



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 193 OF 2009

JAMES CHEGE NJOROGE.....1ST APPELLANT/RESPONDENT

KENNETH ODHIAMBO.....2ND APPELLANT/RESPONDENT

VERSUS

JULIA WANJIKU WANGI.....RESPONDENT/APPLICANT

RULING

By her application dated 27th October 2011, the Respondent/Applicant, seeks an order of dismissal of the Appellants' appeal for want of prosecution. The application is supported by the grounds on the face of it and the Affidavit of Peter Waigwa Ngunjiri, Advocate for the Applicant sworn on 27th October 2011.

Order 42 rule 35(2) of the Civil Procedure Rules 2010 provides that if, within one year after service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, 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.

The Applicant claims that two years have elapsed since the appeal was filed, and that it is clear by the lapse of time that the appellants are not ready and willing to prosecute the appeal and thereby causing injustice to the applicant. For those reasons the appeal should be dismissed for non-prosecution.

The application was opposed by the second Appellant in a Replying Affidavit sworn on 9th February 2012 and filed on 10th February 2012. In his Replying Affidavit Mr. Kenneth Odhiambo, the 2nd Respondent avers at paragraphs 3, 5, 6, 7 and 8 thereof that -

(a) ...it is true that this matter has taken a period of over one year before being fixed for hearing but that this has been for the reason that there have been negotiations to settle out of court and up to todote counsel for the parties are still negotiating (para. 3).

(b) that the application is not made in good faith as the Respondent (Applicant) is yet to be taken to a Doctor for re- examination, thus occasion the delay (para. 5).

(c) the Advocates for the Respondents have not withdrawn from the negotiations, and if they had withdrawn from the negotiations, hearing dates would have been fixed (para. 6).

(d) since the appeals arose from two related matters PMCC No. 226 and PMCC No. 388 of

2006, and which are being negotiated on appeal No. 226 of 2006 a settlement had been reached and final payment of shs. 11,450/= had been paid, (para. 7).

(e) the none prosecution of the appeal has not been due to indolence (para. 8).

No Further Affidavit was filed by the Respondent/Applicant to rebut these averments though Mr. Rabera who urged the application for dismissal insisted that he has not been a party to any such negotiations, and that the application for dismissal should be dismissed for non-prosecution.

The grounds for dismissal of an appeal for non-prosecution are a prolonged and inexcusable delay.

There are three appeals in this matter Nakuru HCCA Nos. 192 & 193 of 2009, and Nakuru HCCA No. 194 of 2009. They are between the same parties. The memoranda of appeal are dated 25th September 2009, and were all filed the same date, 28th September 2009. Mr. Kenneth Odhiambo says that Civil Appeal No. 192 of 2009 has been settled in full, although no order to that effect has been sought and made. Civil Appeal Nos. 193 and 194 appear to be still pending. In the absence of the lower court file, I am unable to say why three appeals were filed by the same firm of Advocates in respect of the same parties. Some explanation does however appear in para. 7 of the Replying Affidavit Kenneth Odhiambo, that the appeals arise out of three separate suits, Naivasha PMCC No. 226 and PMC 749 of 2006, and PMCC No. 266 of 2006, and which are being negotiated for settlement on appeal.

There is always some difficulty in discussing where the delays lies in a matter where there are several suits, and three separate appeals arising from the same suit. It is easy to infer that it is a ruse to delay the Respondent from enjoying the fruits of her judgment in the lower court. There is however no ground for making that inference in light of negotiations that have been going on between the parties and resulting in some payment or payments. For that reason alone, although there has been prolonged delay since 29.09.2009, when the appeals were filed to 27th October 2011 when the application for dismissal for want of prosecution was filed, there is some excuse for the delay, negotiations to settle, followed by part settlement.

For that reason alone, I will not dismiss the appeal for want of prosecution, but will dismiss the application dated 27th October 2011, with a direction that the appeal be either settled or fixed for hearing within the next six months, and in default, stand dismissed upon expiration of six months from the date of this order with costs to the Respondent in such even of failure to so prosecute.

It is so ordered.

Dated, signed and delivered at Nakuru this 30th day of March, 2012

M. J. ANYARA EMUKULE
JUDGE