



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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 1 OF 2015**

**BETWEEN**

**COUNTY GOVERNMENT OF KAKAMEGA.....APPELLANT**

**AND**

**MICHAEL ALOO WAKHU.....RESPONDENT**

**(Being an appeal from the decision of Hon. G. N. Sitati RM in Mumias SPMCC No. 290 of 2012, in a ruling delivered on 16.12.2014)**

**RULING**

**The Application**

1. The application before me is the chamber Summons dated 26.5.20`17 by which the applicant, Michael Aloo Wakhu seeks to have the appellant's appeal dismissed for want of prosecution. The application is premised on four grounds set out on the face thereof, the main ground being that since filing the Memorandum of Appeal on 16.1.2015 the appellants have taken no steps towards preparing and filing record of appeal nor have they taken any initiative to prosecute the appeal. The application is also supported by the applicant's affidavit sworn on 26.05.2017.

2. Though served, the respondents did not file any response to the application nor did they appear to defend the application when the same came up for hearing on 18.07.2017. The application thus proceeded ex parte. Miss Songwa, counsel for the applicant urged this court to allow the application and dismiss the appellant's appeal.

**Background**

3. In Mumias PMCC No. 290 of 2012, the applicant herein was the plaintiff in a suit filed against the clerk County Council of Butere/Mumias and the County Council of Butere Mumias. Upon judgment being given in favour of the applicant, execution ensued but the appellant herein objected to the execution proceedings carried out by Dominion Yard Auctioneer. The property of the applicant had apparently been attached, and it raised an objection on grounds that it was not the right authority to be attached nor was it a party to pay the decretal amount. The appellant claimed that it had been illegally and wrongfully proclaimed. The appellant filed an application dated 16.09.2014 seeking stay of execution pending interparties hearing of the application, but the main prayer( c) of the application was for a declaration that the proclamation and/or attachment of the objector's property dated 12.9.2014 by the auctioneers was illegal and/or irregular and for the court to proceed to nullify the same. The interim order dated

01.10.2014 certified the application urgent and also granted a temporary stay of execution pending hearing and de termination of the application. The application was opposed through grounds of opposition dated 19.11.2014. After hearing the application, the trial court rendered its ruling on 16.12.2014, dismissing the appellant's application, hence this appeal.

### **The Law**

4. The instant application is governed by the provisions of Order 42 of the Civil Procedure Rules 2010 (CPR) as well as Section 79 of the Civil Procedure Act. Order 42 rule II CPR provides that "upon filing of the appeal, the appellant shall within thirty days, cause the matter to be listed before a judge for directions under Section 79B of the Act." This Section of the Act provides that: " Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"

5. Order 42 Rule 12 requires the registrar, after the judge has issued orders under section 79B of the Act, to notify the appellant who shall serve the memorandum of Appeal on every respondent within seven days of receipt of the notice from the registrar. Once the Memorandum of appeal is served, the appellant is required under Order 42 rule 13(1) to cause the appeal to be listed for the giving of directions by a judge in chambers. This is to be done within twenty one days after service of the Memorandum of appeal.

6. In the instant case, the appellant who was served did not file a response, thereby raising a rebuttable presumption that it is the appellant who failed to comply with the rules under Order 42 of the CPR. It is now more than two years since the memorandum of appeal was filed and in the absence of a response from the appellant, this court is satisfied that the appellant did not comply with Order 42 rule 11 of the CPR which meant that the registrar of this court could not proceed to issue any notice under rule 12 of the said Order.

### **Conclusion**

7. From the above analysis. I am satisfied that the appellant herein is guilty of laches and there is absolutely no reason why this appeal should remain pending in the register of appeals at the court. This court does not support the indolent, for justice must not only be done but must also be seen to be done. The continued pendency of this appeal works against the principle of expeditious disposal of cases.

8. Accordingly, the application dated 26.5.2017 be and is hereby allowed and the appellant's appeal dismissed for want of prosecution with costs to the applicant.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of September, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of:-

Mr. Amasakha for Luchunya.....for Respondent/Applicant

M/S Korongo - absent.....for Appellant/Respondent

Polycap Mukabwa.....Court Assistant