



**Wekesa v Wekesa & another (Environment and Land Appeal
E001 of 2022) [2023] KEELC 18751 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E001 OF 2022
EC CHERONO, J
JULY 14, 2023**

BETWEEN

DANIEL NYONGESA WEKESA APPELLANT

AND

DOROTHY SYLVIA WEKESA 1ST RESPONDENT

GEOFFREY WEKESA 2ND RESPONDENT

RULING

1. The applicant vide a Chamber Summons application dated February 24, 2023 is seeking the following orders;
 1. (Spent)
 2. That the appeal herein be dismissed for want of prosecution.
 3. That costs of the appeal and the instant application be awarded to the applicants.
 4. Any other relief that the Honourable Court may deem just and appropriate under the circumstances.
2. The application is based on grounds apparent on the face of the said application supported by the affidavit of the applicant sworn on even date.
3. By way of a response, the respondent filed a replying affidavit sworn on March 9, 2023.
4. According to the applicants, this appeal was filed on January 3, 2022 and was last in court on July 12, 2022 when the Honourable court was due to deliver its ruling on a Notice of Motion application dated February 7, 2022 in which the applicants had also sought to dismiss the appeal on grounds that it was premature and had been overtaken by events.



5. The applicants further stated that the Honourable court delivered the ruling on July 21, 2022 whereby it dismissed the application primarily on the grounds that the appellant was entitled to a fair hearing notwithstanding any perceived weaknesses in their appeal. The applicants further contend that despite this favourable ruling and more than three (3) months having lapsed, the appeal is yet to be set down for hearing. They stated that it is now apparent that the appellant is not keen to prosecute their appeal and that applicants herein continue to be unjustly prejudiced the longer the instant appeal continues to subsist without any action being taken.
6. The applicants further stated that in the circumstances, it is in the best interest of justice that the appeal is dismissed so as to bring it to finality in line with the public policy interest that litigation must come to an end.
7. The respondent in his replying affidavit deposed that the application is premature. He stated that the applicants herein had filed a similar application seeking to have this appeal dismissed and this Court in a Ruling delivered on July 21, 2022 dismissed the same with costs. The Respondent further stated that the lower court file is very active in which file the respondents herein have been making several applications to have him punished for contempt emanating from the order appealed against herein which file is scheduled for mention for him to show cause why he should not be punished for contempt which order he has also preferred an appeal herein. He deposed that this application should not be allowed but allow him to proceed with the appeal once the proceedings are typed and the Ruling certified.

Legal Analysis And Decision

8. I have considered the Chamber Summons application brought under certificate of urgency dated February 24, 2023 and the supporting affidavit. I have also considered the response by way of a replying affidavit as well as the applicable law. Order 42 Rule 35 which has been invoked by the applicant provides 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.”
9. From my interpretation of the provisions of the law, there are two ways in which an appeal can be set down for dismissal for want of prosecution. The first option is where an appellant fails to set down the appeal for hearing three months after the giving of directions under order 13 *CPR*. The second option is where, within one year after the service of the Memorandum of appeal, the appeal shall not have been set down for hearing, the Deputy Registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.
10. Upon perusal of the proceedings in this appeal, the same has not even been admitted under Section 79B of the *Civil Procedure Act*. The appellant in his replying affidavit has stated that the lower court file is very active and that there have been several applications made by the applicant to have him punished for contempt. Those averments have not been controverted. If that be the case, then that explains the reason why the proceedings in the lower court file have not been typed and the court file availed to this court for processing of the appeal.



11. I also note from the proceeding herein that the applicant had made a similar application for dismissal of this appeal vide a Notice of Motion dated February 7, 2022 which was dismissed vide a ruling delivered on July 21, 2022. One year has not passed since the said ruling was delivered.
12. In view of the matters aforesaid, the Chamber summons application dated February 24, 2023 is without merit and the same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 14TH DAY OF JULY, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wekesa holding brief for Wamalwa R
2. Mr. Muyendo holding brief for m/s Kuria
3. Joy: Court Assistant

