



**Kilonzo v Kivoto & another (Environment and Land Appeal
E001 of 2020) [2022] KEELC 14950 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND APPEAL E001 OF 2020
JM MUTUNGI, J
NOVEMBER 23, 2022**

BETWEEN

DAVID MUSYOKI KILONZO APPELLANT

AND

MALUKI KIVOTO 1ST RESPONDENT

NGEI NGUKU 2ND RESPONDENT

RULING

1. The Appellant filed the instant appeal on 28th October, 2020 against the ruling delivered by Honorable Mercy Nasimiyu on 8th October, 2020 in Kyuso ELC No. 13 of 2019, By the ruling the learned trial magistrate dismissed the Preliminary objection holding that it had not been demonstrated that the suit before her was *res judicata* on account of Garissa ELC No. 62 of 2017 that had been dismissed for want of prosecution.
2. The appellant having filed the appeal apparently did not take the initiative to have the appeal progressed to hearing and no directions were given by the court in regard to the appeal. The inaction in the conduct of the appeal provoked the Respondents to file the Notice of Motion dated 20th July, 2022 which is the subject of the present ruling.

By the application the respondents pray for orders that:

- i. That the Honourable court be pleased to dismiss the Appellants appeal herein against the Respondents for want of prosecution.
- ii. That the costs of the application be borne by the appellant.
3. The application was premised on the grounds set out on the body of the application and the affidavit and supplementary affidavit sworn in support of the application by Ngei Nguku, the 2nd Respondent herein. The Respondents argue that the appeal has pended for nearly three (3) years since being filed



without being prosecuted. Indeed the applicants contend the appellant has since filing the appeal not bothered to have the appeal listed for directions with the result that the suit before the Lower court has stalled owing to the appellant's pending appeal before this court. The applicants state that though the suit before the Lower court has been set down for hearing on at least three (3) occasions it has failed to be heard by reason of the pending appeal before this court. The applicants thus contend the appellant has no interest in prosecuting the appeal and is merely using the appeal to frustrate the hearing of the matter before the subordinate court and thus urges the court to dismiss the appeal for want of prosecution.

4. The appellant, David Musyoki Kilonzo has filed a replying affidavit in opposition to the applicant's application. He depones that the delay in prosecuting the appeal was occasioned by the passing away of his previous advocate, one Faruq Kyallo (deceased) in 2021 though he does not give the date when the advocate died. He states the delay has not been deliberate and cites Covid-19 pandemic that ravaged the country over sometime as a contributor to the delay in prosecuting the appeal and urges the court to disallow the application and to allow him to prosecute the appeal which he states has high chances of succeeding.
5. I have carefully reviewed and considered the application, the affidavits in support and the affidavit filed by the respondent in opposition to the application. The explanation by the appellant/ respondent for the delay is that his previous advocate passed away. Although the appellant indicates, the advocate passed away in 2021 no date is given and/or when he came to learn of the death of the Advocate. Besides, the advocate was working in the firm of Garane & Somane Advocates which firm as is evident from the Appellant's affidavit paragraph 5 had several advocates who would have taken up the matter following the death of one of its advocates.
6. The Respondent has further attributed the delay in prosecuting the appeal on the incidence of covid -19 pandemic. While it is true covid -19 disrupted the court systems substantially during its height in 2020, the courts in response sufficiently innovated and came up with strategies to deal with the effects of Covid-19. The courts from the second half of 2020 introduced virtual hearings and the members of the public were sensitized regarding the shift and litigants matters during the whole of 2021 went on uninterrupted and all those who were interested to have their cases heard, were given a hearing either virtually and/or physically. In the premises I am not persuaded the appellant has given a viable explanation as to why there was such delay in having the appeal progress to hearing. A delay of over 2½ years without taking any action in the appeal matter particularly as the suit before the lower court was left hanging is in my view in excusable. The delay in taking any positive action was inordinate.
7. The lower court furnished this court with certified copies of the court proceedings before the court dated January 25, 2022. On the said date both the plaintiff and the defendant together with their advocates appeared before the learned trial magistrate, Hon. M. Nasimiyu - Principal Magistrate. Mr. Mwalimu advocate appeared for the appellant. The appellant's advocate indicated to the court that he intended to come on record for the appellant in the appeal with the intention of withdrawing the appeal. The parties then proceeded to take a hearing date of the case before the lower court, by consent on March 3, 2022. The declared intention by the appellant's advocate made before the sub-ordinate court was not given effect prompting the Respondents to file the present application on July 22, 2022.
8. There is yet another aspect of this matter that invites a comment from the court. This appeal arises from a ruling a preliminary objection. Under Section 75 (1) of the *Civil Procedure Act* and order 43(1) of the *Civil Procedure Rules*, a ruling on a Preliminary objection cannot and is not one of the instances where parties have an automatic right of appeal. An appeal from a ruling on a preliminary objection would only be, if leave is sought and is granted by the court as provided under section 75(1) of the *Civil Procedure Act* and Order 43 Rule (2) and (3) of the *Civil Procedure Rules*.



Section 75 (1) of The Act provides thus:

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted -
 - a. an order superseding an arbitration where the award has not been completed within the period allowed by the court.
 - b. an order on an award stated in the form of a special case.
 - c. an order modifying or correcting an award.
 - d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration.
 - e. an order filing or refusing to file an award in an arbitration without the intervention of the court.
 - f. an order under section 64.
 - g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree.
 - h. any order made under rules from which an appeal is expressly allowed by rules.

Order 43 Rule (2) & (3) of the *Civil Procedure Rules* provides as follows:

2. An appeal shall lie with the leave of the court from any other order made under these Rules.
3. An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within 14 days from the date of such order.
9. The record does not show that any leave to appeal was applied for and/or was granted by the court that dismissed the preliminary objection. As leave was required for the instant appeal to be filed and none was obtained, the appeal is incompetent and constitutes an abuse of the Court process.
10. The up -shot is that the Respondent's notice of motion dated 20th July, 2022 has merit and allow the same as prayed under prayer (1) of the application. The costs of the application are awarded to the Respondent.

RULING DELIVERED AT GARISSA THIS 23RD DAY OF NOVEMBER, 2022.

JOHN MUTUNGI

JUDGE

23-11-2022

Coram:

Hon. John Mutungi - Judge

Court Assistant; Fardowsa

Appellant; Present in person

Mr. Kioko for the Respondent.

