



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 92 OF 2015**

**FRANCIS KIMANI WAWERU.....1<sup>ST</sup> APPELLANT**

**FRANCIS MAINA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**EUNICE CHEPROP KIPROTICH.....RESPONDENT**

**RULING**

[1] The Notice of motion dated **8 February 2018** was filed herein on **19 February 2018** by the Respondent, **Eunice Cheprop Kiprotich**, pursuant to the provisions of **Order 17 Rule 2(3)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that the Court be pleased to dismiss the instant appeal for want of prosecution; and that the costs of the application be borne by the Appellants. It was predicated on the grounds that a period of two years has elapsed since the appeal was filed and that the continued pendency of the appeal herein has been prejudicial and vexatious to the Respondent.

[2] It was further the contention of the Respondent that it appears the Appellants have lost interest in the appeal and therefore that the Court should uphold the policy that appeals be disposed of expeditiously by dismissing this appeal. The Respondent relied on her affidavit sworn on **8 February 2018** in which she averred that the appeal was filed on **31 August 2015**; and that since then, the matter has remained dormant to date. It was further averred by the Respondent that she has been grossly prejudiced by the delay in the prosecution of this appeal, in effect putting a hold on her rights to the fruits of her judgment before the lower court, not to mention the anxiety that the inertia has visited on her.

[3] The application was opposed by the Appellants and an affidavit to that effect sworn by **Ms. Esther B. Oribo, Advocate**, who has the conduct of this appeal on behalf of the Appellants. She averred that she has been following up diligently on the issue of typing of the proceedings in this matter, having paid for a copy of the typed proceedings way back on **21 June 2016**; and that the proceedings have now been typed and are awaiting proof reading. She therefore averred that the delay is not attributable to any fault on her part as Counsel for the Appellants, but on the part of the Court. Counsel further averred that the Appellants have all along been keen and interested in pursuing the appeal and have not lost interest in it as alleged; and therefore should not be subjected to punishment for a mistake that has not been of their own doing. She urged for the dismissal of the application, adding that no prejudice will be suffered by the Respondent.

[4] The application was canvassed by way of written submissions; and in the written submissions filed on **15 July 2018**, Counsel for the Respondent reiterated their contention that it is now three years down the line since the trial court delivered its Judgment in favour of the Respondent on **31 July 2015**; and that the Respondent is yet to enjoy the fruits of her Judgment. It was further pointed out that the Appellant has failed to take any step towards the prosecution of the appeal, including compliance with **Section 79B** of the **Civil Procedure Act** and **Order 42 Rule 11** of the Civil Procedure Rules. According to the Respondent, it was the duty of the Appellants to cause the appeal to be placed before a Judge for directions. The cases of **Haron E. Ogechi Nyaberi vs. British American Insurance Co. Ltd [2012] eKLR**; **Justus Gachoki Wachira vs. Emma Makena [2011] eKLR**; and **Bruce Mutie Mutuku T/A Diani Tour and Travel Centre vs. Equity Bank Limited**, were cited in support of this argument.

[5] It was further the argument of Counsel for the Respondent that, in suitable circumstances, the Court would have jurisdiction to dismiss an appeal which has not been admitted, and posited that this is one of those cases that ought to be dismissed, notwithstanding that the appeal is yet to be admitted. Counsel relied on **Hesbon Amata & Another vs. David Maina Waithaka; Kariby Timber Industries vs. Nemchand Anand & Co. [2004] eKLR** and **Shamchulin A. Gothey vs. Joseph Ng'ang'a Kuria [2013] eKLR** in urging the Court to find that the application is meritorious and ought to be allowed as prayed with costs.

[6] Counsel for the Appellants on his part relied on **Jurgen Paul Flach vs. Jane Akoth Flach [2014] eKLR** for the proposition that, in so far as the appeal is yet to be admitted, the Appellants cannot be faulted for any ensuing delay. It was further submitted that the Appellants have demonstrated that efforts were made to obtain typed copies of the proceedings for purposes of preparing the Record of Appeal, which took time to type and proofread, thereby contributing to the delay. Counsel further submitted that the application is, in any case, not properly before the court as the Applicant invoked the provisions of **Order 17 Rule 2(3)** of the Civil Procedure Rules when the applicable provision is **Order 42 Rule 35** of the Civil Procedure Rules.

[7] Needless to say that the application was hinged on the wrong provision of the law, namely **Order 17 Rule 2(3)** of the **Civil Procedure Rules**, which speaks to the dismissal of suits for want of prosecution. When it comes to appeals, **Order 42 Rule 35** of the **Civil Procedure Rules** is the go-to provision. However, the anomaly is insignificant and ought not to pre-occupy the Court given the express provisions of **Order 51 Rule 10(2)** of the **Civil Procedure Rules**, to the effect that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

[8] **Order 42 Rule 35** of the **Civil Procedure Rules** provides that:

**"(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] Although more than one year has elapsed since the filing of the appeal, **Sub-rule (2)** is not the provision envisaged herein as indeed no notice has been issued by the Deputy Registrar. The most apt provision therefore is **Sub-rule (1)**; but for that provision to be invoked, it must be demonstrated that directions have been given under **Rule 13** of **Order 42**, Civil Procedure Rules. In this matter, the lower court file is yet to be forwarded; which means that the appeal is yet to be admitted pursuant to **Section 79B** of the **Civil Procedure Act**. And while it is appreciated that it is the responsibility of an appellant to move the Court for purposes of **Section 79B of the Civil Procedure Act**, in this instance, the Court would not be able to give directions without the lower court file.

[10] Clearly therefore, the application dated **8 January 2018** is premature and is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**OLGA SEWE**

**JUDGE**