



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**HIGH COURT CIVIL APPEAL NO. 23 OF 2015**

**JORAM ADALA OKUBI.....APPELLANT**

**VERSUS**

**MUSA OUNDO MUSALAMA.....1<sup>ST</sup> RESPONDENT**

**SAMUEL MULERA LUKRI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The application before me is a Notice of Motion filed on 8/8/2016 and dated the same. It is brought under sections 1A, 1B and 3A of the Civil Procedure Act (cap 21), Order 42 Rules 35 of Civil Procedure Rules and all other enabling provisions of law. It was filed by the 2<sup>nd</sup> respondent – **SAMUEL MULERA LUKIRI** – against the appellant – **JORAM ADALA OKUBI**.

2. The prayers sought are set out here *ipssisma verba* (using same words):

Prayer (a) That the Civil Appeal instituted by the appellant dated 2<sup>nd</sup> June, 2015 be dismissed for want of prosecution.

Prayer (b) That the eviction orders issued in Busia Resident Land case NO. 32 of 2002 be reinstated.

Prayer (c) That the original land title NO. SAMIA LUCHULULO/BUKHULUNGU/1269 be restored back as per the order of BUSIA ELC NO. 80 OF 2011.

Prayer (d) That the costs of this application be provided for.

3. The grounds advanced in support of the application allege that the appeal herein was filed on 2/6/2015 yet to date, over 14 months since, the appellant has not listed the appeal for hearing or moved the court to hear and determine the same. The appeal is now said to be time-barred and it is further alleged that it was filed in bad faith, principally to deny the respondent the fruits of the orders issued in BUSIA SRM Land case No. 32 of 2002.

4. It appear like the appellant responded to the application by way of grounds of opposition. I say so because the appellant filed reply to such grounds on 8/11/2016. That reply is dated 6/9/2016. The grounds of opposition however are not in the court file. I will desist from highlighting or commenting on the appellant's reply because I do not know which grounds he was responding to.

5. Both sides canvassed the application by way of written submissions. The 2<sup>nd</sup> Respondents submissions were filed on 3/10/2016. The appellants submissions were filed on 6/12/2016. The 2<sup>nd</sup> respondents submission largely reiterates and amplify what he stated in his application. The appellants submissions approach the matter in a rather technical way. According to the appellant, no directions have been taken and no record of appeal has yet been availed. He submitted that under Order 42 Rule 35 under which the application is brought, dismissal can only take place if these two things have been done. Another aspect raised is that there is already a pending succession case stated to be Succession Cause NO. 461 of 2014 where the applicant herein has filed an objection. The appellant cited two cases;- **JURGEN PAUL FLACH VS JANE AKOTH FLACH: CIVIL APPEAL NO. 119 OF 2012, NAKURU and MUMIAS SUGAR CO. LTD. VS JANEPHER ONYANGO OPIMBI: HCA NO. 116 of 2014, KAKAMEGA.** These two authorities were not availed.

6. I have considered the application and the rival submissions. I have had a look at the memo of appeal filed on 2/6/2015. In the court file I see a record dated 17/9/2015 in which **F. TUIYOT J.** has admitted the appeal and directed that it be heard by a single judge. Another direction is that the appellant file a record of appeal and thereafter move the court for directions. Another record from the court registry addressed to all the parties notifies that the appeal had been admitted, with the appellant being told to file a record of appeal within 45 days and thereafter take directions.

7. It is now over one and a half years and the appellant has neither filed the record of appeal nor taken directions. Yet when the 2<sup>nd</sup> respondent takes issue with that, he is confronted with a technical argument to the effect that his application cannot succeed as the record of appeal has not yet been filed and directions have not yet been taken. A question arises: who was supposed to file the record of appeal and/or take directions? The answer to this is that it is the appellant himself who was supposed to do it. But in a rather twisted logic he wants to use to his advantage a state of affairs he has caused against the respondent.

8. Another argument by the appellant is that there is a succession case pending which impedes the proceedings of the appeal. This is another spurious and untenable averment. If there is such a case pending, why not formerly seek stay of proceedings in this case to await the outcome of the other case? For how long can the appeal herein be kept pending and hanging over the respondent's head?

9. The circumstances show that the appellant has been grossly indolent. He wants to benefit from his wrongful omissions. The law is clear: ***Nemo Commodum Capere Postest de injuria sua propria*** (which is Latin for: No one can derive benefit from his own wrong). It is unacceptable that he filed the appeal long ago and has left it hanging over the respondent's head for the long. The respondent is justified to complain.

10. Before making the final decision, I wish to observe that the respondents application has many prayers. These prayers were however not urged before the court. Both sides focused on the prayer for dismissal of the appeal. The decision of the court will therefore focus on that prayer only. The other prayers, save for that of costs, are rejected. The other observation is that the appellants response was rather jumbled. Authorities were cited without being availed. There was no mention even in the submissions of what was being relied on in the un-availed authorities. The appellants even went further and mentioned a succession case without availing anything to show it exists.

11. The upshot: the application is allowed in terms of prayer a) which ask for dismissal of the appeal for want of prosecution. Costs of the application (prayer (d) )are granted to 2<sup>nd</sup> respondent. All the other prayers are not granted.

**A. K. KANIARU,**

**JUDGE.**

**DATED AND DELIVERED ON ...27TH.....DAY OF ...FEBRUARY...2017.**

**APPELLANT.....PRESENT.....**

**1<sup>ST</sup>RESPONDENT.....PRESENT.....**

**2<sup>ND</sup>RESPONDENT.....PRESENT**

**3<sup>RD</sup> RESPONDENT..... PRESENT.....**

**COUNSEL.....**

**J U D G E.**