Baringo County Government v Boiwo (Environment and Land Appeal 14 of 2022) [2022] KEELC 12637 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12637 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND APPEAL 14 OF 2022

L WAITHAKA, J

SEPTEMBER 26, 2022

BETWEEN

BARINGO COUNTY GOVERNMENT ..... APPELLANT

AND

FRANK KIPTOO BOIWO ..... RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated December 10, 2020 and the Notice To Show Cause dated May 23, 2022. Through the aforementioned Notice of Motion, the respondent herein prays for dismissal of the appeal herein for want of prosecution.

2. The application is premised on the grounds that the appellant has refused, neglected and/or failed to take any step to prosecute the appeal; that no reasonable explanation has been given for the failure to set the appeal down for hearing or directions; that the delay in fixing the appeal for hearing and/or directions offends the provisions of section 1A, 1B and 3A of the *Civil Procedure Act* and article 159(2)(b) of the *Constitution* of Kenya. The delay is said to be prejudicial to the respondent.

3. Terming the appeal an abuse of the court process, the respondent urges the court to dismiss it with costs to him.

4. The application is supported by the affidavit of the respondent's advocate, Steve Opar, in which the grounds on the face of the application are reiterated.

5. The application is opposed on the grounds that it was prematurely filed as the appeal has neither being admitted nor directions given in respect thereof; that either party to the appeal could fix the appeal for hearing and that the appellant could not fix the appeal for hearing because of the pendency of an application by the respondent seeking to dismiss the appeal; that the respondent misled or misrepresented to the appellant that he was going to withdraw the application for dismissal of the appeal but failed to do so.

6. Further that the appellant has an arguable appeal and that the respondent (applicant) has not demonstrated what prejudice, if any, he would suffer if the orders sought are denied.

7. In a rejoinder, the respondent (applicant) maintains that for more than one year and 2 months (14 months) the appellant (respondent) never took any initiative or steps to set down the appeal for directions/hearing; that owing to the appellant's failure to set down the suit for hearing/directions, the court on its own motion on May 23, 2022, issued the appellant with a notice to show cause why the appeal should not be dismissed. The respondent contends that the appeal is incompetent for want of a certificate of delay and that it has been overtaken by events; (the decision of the court appealed from has been complied with by constructing a house in the suit property).

8. Pursuant to directions given on June 21, 2022, the application was disposed of by way of written submissions.

9. In his submissions, the applicant has given an overview of his case and that of the respondent and submitted that the delay of 2 years and 7 months in fixing the appeal for hearing/directions in the circumstances of this case is inordinate and inexcusable; that the reason given by the appellant for the delay is not good enough and that there is no competent appeal before court as the appeal is not accompanied by a certificate of delay despite having been filed two years from the date of delivery of the impugned ruling. It is also contended that the appeal has been overtaken by events as the ruling appealed from has been executed in accordance with the decision of the lower court.

10. The respondent/applicant has placed reliance on order 17 rule 2(1) of the *Civil Procedure Rules* and the cases of *Nilesh Prechand Mulji Shah & Another t/a Ketan Emporium v MD Popal & Another* (2016) eKLR and the case of *Argan Wekesa Okumu v Dima College limited & 2 others* (2015) eKLR.

11. On his part, the respondent has given an overview of the circumstances giving rise to the appeal herein and on the fact that the learned trial magistrate made conclusive determination on issues of fact and law at the interlocutory stage. Based on the decisions in the cases of Symon Gaturu Kimamo & 587 others vs East African Portland Cement Co Ltd (2011) eKLR and *Gorvas Holding Limited vs Kensalt Limited & 4 others* Nairobi E & L Division Civil Case no 493 of 2012 in which it was *inter alia* observed that the court is not at liberty to make any conclusive findings of fact or law at the interlocutory stage; it is submitted that the appellant's appeal is arguable.

12. It is further submitted that the appellant through the replying affidavit of its attorney filed on January 14,2021, has given very convincing reasons/explanations why the appeal should not be dismissed for want of prosecution. In that regard, It is reiterated that the respondent had filed the instant application seeking to dismiss the appeal; that the respondent had promised to withdraw the application but failed to do so and that the appellant could not fix the appeal for hearing/direction before the respondent's application was heard and determined.

13. Concerning the Notice To Show Cause issued by the court, it is submitted that it was issued in error because the appeal could not be fixed for hearing or directions during the pendency of the respondent's application for dismissal of the appeal.

14. It is pointed out that the appellant has already filed a record of appeal; that the appeal has not been admitted in accordance with section 79C of the *Civil Procedure Act* and that directions have not been given. Based on the decision in the case of *Jurgen Paul Flach vs Jane Akoth Flack* (2014)eKLR where it was held that before an appeal can be set down for dismissal for want of prosecution, directions ought to have been given; it is submitted that the appeal herein is not ripe for dismissal for want of prosecution. It is further submitted that the respondent has not shown what prejudice he has suffered or will suffer if the appeal is heard on merit. Based on the decision in the case of *D T Dobie & Company*

(Kenya) Ltd vs Joseph Mbaria Muchina & Another (1980) eKLR where it was held that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal, it is submitted that the respondent has not made up a case for being granted the orders sought.

15. Concerning the argument by the respondent that on account of the fact that the impugned decision of the court has been executed or acted upon by constructing a house on the suit property thereby rendering the appeal overtaken by events; that argument is said to be farfetched as construction on the suit property cannot make the respondent the owner of the suit property if this court finds in favour of the appellant.

16. Have carefully considered the application by the applicant, the affidavit evidence adduced in support thereof, the response by the appellant and the submissions filed by the parties, I find the sole issue for the court's determination to be whether the appeal herein should be dismissed for want of prosecution.

17. In determining this question, I will not re-invent the wheel but rely on the persuasive decision in the case of Jurgen Paul Flach *supra* where H A Omondi J, (as she then was) held:-

> " the law concerning dismissal of an appeal for want of prosecution is contained in order 42 rule 35 of the *Civil Procedure Rules*.
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> Under rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. these are:-
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> A situation where three months after issuance of directions under order 42 rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options, one, to fix the appeal for hearing or to apply for summons for the dismissal of the appeal. See order 42 Rule 35(1). Also see *Kirinyaga General Machinery v Hezekiel Mureithi Ireri* HCC no 98 of 2008 where while interpretting order XLI 31 (now order 42 rule 35), Mary Kasango J, observed:-
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> > 'It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained.'
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> The second scenario is that contemplated under order 42 rule 35(2). Unlike rule 35(1) which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under subrule (rule 35(2), if within one year after 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 the judge in chambers for dismissal."

18. In applying the above cited legal position to the circumstances of this case, where directions had not been issued when the respondent filed the instant application, I find the application to be incapable of forming the basis of granting the orders sought. I also note that the application was brought under the wrong provisions of the law to wit order 17 rule 2(3) of the *Civil Procedure Rules*, which deals with suits generally as opposed to appeals.

19. Having found the application by the respondent/applicant to be incapable of forming the basis of dismissal of the appeal, I now turn to the Notice To Show Cause issued by the court.

20. As pointed out herein above, the court's jurisdiction to issue a notice to show cause why an appeal should not be dismissed for want of prosecution is found in order 42 rule 35(2) of the *Civil Procedure Rules* which provides as follows:-

> " If, within one year after 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 for dismissal."

21. In the circumstances of this case, on or about May 23, 2022 the registrar issued the parties to this appeal with a Notice To Show Cause (NTSC) why the appeal herein should not be dismissed for want of prosecution.

22. Concerning the NTSC, the appellant contends that it should not have been issued because there was a pending application for dismissal of the suit by the respondent; that the appellant could not fix the appeal for hearing before the pending application for dismissal of the appeal was heard and determined and that it was misled by the respondent who had promised to withdraw the application but failed to do so.

23. I have carefully read and considered the reasons/explanation offered by the appellant for failure to list the appeal for hearing/directions within the time stipulated by law for fixing an appeal for direction or hearing and the law undergirding the process of processing appeals for hearing. I note that the Law imposes an obligation on both the court and the parties in ensuring that appeals are processed for hearing timeously. For instance, order 42 rule 13 of the Civil Procedure Rules imposes an obligation on the registrar to, within 21 days of service of the Memorandum of Appeal, list the appeal for directions before a judge. See the said rule which provides as follows:-

> " 13(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of Appeal, the registrar shall cause the Appeal to be listed for the giving of directions by a judge in chambers.....
>
> 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 possession of either party have been served on the party...."

24. In the circumstances of this case, where the appeal had neither being listed for directions as by law required and where the respondent had filed an application for dismissal of the suit, which application needed to be heard and determined first before directions could be given in the appeal, I am of the considered view that justice would be served by giving the appellant an opportunity to prosecute its appeal but without further delay.

25. Consequently, I decline to dismiss the appeal and direct the appellant to ensure that the appeal is heard and determined within 120 days (four months) from the day of delivering of this ruling failing which, the appeal shall be deemed to have been dismissed with costs to the respondent upon expiry of the time herein given.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 26TH DAY OF SEPTEMBER, 2022.

L N WAITHAKA

JUDGE