



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.2 OF 2014

ESTHER KANYUA MUKIRA.....1ST APPELLANT

MARTIN KIRIMI MUKIRA.....2ND APPELLANT

MORRIS MWENDA MUKIRA.....3RD APPELLANT

Versus

CID OFFICE MERU.....1ST RESPONDENT

CORPORAL M. MUTHUI.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Dismissal of Appeal for Want of Prosecution

[1] By an application dated 8th February, 2016 which is expressed to be brought under Order 42 Rule 35 (1) (2) of the Civil Procedure Rules and Article 159 (2) of the Constitution, I am being asked to dismiss this appeal for want of prosecution. The major reason given is that a considerable period of time has passed by without a step having been taken by the Appellants to prosecute this appeal. They said that this appeal was last in court on 6th November, 2014 and it has not moved since then. They equated the delay herein to denial of justice in step with the old age adage – justice delayed is justice denied. According to the Applicants, this is proof that the appellant has lost interest in the appeal. They therefore beseeched the court to dismiss the appeal for want of prosecution as a way of bringing this litigation to an end. These grounds were echoed in the affidavit by Esther Kanyua Mukira as well as in the written submissions filed by the Applicants pursuant to the directions of the court given on 9th March, 2016. In the submissions, however, the Applicants emphasized that despite writing some letters to court the Respondents did not follow up on the appeal. They argued that to make matters worse, even the letters the Respondents wrote were not copied to the applicants. Their overall impression was that this appeal has no chances of success and for that reason coupled with the delay herein the appeal becomes a candidate for dismissal for want of prosecution.

[2] The Respondents returned fire and filed a replying affidavit in opposition to the application. The major averments by Mr. Kiongo, the State Counsel herein, were that the delay in this appeal was occasioned by acts beyond their control. He said that he formally applied for certified copies of proceedings in Nkubu PMCC. NO. 21 of 2012 and followed through on the said request through writing of letters to the Executive Officer, Nkubu courts; but in vain. He was of the view, therefore, that the

delay is not of their making and it is excusable. Accordingly, he sought the court to give them more time to pursue the appeal but at the same time assist in procuring the proceedings herein. still interested in the appeal.

DETERMINATION

[3] In this application I find two opposing ideas emerging. On one hand, the Applicants claim that the Respondents have not taken any step for over one year now to prosecute this appeal. On the other hand, the Respondents say that despite having applied for proceedings and subsequent follow-up, they are yet to receive proceedings and judgment which is necessary in the prosecution of the appeal. It is a good beginning point to state, and I have stated before, summary dismissal of a proceedings is the most draconian judicial act, except, if it is the only appropriate action to take, courts must be prepared take it and remove the offending proceeding out of the way in order to bring the litigation to a closure. But is this case an appropriate one for this court to draw the proverbial sword of the Domiciles and dismiss the appeal for want of prosecution? Without doubt, the Respondents applied for certified proceedings and judgment for purposes of this appeal. I can see they also wrote follow-up letters to the Executive Officer on 23/1/14, 12/3/15 and 12/6/15. I also do not have any reason to doubt the averment by Mr. Kiongo, the State Counsel, in paragraph 7 of his affidavit that on 3/2/2016 when he had gone to Nkubu Law courts for a ruling in another case visited the E.O's office over the proceedings herein but he was not provided with any proceedings. Despite these efforts, the proceedings have not been provided yet. Notably, the delay to provide proceedings may have been caused by varied factors but I do not think in the circumstances of this case, the failure can attribute to the Respondents. Accordingly, this appeal is not an appropriate candidate for dismissal for want of prosecution. I will spare the appeal. In the upshot, therefore, I dismiss the application dated 8th February 2016 but with no orders as to costs as this was an honest and lawful venture to seek to terminate the appeal. However, the appeal should move forward and towards that end, I direct the Executive Officer, Nkubu law courts to supply the Respondent and this court with certified copies of proceedings in Nkubu SPMCC. NO. 21 OF 2012 within 30 days. I will also assign this appeal a mention on such date as shall be agreed among the parties to confirm receipt of proceedings; and also so that the provisions of section 79B of the Civil Procedure Act can be invoked. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day

of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Ogoti advocate for respondent

No appearance for appellants

F. GIKONYO

JUDGE