Kazimzuri v North Coast Development Company Limited (Environment and Land Appeal 25 of 2021) [2024] KEELC 6755 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6755 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 25 OF 2021

LL NAIKUNI, J

OCTOBER 9, 2024

BETWEEN

SAID HAMISI KAZIMZURI ..... APPELLANT

AND

NORTH COAST DEVELOPMENT COMPANY LIMITED ..... RESPONDENT

RULING

I. Introduction.

1. Before this Honourable Court for its determination is a Notice of Motion application by the Respondent/Applicant herein – "North Coast Development Company Limited" dated 12th April, 2023. It was brought under the provisions of Sections 1A,1B, 3 and 3A of the Civil Procedure Act, Cap 21 and Order 17, Rules 2 (1-6), Order 42 Rule 35 and Order 51 of the Civil Procedure Rules, 2010.

2. Upon service the Appellant while opposing the application filed a 7 Paragraphed Replying Affidavit dated 4th July, 2023. The Honourable Court will be dealing with it in more depth later on.

II. The Respondent/Applicant's case

3. The Respondent/Applicant sought for the following reliefs:-

    a. That this Honourable Court be pleased to dismiss this suit for want of prosecution.

    b. That the costs of this application and appeal be borne by the Appellant.

4. The application was premised on the grounds, testimonial facts and averments made out in the 11 Paragraphed supporting affidavit sworn by the said Ahmed Salim Salmaanon the 12th April, 2023. He deponed in summary that:

a) He was the General Manager at the Respondent/Applicant's company thus conversant with the facts in issue, and duly authorized to swear the affidavit on its behalf.

b) The Appellant filed a Memorandum of Appeal on 11th June, 2021 to appeal against the Judgment delivered on 28th May, 2021 by Hon. G. Kiage which struck out the filed Plaint in CMCC (ELC) Mombasa No. 1 of 2021 on grounds that it contravened the provisions of Section 6 of the Civil Procedure Act, Cap. 21.

c) On 28th March, 2022, this Honourable Court gave direction that the Record of Appeal be filed in 45 days and slated it for mention on 8th June, 2022. However, on the material date, the Appellant indicated that he had been unable to file the said Record of Appeal for reasons that the trial court had not typed its proceedings.

d) Despite the directions by this court on 28th March, 2022 and 8th June, 2022 to file a Record of Appeal, the Appellant had failed to file the same and never bothered to seek leave to extend time for filing the Record of Appeal.

e) Further, the Appellant had failed to demonstrate that they were pursuing the typed proceedings and/or the serious or eagerness to have the appeal prosecuted.

f) The Respondent shall suffer prejudice if the appeal continued to subsist because the original suit CMCC (ELC) No. 1 of 2021 was struck out on the subject of the principle of "Res Judicata" which is encapsulated under the provision of Section 6 of the Civil Procedure Act, Cap. 21.

g) In further explanation of the above, the mischief being nurtured by the Appellant was that the civil suit - CMCC ELC 113 of 2019 was pending hearing and determination before the Chief Magistrate Court, hence the Respondent was exposed to risk in the event this suit before the Lower Court was to succeed the Appellant would continue to pursue with this appeal leading to multiplicity of suits.

h) Indeed the mischief was enhanced by the continued delay in the prosecution of this appeal even though the Memorandum of Appeal was filed on 11th June, 2021 the Appellant had failed to demonstrate the steps they had taken to file the Records of Appeal or to extend the time for filing it subject to the directions given by this Court.

i) The appeal was ripe for dismissal under the provisions of Order 17 Rules 2 and 3 and Order 42 Rule 35 of the Civil Procedure Rules, 2010.

III. The Responses by the Respondent

5. On 20th April, 2023, the Learned Counsel Omollo on behalf of the Appellant stated that he was yet to file a Record of Appeal for the same reason that proceedings have not been typed. On the other hand, M/s. Maiga Advocate was not convinced and asked the court to dismiss and the court "inter alia" summoned and directed the Court Chief administrator, Mr. Mokaya to ensure that proceedings were typed and parties supplied with certified copies within 14 days (from the above-mentioned date) and that the Appellant would file and serve within seven (7) days after the above.

6. On the next mention date of 30th May, 2023 the instant application had already been filed and the court directed that the Appellant be served and also file and serve its reply. Over the next two sessions of 5th July, 2023 and 28th September, 2023, the issue of the record of appeal was not discussed until on the court session of 2nd November, 2023 when Learned Counsel Omollo indicated that the instant

application of 12th April, 2023 had been overtaken by events as they had already obtained the typed proceedings, compiled and filed a Record of Appeal. On this emerging fact the court directed that it will deliver a ruling limited to costs of the application. And that is the gist of this application.

7. While opposing the said application, the Learned Counsel Vincent Omollo swore a seven (7) Paragraphed Replying Affidavit dated 4th July, 2023 reiterating the events above stated. He deponed in summary as follows:

    a) That on 26th April, 2023, the appeal came for directions where the Chief Court Administrator; Mr. Mokaya was directed by this Honourable Court to ensure that the proceedings were typed and by the next session of 30th May, 2023 the proceedings had not been typed.

    b) That as at the time of filing the instant replying affidavit, an officer known as Teddy Abunde from the lower court registry had informed him that proceedings had been typed but not certified as it was being proof read.

    c) That the delay in progressing the appeal was not the fault of the Appellant but it was caused by the lower court registry in typing and certifying proceedings and that the Appellant should not be punished.

IV. Submissions.

8. On 2nd November, 2023 in the presence of all parties, the Honourable Court directed that the application be disposed off by way of written submissions.

9. By the time of penning down this Ruling only the Counsel for the Respondent had filed their submissions dated 5th July, 2023. The Court would proceed to render its Ruling on merit on notice.

V. Respondent's Submissions

10. The Learned Counsel for the Respondent, the Law firm of Messrs. Wandai Matheka & Company Advocates filed their written submissions dated 5th July, 2023. M/s. Maiga commenced the submissions by providing a brief back - ground of the matter. To begin with, she informed the Honourable Court that the application by the Respondent/Applicant sought to have this court dismiss the appeal for want of prosecution under the provision of Order 17 Rules 2 and 3 of the Civil Procedure Rules, 2010 and Order 42 Rule 35 of the Civil Procedure Rules, 2010.

11. Further, the Learned Counsel enumerated the facts of the case to the effect that the appeal emanated from a decision of the lower court whereby it struck out the suit on ground that it contravened the doctrine of "Res Judicata" in that it found the Appellant had filed other multiplicity of suits in other Courts. Being aggrieved the Appellant preferred this Appeal by filing a Memorandum of Appeal dated 11th June, 2023.

12. The Learned Counsel averred that despite the numerous opportunities the Appellant had been accorded by this Court to comply it was all in vain. Instead it continued to hinder the hearing and final determination of the Appeal. She contended that the Respondent would suffer prejudice for as long as the appeal continued there were risk of other multiplicity of suits pending in other Courts. To buttress on this point the Learned Counsel relied on the case of: "Protein & Fruits Processors Limited & Another – Versus - Trust Bank Kenya Limited (2015) eKLR, where the Court held:-

> "Unless within three months after the giving of directions under rule 13 of 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."

13. The Learned Counsel argued that when directions were issued on 28th March, 2022, the Appellant was given more time in the succeeding court sessions but the same opted to abuse the court process. Further, that the Appellant had no viable reason why the appeal should not be dismissed. Additionally, the Learned Counsel cited the case of:- "Nilesh Premchand Mulji Shah and another t/a Ketan Emporioum – Versus - M.D Popat and others & another (2016) eKLR, where the Court held as follows:-

> "11.Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without exploration is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest, of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the Defendant on account of that delay. This is what the case of Ivita – Versus - Kyumba [1984]KLR 441 espoused that:
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> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiffs excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.

14. In conclusion, the Learned Counsel urged the court to consider the tenet for dismissal for want of prosecution which included:

    i. Whether the delay was prolonged and inexcusable, and if it was whether justice could be done despite the delay

    ii. And if the court was satisfied with the Plaintiff's excuse

    iii. Regard must be taken as to whether the party instituting the suit has lost interest in it.

15. In the long run, the Learned Counsel was of the view that the Appellant had not made any efforts to ensure that the Record of Appeal was filed; that the chronology of proceedings indicated that the Appellant had lost interest in the appeal and hence the Court should proceed to dismiss the appeal.

V. Analysis and Determination.

16. I have keenly assessed the filed pleadings herein, the written submissions by the Respondent, the cited authorities, the relevant provision of the Constitution of Kenya, 2010 and the statutes.

17. To enable the Honourable Court reach at a reasonable, Equitable and fair decision, it has framed the following three (3) issues for its determination. These are:-

    a) Whether the Notice of Motion application dated 12th April, 2023 has any merit whatsoever.

    b) Whether the parties herein are entitled to the reliefs sought.

    c) Who will bear the cost of the application.

ISSUE No. a). Whether the Notice of Motion application dated 12th April, 2023 has any merit whatsoever.

18. Under this sub – heading, the Honourable Court will assess the main substratum of the this application. These are mainly whether the appeal preferred by the Appellant should be dismissed with costs for want of prosecution. Before embarking on whether an appeal should be dismissed, its imperative to incapsulate the process of institution of an appeal. An appeal is preferred by an aggrieved party by a decision from the legal entity by filing a notice within a particularly set out time frame. For an appeal as in the instant case emanating from the lower Court to the Superior Court is undertaken pursuant to the provision of Section 79B to G of the Civil Procedure Act, Cap. 21 and Order 42 Rules 1 to 35 of the Civil Procedure Rules, 2010. An appeal is followed by filing of a Memorandum of Appeal and subsequently compilation and filing and service of a Record of Appeal. Subsequently, the appeal has to be admitted and directions on how it should be disposed off, either through affidavits, submissions or adducing of "Viva Voce" evidence be agreed upon by consensus and guidance of the Court. From experience, it is in one of the rarest of cases that Courts or parties opt for the adducing of oral evidence as its assumed all that would have been undertaken already from the previous process and also taking that appeal is more concerned more on matters of law than facts.

19. Principally, as already indicated above, the law governing the dismissal of appeals for want of prosecution are as provided for under the provision of Order 42 Rules 20 and 35 (1) & (2) of the Civil Procedure Rules, 2010 provides:-.

> Rule 35. (1) Dismissal for want of prosecution – 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 foe 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."

20. What the above stated provision of the law which is couched in mandatory terms, emphasizes on is that for an appeal to qualify for dismissed for want of prosecution the following two (2) fundamental ingredients have to have been fulfilled:-

a). There ought to have been directions taken by the Court;

b). A period of three (3) months ought to have lapsed after the direction have been taken. Indeed, for this to happen, directions had to have been given.

Ideally, the Applicant has to prove this fundamental requirement. This legal position has been supported by numerous Court decisions. The Honourable Court wishes to cite one of the leading authority on this issue. This is the case of: "Pinpoint Solutions Limited & Another – Versus – Lucy Waithegeni Wanderi (As the Legal Administrator of the Estate of James Nyanga Muchangi) (2020) eKLR, and which decision I am fully in agreement with held as follows:-

> ".....20. The provisions of the Law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an Appellant fails to proceed as per Order 42 Rule 11 and 13 of the Civil Procedure Rules, 2010.

> This Court took the view that an appeal cannot be dismissed before directions had been taken. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules,. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Rules. There was also no indication that the lower Court file and the proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid".

Issue No. b). Whether the parties herein are entitled to the reliefs sought.

21. Under this Sub – heading, the Honourable Court will critically examine and hence apply the legal applications onto the facts in the instant case. The facts as the court has stated before is that the Appellant was directed on 28th March, 2022 to file a record of appeal within 45 days but it is only on 27th September, 2023 when the record of appeal was filed. There were several court sessions in between the period where the appellant always came to court stating that the reason they have not filed is because the trial court had not yet typed its proceedings.

22. Further, the Honourable Court is informed by various provisions of the law on the principles of natural Justice, Equity and Conscience, fair hearing and the Overriding Objective as founded the provisions of Article 50 (1) and (2) of the Constitution of Kenya, 2010, Sections 3 & 13 of the Environment & Land Court Act, No. 19 of 2011; Sections 101 of the land Registration Act, No. 3 of 2012 and Section 150 of the land Act, No. 6 of 2012. Notably, every person is entitled to fair hearing as envisaged under Article 50:

> "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate , another independent and impartial tribunal or body"

23. The Learned Counsel for the Respondent has argued in their submissions that the appellant has not demonstrated his efforts in obtaining the typed proceedings. However, this cannot be an isolated case as I have been in this station for three years and I understand the workload when it comes to typed proceedings. I completely understand that the staffing of office administrators who are normally in charge of typing is below the expected number in abig station like Mombasa. As a judge, we are the final consumers of the typed proceedings and it is us who suffer the most when proceedings are not typed as we have to put in our returns as well as performing our core duties of dispensing justice.

24. The Learned Counsel for the Respondents have also alleged mischief by the Appellant as there is another suit; CMCC ELC 113 of 2019 which the same failed to annex for the court to peruse. The Respondent has failed to substantiate the allegations of mischief by not producing the copies of pleadings of the alleged suit. The maxim has always been semper necessitas probandi incumbit ei qui agit which directly translates to 'the necessity of proof always lies with the person who lays charges.' It is clear that the Respondent is the looser. However I have to depart from the general rule as counsel for the respondent had a duty to demonstrate to the Respondent the steps it has taken in finalizing the appeal bearing in mind that there is allegedly another suit pending in the lower court probably on the same subject matter and/or issues.

25. Be that as it may, the Respondent never were able to demonstrate having had any evidence that the directions of this Court were ever taken thus to warrant the orders for the dismissal to be granted as dictated under the provision of Order 42 Rule 35 (1) and (2) of the Rule. For that very reason, the application must fail by all standards apart from the issue of their costs.

Issue No. c). Who will bear the costs of the application

26. It is trite Law that the issue of Costs is at the discretion of the Court. Costs is an award that a party is granted at the conclusion of any legal action or proceeding in any litigation. The provision of Section of 27 (1) of the Civil Procedure Act, Cap 21 which provides as follows: -

> "Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct."

27. By the event it means the result or outcome of the legal action. I am guided by Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant - Versus - Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 this court held as follows: -"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

28. Additionally, Costs have been discussed in Halsbury's Laws of England 4th Edition (Re-issue), {2010}, Vol.10. para 16 which states:

> "The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".

29. Mr. Justice (Retired) Kuloba in 'Judicial Hints on Civil Procedure', 2nd Edition, (Nairobi) Law Africa) 2011, page 94 stated:-

> "Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise..."

30. Additionally, in the case of "Re Ebuneiri Waisswa Kafuko Kampala HCMA No. 81 of 1993 where the court held as hereunder: -

> "The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that he costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the

judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs."

31. In the instant case, the Honourable Court has founded that the application by the Appellant had been overtaken by the fact in that the Appellant had since filed a Record of Appeal. However, I still hold that it is reasonable that the Respondent be awarded costs for the application herein.

VI. Conclusions and Findings.

32. Ultimately, having caused the indepth analysis of the issues herein, on Preponderance of Probability and balance of convenience, the Honourable Court proceeded to make the following orders: -

    a) Thatthe Notice of Motion application dated 12th April, 2023 partly succeeds on costs by largely it be and is hereby found to be overtaken by events as the Appellant has already filed the Record of Appeal.

    b) Thatthe matter be fixed for mention on 28th October, 2024 for taking final direction on the disposal of the appeal pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Orders 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.

    c) Thatthe appeal to be prosecuted within thirty (30) daysfrom the date the directions shall have been given.

    d) Thatthe Honourable Court taking that all facts remain constant reserves a Judgement date be on 27th January, 2025.

    e) Thatcosts of the application to be awarded to the Respondent to be borne by the Appellant.

    It is ordered accordinglY

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED, DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2024

.....

HON. MR. JUSTICE LL. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

RULING DELIVERED IN THE PRESENCE OF:

a) M/s. Firdaus Mbula, the Court Assistant.

b) Mr. Omolllo Advocate for the Appellant/Applicant.

c) M/s. Maiga Advocate for the Respondent.