



REPUBLIC OF KENYA



KENYA LAW
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**Ngerechi & 3 others v Ngerechi (Environment and Land Appeal
21 of 2020) [2022] KEELC 2219 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 21 OF 2020**

CG MBOGO, J

MAY 31, 2022

BETWEEN

SAMUEL K NGERECHI 1ST APPELLANT

RICHARD K BOSEK 2ND APPELLANT

WILSON K SANG 3RD APPELLANT

JOSEPH MOSONIK 4TH APPELLANT

AND

JOSEPH KIPKOECH NGERECHI RESPONDENT

RULING

1. What is before this court for determination is a Notice of Motion application dated 30th July, 2021 which is similar to the Notice of Motion application dated 12th July, 2021 brought pursuant to Order 42 Rule 35 (2) of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* seeking the following orders: -
 1. That this appeal be dismissed for want of prosecution.
 2. That costs be borne by the appellant.
2. The application is premised on the grounds on the face of it and in the Supporting Affidavit of Joseph K Ngerechi- the applicant herein sworn on 30th July, 2021. The applicant deposed that on 9th July, 2020, the respondents filed a memorandum of appeal pursuant to an application where they sought leave to file an appeal out of time against a ruling delivered on 23rd December, 2015.
3. The applicant further deposed that leave was granted on 10th June, 2020, the Memorandum of Appeal was filed on 9th July, 2020 which is a day less than the 30 days statutory period of filing an appeal which conduct brings to fore litigants who are out to frustrate the other party and not ready to time



lines as stipulated in law. Further, that the respondents are out to frustrate him and ensure that he does not reap fruit of successful litigation since they have failed to prosecute their appeal one year down the line. The applicant relied on a copy of the Memorandum of Appeal dated 6th July, 2020 and filed in court on 9th July, 2020.

4. The respondents filed Grounds of Opposition to the application challenging the same on the following grounds: -
 1. That the application is inconsistent with the right to hearing under Article 50 (1) of the Constitution and that a fair hearing be granted to the parties to the dispute in accordance with the law
 2. That our appeal which is already filed before the court raises substantial issues, this court should give us an opportunity to ventilate those issues.
 3. That we have since filed our appeal in the high court on the online portal.
 4. That this matter was filed during the height of the Covid 19. The Covid 19 situation was unforeseeable and unavoidable act of God or force majeure having the effect of legally frustrating any contract. Covid 19 situation which has been experienced by the workers should not be used by the applicant to unilaterally dismiss this appeal for want of prosecution.
 5. That the overriding objective was the expeditious disposal of suits and that the constitution mandated that the same would be done justly, equitably and proportionately to guarantee the appellants right of fair hearing. The appellants are keen on prosecuting the appeal herein in merit, we urge this court not to dismiss their appeal as the delay was as a result of the Covid 19 situation beyond our control.
 6. That during this period there was an internal re-organisation of the court to allow for digital filing/hearing. The delay in prosecuting the suit was as a result of this and more so face to face hearing had been stopped.
 7. That there is nothing on record to indicate that the respondents herein deliberately sought by way of evasion or otherwise to delay or obstruct the course of justice.
 8. That it is in the interest of justice that the suit is heard on merit upon hearing all parties and considering the pleadings already filed before court.
5. The applicant filed written submissions dated 20th January, 2022. The applicant raises three issues for determination namely: -
 1. Whether the respondents conduct since the ruling the subject of the appeal portray a litigant who is seeking justice or otherwise.
 2. Whether the failure to prosecute the appeal within one year has been explained satisfactorily by the respondents.
 3. Whether the appeal should be dismissed in the interest of justice.
6. The applicant submitted that this is an appeal against the ruling delivered by the trial court on 23rd December, 2015, Narok CMCC No. 1 of 2007. The respondents moved to court in the year 2018, three years later after ruling was delivered and filed the appeal on 9th July, 2020 subsequent to a ruling delivered by my brother Justice Kullow on 10th June, 2021. That the respondents ought to have filed the appeal immediately but their actions were deliberate to file the appeal on the last day which indicates that their intention was not to seek justice but to have the matter drag as long as possible to their benefit.



As such since the respondents are in occupation of the suit land, they continue to benefit the longer the case subsists.

7. The applicant further submitted that the respondents filed a record of appeal in August of 2021 with no signed and sealed decree or order that has been appealed against. Again for one year, no action has been taken to admit the appeal or otherwise. The respondents were represented by an advocate and courts were conducting matters virtually, therefore the Covid 19 pandemic is not excusable. It is clear that the respondents action is to frustrate the applicant.
8. The respondents filed written submissions dated 11th February, 2022. The respondents submit that the applicant is misleading this court as the ruling directed that the appeal be filed within sixty days from the date of ruling being 10th June, 2020. The respondents submitted that directions ought to be taken first in accordance with the Civil Procedure Rules. In any case, the applicant has usurped the powers of the Deputy Registrar in filing for dismissal for want of prosecution under Order 42 Rule 25 (2) of the *Civil Procedure Rules*. That it is inappropriate for a party to rely on the inherent power of the court where there is an express provision which a party can base its application. The respondents rely on the case of *Jurgen Paul Flach versus Jane Akoth Flach* [2014] eKLR and *Rosarie EPZ Limited versus Stanlex Mbitshi James* [2015] eKLR.
9. I have analysed and considered the application, grounds of opposition and the written submissions filed by both parties and the issue for determination is whether the Memorandum of Appeal dated 6th July, 2020 ought to be dismissed for want of prosecution.
10. By a ruling dated 10th June, 2020, my brother Justice Kullow allowed the extension of time within which the respondents intended appeal would have been filed on the condition that the appeal be filed within 60 days of the ruling hearing. This meant that the intended Memorandum of Appeal should be filed have been filed at least on or before 10th August, 2020. In this case, the respondents filed their Memorandum of Appeal dated 6th July, 2020 on 9th July, 2020 and a Record of Appeal on 27th August, 2021. This court admitted the appeal for hearing on 2nd December, 2021.
11. The applicant is of the opinion that the respondents are not keen to prosecute the appeal and he continues to suffer as a result of the actions of the respondents.
12. Section 79B of the *Civil Procedure Act* provides as follows:

“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”.
13. Order 42 Rule 13 of *Civil Procedure Rules* provides as follows: -
 - 1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
 - 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
 - 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to



the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

- 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
- a) the memorandum of appeal;
 - b) the pleadings;
 - c) the notes of the trial magistrate made at the hearing;
 - d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
- Provided that—
- i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

14. Based on the above provisions of the law, this court was satisfied that the appeal was well in order and could be admitted for hearing. The procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules.

15. Order 42 Rule 35 (1) of the *Civil Procedure Rules* stipulates as follows:

“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”.

16. Order 42 Rule 35 (2) of the *Civil Procedure Rules* stipulates as follows:

“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”

17. In my view, directions must have been given before an appeal can be dismissed for want of prosecution. The respondents in this case complied and filed the memorandum of appeal within the 60 days window period granted by court.

18. Arising from the above, I find no merit in the notice of motion application dated 12th and 30th July, 2020, the same is dismissed with no orders as to costs. It is hereby ordered.



DATED, SIGNED AND DELIVERED VIA EMAIL ON 31ST MAY, 2022.

Mbogo C.G

Judge

In the presence of: -

CA: Timothy Chuma

