



REPUBLIC OF KENYA



KENYA LAW
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**Sokoto v Njoroge (Environment and Land Appeal 60 of 2015)
[2023] KEELC 20129 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 60 OF 2015
JA MOGENI, J
SEPTEMBER 27, 2023**

BETWEEN

PAUL MWAURA SOKOTO APPELLANT

AND

FLORENCE NGENDO NJOROGE RESPONDENT

RULING

1. By a Notice of Motion dated 5/07/2023 pursuant to Article 159(1) (d) of *the Constitution*, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law the Appellant/Applicant seeks for orders that:-
 - i. Spent
 - ii. That the firm of Gikenye Mugo and Rienye Advocates be granted leave to come on record for the appellant
 - iii. That pending the inter partes hearing of this application this court be pleased to order a stay of execution of the judgment of the Chief Magistrate's Court at Nairobi in Civil Suit 2561 of 2006
 - iv. That the Honorable Court be pleased to set aside the orders made on 17th January 2017 dismissing this appeal for want of prosecution and reinstate the appeal for hearing
 - v. That the Appellant be granted leave to amend the memorandum of appeal
 - vi. That pending the hearing and determination of the appeal herein this Honorable Court be pleased to order a stay of execution of the judgment of the chief magistrate's court at Nairobi in civil suit 2561 of 2006.
 - vii. That cost of this application be in the cause.



2. The Applicant relied on the 15 grounds on the face of the application and the Applicant's affidavit dated the 5/07/2023.
3. That facts giving rise to the said Application being that on the applicant was sued in Civil Suit No. 2561 of 2006 and on 19/06/2012 the lower court rendered judgment allowing the respondent to evict the applicant from the suit property which he claimed to have bought in 2003 from one Francis Maina Mugo through an agreement which the parties executed dated 28/02/2003 for plot number 34 Kahawa West. The applicant attached a copy of the agreement to the supporting affidavit.
4. The applicant states that the respondent has moved to execute the decree of the lower court through a hearing of a notice to show cause application which is slated for hearing on 12/07/2023 which he fears that unless conservatory orders are issued the respondent may proceed to demolish his home. Further that the delay in prosecuting the appeal was not out of his mistake but that of his counsel.
5. That he is in possession since 2003 and that the appeal raises triable issues with a probability of success.
6. The certified the matter to be urgent on 10/07/2023 and directed the application to be served upon the respondent for inter partes hearing on 26/07/2023 and which day the parties by consent sought to have the matter disposed of by way of written submissions. Leave was granted to parties to file and serve their submissions within 14 days each and a ruling date was reserved for 27/09/2023.
7. The Application was opposed. The Respondent filed grounds of opposition dated 25/07/2023 and also an affidavit sworn on the even date. In it she stated that the Application was scandalous, frivolous, vexatious and an abuse of the process of the Court, brought in bad faith and designed to obstruct justice. She then stated that the applicant had never been keen to prosecute his case since the year 2017. He restated that up to the time the case was dismissed, 6 years since the dismissal of the appeal.
8. In the grounds of opposition and the affidavit the respondent termed the time taken to file the application to be inordinate and unreasonable. He also stated that the applicant had not met the threshold of Order 42 Rule 6(2) to warrant the grant of stay of execution.
9. That since the appellant did not prosecute his appeal the respondent filed a notice to show cause dated 21/05/2015 which heard and determined and an order issued since the appellant did not file any response it was therefore undefended.
10. The respondent has also stated that the advocate for the appellant Mr James Waithaka Wachira was alive and active upto 2019 and therefore the dismissal of the appeal for want of prosecution on 17/01/2017 did not coincide with the death of the advocate for the appellant.
11. It is the contention of the respondent that the appeal filed lacks merit and the appellant's letter of allotment does not qualify for having title to the suit property and that the appellant has not come to equity with clean hands.

Analysis and Determination

12. The court has noted from the application and supporting affidavit that the appellant has attempted to explain a delay of six (6) years in seeking the orders sought in the application dated 05/07/2023.
13. From the pleadings filed I note that the judgment in the subordinate court was delivered on the 19/06/2012, wherein the appellant herein filed an appeal Civil Appeal No. 342 of 2012 which was transferred to this court and was registered as ELC 60 of 2015. The lower court in addition to the filing of the appeal granted a stay of execution of its judgment on 7/11/2012.
14. Due to the failure to prosecute the appeal it was dismissed for want of prosecution on 17/01/2017.



15. After a period of six (6) years when the appeal was dismissed, and eleven (11) years since the delivery of the judgment by the Chief Magistrate, the Applicant has filed an application in this court seeking stay of execution of the judgement of the trial magistrate that was rendered on 19/06/2012 and to set aside the orders made on 17/01/2017 dismissing the appeal for want of prosecution which appeal was filed but never prosecuted and according to the Applicant for a mistake by his advocates who he instructed after the death of his advocate Mr. James Waithaka Wachira who had the initial conduct of the matter since 2017 and died in 2019 April.
16. Under Order 17 Rule 2 of the Rules, the appellant has not explained the delay of two years before the death of his advocate why he did not prosecute the appeal. He has also not explained the delay of six years in filing the instant application nor the delay of four years in appointing counsel to represent him. He has not explained why he failed to prosecute his appeal despite being granted a stay pending appeal on 7/11/2012 and five (5) years later the appeal had not been prosecuted and the respondent moved the court for dismissal.
17. The letter to the Law Society that the appellant has produced show that he wrote to the Society on 27/09/2019, yet the appeal was dismissed on 17/01/2017. The response from the Law Society was very swift since they sent a response on 30/09/2019 directing the appellant to liaise with Njamwitha George Kariuki Advocates. The appellant has not attached any document to show that this law firm was contacted at all.
18. There is a growing practice where litigants perennially blame their advocates for failure to attend court and for their cases being dismissed for want of prosecution. I find these arguments lacking in substance. For one, it is the sick person who visits a doctor and goes for check-ups so that the doctor can indeed affirm that the prescription made is working. How does one blame their doctor when they fail to make a follow up on their own wellbeing? Or how does the doctor know you are okay if you fail to make regular visits to the clinic and take the necessary tests?
19. I am guided by the authority of *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR where the learned judge held as follows:

“It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff’s Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant.”
20. In the instant application and from all the material on record I see indications the point to the fact that the appellant was not a diligent litigant at all. It was his duty to diligently and expeditiously prosecute the suit which they filed in 2012. See *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. The mere fact that there was no communication from his advocates does not justify the failure on his part to follow up on his own appeal leading to dismissal.
21. There was no follow up by the Applicant on the dates of his matter for over six (6) years in fact if I took into consideration the date when the judgement was delivered in 2013, the follow up has been pending for eleven (11) years. Even if his former advocates could have been blamed for any error of miscommunication eleven and six years is too long a time for one to keep waiting for someone else to bail you out. Given the circumstances I am not convinced that I can excuse the appellant’s indolence. The court is thus not satisfied that the applicant has made out a case for setting aside of the dismissal order made on 17/01/2017 nor stay of the judgment of the lower court made on 19/06/2012.



22. The upshot of the foregoing is that the court finds no merit in the applicant's notice of motion dated 5/07/2023. Accordingly, the same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27th DAY OF SEPTEMBER 2023.

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MOGENI J

JUDGE

In the virtual presence of

Mr. Rienye for Applicant/Appellant

Ms. Ngure holding brief for Mr. Kahaki for Defendant/Respondent

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

