



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**E.L.C APPEAL NO. 55 OF 2013**

**JAMES KINYUA MIGWI.....APPELLANT**

**VERSUS**

**ANTONY WACHIRA WANGARI.....1<sup>ST</sup> RESPONDENT**

**TIMOTHY NJIRAINI WARUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion dated 28<sup>th</sup> June, 2021 on 29<sup>th</sup> June, 2021 whereby he is seeking the following orders: -

- a. **That the Appeal against the Defendants herein be dismissed for want of prosecution.**
- b. **That the costs of the application be provided for.**

2. The application is premised on the grounds set out on the face of the application and on the supporting affidavit of the second respondent sworn on 28<sup>th</sup> June, 2021.

3. The Plaintiff opposed the application by way of a Replying Affidavit sworn on 18<sup>th</sup> October, 2021.

4. When the application came up for hearing on 2<sup>nd</sup> November 2021, the parties through their advocates on record agreed that the application be canvassed by way of written submissions. The applicant filed his on 28<sup>th</sup> June, 2021 while the Respondent filed his on 2<sup>nd</sup> December, 2021.

**APPLICANT'S CASE AND SUBMISSIONS**

5. The applicant's case is that this suit was initially filed in Embu High Court and was transferred to this Court in 2013.

6. The applicant stated that vide an application dated 28<sup>th</sup> August, 2012, the Appellant obtained interim orders whereafter he has not shown any intention to prosecute the case.

7. He stated that he bought the property in dispute Land Parcel Registration No. Inoi/Kariki/2594 by way of public Auction, though the appellant claims that the said auction was unlawful.

8. He stated that he had been informed by his advocates on record that the appeal was incompetent and bad in law as the appeal is against a ruling delivered by the trial court with respect to dismissal of an application dated 6<sup>th</sup> July, 2011 which had been brought under *Order 22 Rule 75 of the Civil Procedure Rules*.

9. He stated that under *Order 43 Rule 192 of the Civil Procedure Rules*, the applicant ought to have sought leave to appeal which he didn't and thus it is incompetent for want of leave.

10. He stated that on 14<sup>th</sup> October, 2015 the appeal was admitted and 5 years down the line the appellant is yet to file a record of appeal.

11. He stated that the delay in prosecuting the appeal was greatly prejudicing him.

12. He stated that on 13<sup>th</sup> March, 2020 the Appellant was allowed to prosecute his case. However, it had been more than one year and the appellant had not taken any step.

13. In his submissions, the applicant submitted that there was a serious disinterest in prosecution of the appeal by the appellant. They relied on the case of *Kenya Nut Company Ltd v Justice Musyoka Nkabi (2018)* whereby the Court dismissed an appeal for want of prosecution.

14. He submitted that the appeal was incompetent as the same was filed without leave as provided under *Order 43 Rule 1 of the Civil Procedure Act* and thus lacks foundation. They relied on the authority of *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara (2021)*.

15. He further submitted that equity aids the vigilant and not the indolent and that the explanation offered by the Respondent was not satisfactory as they have failed to give reason why to-date they have not filed a record of appeal or set the appeal down for hearing.

#### **RESPONDENT'S CASE AND SUBMISSIONS**

16. The Respondent's case is that the matter was last in court on 13<sup>th</sup> March, 2020 when the Honourable Court allowed the Notice of Motion dated 20<sup>th</sup> December, 2018. Thereafter, the Covid Pandemic arose and courts were shut down and therefore, he was not able to prosecute the matter as it was equally challenging to get a date from the registry.

17. He stated that he is keen on prosecuting the matter as it has been active until recently when accessing courts became a challenge.

18. He stated that there had been subsisting applications making it impossible to prosecute the appeal.

19. He prayed that the application be dismissed.

20. In his submissions, he reiterated the explanation set out in his Replying Affidavit.

21. He submitted that the application had been brought under the wrong section of the law as the enabling order under the Civil Procedure Rules would be *Order 42 Rule 35 of the Civil Procedure Rules*.

22. He submitted that no directions had been taken as per that provision and that the applicant had ridden on a section completely irrelevant to the case at hand.

23. He prayed that in the interests of justice, he be granted conditional leave to prosecute the appeal.

#### **ANALYSIS**

24. I have considered the application, the grounds set out thereunder, the rival affidavits and submissions as well as the relevant law.

25. The applicant has brought the application under ***Order 17 Rule 2 (3) of the Civil Procedure Rules*** which provides that: -

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

26. Sub-rule 1 provides as follows: -

***2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

27. The respondent claimed that the application had been brought under the wrong provisions of the law as the same ought to have been brought under *Order 42 Rule 35 of the Civil Procedure Rules* which 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.***

28. As regards the issue of the enabling provisions of the application, it is my view that the lacuna is a procedural technicality which is immaterial as the same is cured by *Order 51, rule 10 of the Civil Procedure Rules* which provides as follows: -

***10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.***

37. The applicant has sought dismissal of this appeal for want of prosecution on grounds that the respondent has been indolent and that the appeal is incompetent for failure to seek leave.

38. On this issue of incompetency for failure to seek leave, this is guided by the case of **Serephen Nyasani Menge v Rispah Onsase [2018] e KLR** where it was held as follows: -

*“10. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred .... Under Order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order”.*

39. I have looked at Annexures **TNW 3**, **TNW4**, and **TNW5** in the applicant’s Supporting Affidavit as well as the Memorandum of Appeal which has been dubbed as “*Grounds of Appeal*” filed on 28<sup>th</sup> August, 2012. It is clear from the materials that the impugned ruling delivered on 31<sup>st</sup> July, 2021 arose from an application brought under *Order 22 Rule 75* whose order requires leave before appeal.

40. However, it is my view that the appeal was filed with leave as required under the law as indicated at page 3 of the impugned ruling which is annexure **TNW 3** in the applicant’s Supporting Affidavit whereby it is indicated as follows: -

**“Right of Appeal.**

**K.K CHRUIYOT – SRM**

**SIGNATURE”**

29. On the issue of want of prosecution, the applicant’s case is that the appellant went to slumber upon obtaining interim orders of stay of execution.

30. The respondent has blamed the failure to prosecute the appeal on the Covid pandemic which made it difficult to conduct matters in court and pick dates at the registry.

31. The respondent also contends that his appeal ought not to be dismissed as directions had not been taken.

32. In the case of **Abraham Mukhola Asitsa v Silver Style Investment Company Ltd [2020] e KLR** the Honourable Court held as follows: -

*“11. From the authorities above, it is would appear that an appeal cannot be dismissed for want of prosecution before directions have been taken.*

*12. However, I am not persuaded that there is any justification, for the party to file appeal, and thereafter go to sleep. An appeal is not filed for the sake it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files appeal and goes to sleep and takes no action on it for a long time, cannot hide order above the provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the courts are being told they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals.”*

41. It is therefore evident from the foregoing that, even if directions had not been given/taken, this Honourable Court still retains its discretion to dismiss an appeal for want of prosecution.

42. The question is whether this Honourable Court has been given sufficient grounds to exercise its discretion to dismiss the appeal for want of prosecution. This position was held in the case of **China Road & Bridge Corporation v John Kimenye Muteti [2019] e KLR** where the court held: -

*20. The applicant herein is therefore perfectly entitled to move the Court for the dismissal of this suit. However as indicated above the decision whether or not to dismiss a suit for want of prosecution is an exercise of discretion and both parties to the suit are under a duty to disclose material upon which the Court is to exercise its discretion. Whereas the Respondent in an appeal has no obligation to state the reasons for seeking the dismissal of the suit as long as the application falls within the parameters of dismissal, it must be remembered that in deciding whether or not to dismiss the suit or appeal the Court will take into account the nature of the claim, the period of the delay and the prejudice to be suffered. In other words, the Court will take into account all the circumstances of the case. In exercising the discretion it is my view that prejudice is the most important consideration in the exercise of discretion in such matters.*

43. Going by the explanation offered by the respondent, it is correct to say that, in as much as there was interruption of the normal court process due to the pandemic, courts of law continued to operate by handling matters virtually as per the various practice directions that were issued by the Honourable Chief Justice of the Republic of Kenya in the year 2020.

**CONCLUSION**

44. In view of the foregoing, I find the application dated 28<sup>th</sup> June, 2021 merited and the same is allowed with costs. Consequently, this appeal is dismissed for want of prosecution with costs. It is so ordered.

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**HON. E.C. CHERONO**

**ELC JUDGE**

**IN THE PRESENCE OF:-**

1. MS WAMBUI MWAI HOLDING BRIEF FOR NDIRANGU FOR RESPONDENT
2. APPLICANT/ADVOCATE – ABSENT
3. KABUTA, COURT ASSISTANT – PRESENT.