



**Mwangi v Leshomo (Environment and Land Appeal E016 of 2021)
[2022] KEELC 15133 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

**YM ANGIMA, J
DECEMBER 1, 2022**

BETWEEN

SARAH NJERI MWANGI APPELLANT

AND

KOMITO LESHOMO RESPONDENT

RULING

1. By a chamber summons dated March 14, 2022 expressed to be based upon article 159(2) of the Constitution of Kenya 2010, order 42 of the Civil Procedure Rules, 2010 (the Rules) and all other enabling provisions of the law, the respondent sought the following orders:
 - a. That the honourable court be pleased to dismiss the appeal for failure to comply and want of prosecution.
 - b. That the lower court file namely Maralal SPMCC ELC No 4 of 2019 be returned to Maralal Law Courts for purposes of execution proceedings.
 - c. That costs of this application be provided for.
2. The application was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by the respondent on March 14, 2022. It was contended that since filing the memorandum of appeal the appellant had failed to file a record of appeal or to take any steps to prosecute the appeal for a period of about 6 months. It was further contended that the appellant had also failed to file a certified copy of the decree to facilitate the prosecution of the appeal.
3. It was the respondent's view that the appellant was no longer interested in prosecuting the appeal hence the same ought to be dismissed for want of prosecution and the original file returned to the trial court to enable him execute the decree.



4. The respondent filed a replying affidavit sworn by Charles Gakuhi Chege the advocate on record for the appellant on May 11, 2022. He deposed that he had the appellant's authority to swear the affidavit on her behalf. It was contended that the application was incompetent, bad in law and an abuse of the court process. It was contended that a dismissal under order 42 rule 35 of the Rules can only be undertaken 3 months after directions are given or one year after service of the memorandum of appeal.
5. The appellant further contended that she was in the process of compiling and filing the record of appeal to facilitate the hearing of the appeal. It was contended that the appellant was entitled to have her appeal heard and determined on merit. Accordingly, the court was urged to dismiss the application.
6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the respondent's submissions were filed on September 26, 2021 whereas the appellant's submissions were not on record by the time of preparation of the ruling.
7. The court has considered the respondent's notice of motion dated March 14, 2022, the appellant's replying affidavit in response thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the respondent has made out a case for dismissal of the appeal for want of prosecution.
8. Order 42 rule 35 of the Rules on dismissal of appeals for want of prosecution stipulates as follows:
 - (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."
9. The court has considered the respondent's submissions and the material on record on the question for determination. The court has noted that the respondent relied upon the case of John Njagi Karua v Njiru Gatumu [2021] eKLR and Brenda Nawekulo Uluma v Robert Otieno Matete [2020] eKLR in support of the application. The court has, however, noted that in both cases the respondents' applications for dismissal of the appeals were rejected for failure to satisfy the conditions for dismissal set out in order 42 rule 35 of the Rules.
10. The court has perused the court file in this matter. Contrary to the respondent's claim, the appeal has never been admitted and directions have never been under order 42 rule 13 of the Rules. In the case of Brenda Nawekulo Uluma (supra) it was held, inter alia, that:

"The court must seek to determine whether the appeal was placed before a judge for directions. In the case of Morris Njagi & Another v Mary Wanjiku Kiura [2017] eKLR the court held:

"A party can only apply for dismissal where directions have been given. That is under order 42 rule 35(1) of the Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is order 42 rule 35(2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal."



11. It is also evident from a perusal of the record that the appellant filed her memorandum of appeal on September 10, 2021 whereas the respondent's chamber summons dated March 14, 2022 was filed on April 28, 2022. The period of one year stipulated under order 42 rule 35(2) of the Rules had certainly not lapsed by the time the instant application was filed. In the premises, the court finds that the respondent has not made out a case for dismissal of the appellant's appeal for want of prosecution.
12. The upshot of the foregoing is that the court finds no merit in the respondent's said application hence the same is for dismissal. Accordingly, the court makes the following orders for disposal thereof:
 - a. The chamber summons dated March 14, 2022 is hereby dismissed with costs to the appellant.
 - b. The appellant shall file and serve her record of appeal within 60 days from the date hereof and list the appeal for directions within 30 days from the date of filing the record.
 - c. Mention on February 2, 2023 to confirm the appellant's compliance.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 1ST DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms Muigai holding brief for Ms Ndegwa for appellant

Mr Kihoro Kimani for the respondent

C/A - Carol

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Y M ANGIMA

JUDGE

