



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ENVIRONMENT & LAND CASE APPEAL NO.55 OF 2013

JAMES KINYUA MIGWI.....APPELLANT

VERSUS

ANTHONY WACHIRA WANGARI.....1ST RESPONDENT

TIMOTHY NJIRAINI WARUI.....2ND RESPONDENT

RULING

The Appellant filed this appeal on 28th August 2012 against the decision of HON. K. K. CHERUIYOT delivered on 31st July 2012 in KERUGOYA SPMCC No.312 of 2012.

The appeal was admitted on 12th October 2015 and the parties were notified accordingly. However, the Appellant did not take any steps to prosecute the appeal and on 12th April 2017, the 2nd Respondent filed an application dated 10th April 2017 seeking the following orders:

- 1. That this Honourable Court be pleased to strike out the appeal for failure to take any reasonable steps towards preparing the appeal for hearing.***
- 2. That this Honourable Court be pleased to strike out the appeal for having been filed without leave of Court.***
- 3. That the Costs of this application be provided for.***

The application is predicated on the grounds set out therein and also supported by the affidavit of TIMOTHY NJIRAINI WARUI the 2nd Respondent herein. The gravamen of the application is that whereas this appeal was admitted on 14th October 2015, the Appellant has failed to prepare a record of appeal. Further, that the appeal was against an order grounded on order 22 Rule 75 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and leave ought to have been sought before the appeal was filed. That such indolence should not be tolerated as it is prejudicing the Respondents.

The application is opposed and in his replying affidavit dated 24th April 2017, the Respondent avers, inter alia, that upon filing the appeal, his Counsel waited for the same to be admitted and it was only admitted on 14th October 2015 after which this appeal was transferred to KERUGOYA ELC from EMBU ELC after which Counsel for the 1st Respondent filed an application to cease acting. That application was allowed on 10th November 2016 and so the Appellant has not been indolent and directions have not been taken. That the transfer of this appeal from EMBU ELC to KERUGOYA ELC has played a major role in having it determined.

It is not clear from the record if directions were ever given as to how the application dated 10th April 2017 was to be canvassed. However, when the parties appeared before MUKUNYA J on 26th April, 2018 both MR. NDIRANGU ADVOCATE for the Appellant and Mr. MAGEE ADVOCATE for the 2nd Respondent were present and MR. MAGEE informed the Court that he had filed the submission to the application. Mr. NDIRANGU sought time to file his submission and was granted upto 17th May 2018 to do so but come that day, MR. MAGEE informed MUKUNYA J that he had not been served with any submissions by MR. NDIRANGU who was not present in Court. MUKUNYA J fixed the ruling for 6th July 2018 and the file was sent to me at BUNGOMA ELC. I am inclined to believe that MUKUNYA J did not intend to transmit this file to me because there are no orders to that effect. Besides, there is no letter from the Deputy Registrar KERUGOYA forwarding this file to me or to the Deputy Registrar Bungoma.

Having said so, I think what the parties want from the Court is a ruling and not how this file arrived at BUNGOMA ELC so I will not belabour those niceties.

I have considered the application dated 10th April 2017 and the submission by MR. MAGEE.

This appeal was admitted on 12th October 2015 and the Deputy Registrar promptly sent a notice dated 14th October 2015 to MR. NDIRANGU requiring him to prepare and file the record of appeal. As at the time the application dated 10th April 2017 was filed, the Appellant had not prepared and filed the record of appeal. The Appellant in paragraph fourteen (14) of his replying affidavit had deponed that the inaction on his part was caused by the transfer of this appeal from EMBU H.C. to KERUGOYA ELC. This appeal was transferred to this Court from EMBU H.C. by ONGUNDI J way back on 4th January 2013 and was placed before me on 9th July 2014 when I noticed that it had not been admitted. I proceeded to admit it and the notice dated 14th October 2015 was issued to the Appellant's advocate. It has not been suggested that the said notice was not received. Therefore, the complaint that the delay to prosecute this appeal was due to the transfer from EMBU to KERUGOYA cannot be correct because the appeal was admitted in KERUGOYA from where the notice to the Appellant was dispatched.

The appellant has further deponed in paragraph eight (8) of his replying affidavit that Counsel for the 1st Respondent had filed an application to cease acting which application was concluded on 10th November 2016. That did not stop the Appellant from filing the record of appeal and in any event, no explanation has been given for failure to file the record of appeal between 10th November 2016 and 12th April 2017 when this application was filed.

The long and short of all this is that the Appellant did not take any of the steps required under Order 42 of the Civil Procedure Rules to have this appeal ready for trial. He went into a deep slumber and only woke up when he was served with this application. The delay is inordinate and has not been explained.

The up-shot of the above is that this appeal is struck out with costs to the 2nd Respondent.

BOAZ N. OLAO

ELC JUDGE

20TH JUNE 2018

Ruling dated and signed at BUNGOMA ELC this 20th day of June 2018.

To be delivered at KERUGOYA ELC on notice.

BOAZ N. OLAO

ELC JUDGE

20TH JUNE 2018