applicant further submits that the delay in prosecuting the appeal has caused her undue prejudice and continued loss and damage of the estate of the deceased as well as accumulation of the advocate's legal fees. Further, the appellant is still enjoying the stay of execution orders to the detriment of the applicant who is unable to enjoy the fruits of her judgment. The applicant relies on the cases of **Peter Kipkurui Chemoiwo vs Richard Chepsergon [2021] eKLR** and **Abraham Mukhola Asista vs Silver Style Investment Company Limited [2020] eKLR**.

The Respondent's Submissions

13. The respondent submits that her appeal raises serious issues which the honourable court ought to address. She further adds that she intends to make an application to this court to have the file returned to Othaya Principal Magistrate Court to enable the court to certify the decree.

14. The respondent further adds that according to **rule 63 of the Probate and Administration Rules** only the listed provisions of the Civil Procedure Act are applicable in succession proceedings which does not include Sections 1A, 1B, 3A and Order 42 and neither does it allow for a chamber summons application in succession proceedings. As such, the respondent prays that the application be dismissed.

Issues for determination

15. After careful analysis of the pleadings and submissions, the issues for determination are identified as follows:-

- a) Whether the application is incompetent;
- b) Whether the appeal ought to be dismissed for want of prosecution.

The Law

Whether the application is incompetent.

16. The respondent argues that the application is incompetent because it is based on the Civil Procedure Act particularly Order 42 of the Civil Procedure Rules and as per Rule 63 of the Probate and Administration Rules, Order 42 does not fall into the category of rules applicable in a succession cause.

17. **Rule 63 of the Probate and Administration Rules** provides:-

“Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registry in any particular case for reasons to be recorded the following provisions of the Civil Procedure Rules, namely Order 5 Rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap 21 sub-leg) together with the High Court (Practice & Procedure) Rules (Cap 8 sub-leg) shall apply so far as relevant proceedings under these Rules.”

18. While facing a similar issue, the court in **Sally Jeptoo Mwei vs Esther Jepkoech Mwei [2014] eKLR** addressed this issue as follows:-

“In my view, though it is true that Order 42 of the Rules is not among the orders specifically stated by the aforesaid rule, the wording of the rule leaves no doubt that the list of procedural rules applicable to succession matters cited therein was not meant to be exhaustive as the rule was to apply subject to “any order of the court or a registrar in any particular case for reasons to be recorded.” The rules were also to apply together with other High Court (Practice Procedure) Rules. Besides, section 47 of the Law of Succession Act read together with Rule 73 of the Probate and Administration Rules empowers this court to entertain any application and determine any dispute under the Law of Succession Act and make such orders as may be expedient and necessary for the ends of justice to be met and to prevent abuse of the court process.”

19. **Article 159 of the Constitution of Kenya 2010** enjoins courts to administer substantive justice, which requires them to overlook procedural technicalities, which may hinder the path of resolving the core dispute between the parties before it. Having considered the facts of the present case and the arguments of the parties herein, I am of the considered opinion that the application is properly before the court.

Whether the appeal ought to be dismissed for want of prosecution.

20. **Order 42 Rule 35 (1) of the Civil Procedure Rules** provides:-

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.

21. **Rule 35 (2)** provides:-

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.

22. Therefore, Order 42 Rule 35 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under **Section 79B of the Civil Procedure Act** as is envisaged in **Order 42 Rule 11 of the Civil Procedure Rules**. The second scenario is that if after service of the memorandum of appeal the appeal would not have been set down for hearing, the registrar shall on notice of the parties list the appeal before the judge for dismissal.

23. This principle has been enunciated in the case of **Pinpoint Solutions Limited & Another vs Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi) [2020] eKLR** where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying:-

“The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Rule 13 of the Civil Procedure Rules, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

24. Similarly on the principles governing dismissal for want of prosecution, the court in **Mwangi S. Kimenyi vs Attorney General & Another, Civil Suit Misc. No. 720 of 2009** held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what matters to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

25. In analysing the instant case, the matter was concluded in the trial court on 24th May 2019. The respondent applied for certified proceedings on 24th May 2019 and filed her Memorandum of Appeal on 21st June 2019. The registrar wrote to the advocates on 22nd October 2019 notifying them that the appeal was admitted to hearing. The respondent was also granted stay of execution pending appeal on 23rd July 2019. Thereafter, the respondent made no effort to prosecute her appeal and was only roused from slumber when the applicant filed her application to dismiss the appeal for want of prosecution.

26. According to the respondent, the reason for the delay in prosecuting the appeal is that she experienced difficulties, due to the Covid-19 pandemic in the year 2020. However, on perusal of the court record, by 22nd October 2019, the proceedings and judgement were typed and the certificate of confirmation of grant was certified. Thus, the respondent's only task was to prepare the record of appeal and serve the applicant and then proceed to list down the appeal for directions. The respondent said that the court registries were inaccessible but this reason is not justifiable since the court registry had already completed its work at the time, the court downsized operations in April 2020. Thus the respondent had five(5) months at his disposal to have prepared and served the record of appeal as well as listing it for directions.

27. The respondent also continues to enjoy stay orders pending appeal to the detriment of the applicant who has been denied fruits of her judgment. In my view, the applicant is bound to suffer more prejudice than the respondent in the circumstances due to delay in execution of the judgement due to the appeal that has not been prosecuted for over one(1) year. I find that the ends of justice will not be served in keeping the appeal in the shelves of the court registry indefinitely.

28. Further, I have already noted that under the existing rules, an appeal cannot be dismissed for want of prosecution before directions are taken. However, I am of the view that there is no justification for a party to file an appeal and thereafter go to slumber. I am persuaded by the case of **Abraham Mukhola Asitsa vs Silver Style Investment Company Limited [2020] eKLR** where the court stated:

“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 take action 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.”

29. Thus from the foregoing decision, I am persuaded that the court, even at this stage may exercise its discretion to dismiss the appeal for want of prosecution even though directions had not been taken. It is not justifiable for the applicant to continue to be kept in suspense in an appeal where the appellant seems to have lost interest and been hindered from enjoying the fruits of the judgement.

30. The overriding objective calls for expeditious disposal of cases and utilisation of judicial resources in an economic manner. The act of the appellant has resulted in inordinate delay which is contrary to the principle of expeditious disposal of cases.

31. For the foregoing reasons, I am of the considered view that this application has merit and ought to be allowed.

32. This appeal stands dismissed with costs to the respondent.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 29TH DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 29th day of July, 2021