



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCA NO. 14 OF 2018

PETER KYALO MUTUA

NZIOKI WILSON NDUTU

DANIEL MULANDI KIKUNZE

JULIUSKIOKO WAMBUA

ROSEMARY K. MUTUNGA (Suing as trustees for themselves and other beneficiaries o

ATHI RIVER SLUM DWELLERS.....APPELLANTS

VERSUS

AKIBA MASHINANI TRUST.....RESPONDENT

(Being an Appeal from the original Judgment in Machakos CMCC No. 1151/2013 by Hon. A.G. Kibiru (CM) delivered on 16/5/18)

RULING

What is before Court for determination is the Respondent's Notice of Motion dated 11th August, 2021 that was brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules 2010, where it sought for the following orders:

- a) That this Honourable Court dismiss this Appeal for want of prosecution.***
- b) That the costs of this application be provided for.***

The application is premised on the grounds on the face of it and the supporting affidavit of Jane Weru its Executive Director who deposes that the appellants filed this appeal against the Judgment delivered in CMCC 1151 of 2013 on 16th May, 2018. She contends that since then, the appellants filed an application for stay of execution on 25th June 2018 which was later dismissed with costs to the Respondent. She claims three (3) years have lapsed and the appeal has never been set down for directions and the Appellants have elected not to proceed with it. She seeks for the Appeal to be dismissed for want of prosecution as justice delayed is justice denied.

The Appellants opposed the application by filing a replying affidavit sworn by Peter Kyalo Mutua who avers that the application is premature as the parties had never been notified by the Deputy Registrar that the appeal had been admitted for directions to be taken. He explains that together with other trustees, they had sued the Respondent as it failed to release the title deed for Land Parcel Number MAVOKO TOWN BLOCK 3/2347 despite the loan having been fully paid and no charge registered on the title. He states that the suit land belonged to over 400 members of the ATHI RIVER SLUM DWELLERS, who were anxious to have the land sub divided and each member gets their plot. He reiterates that other Appellants were anxious to have the appeal heard and determined on merit as it affected the interests of many members. He confirms that their advocate had already applied as well as paid to be supplied with typed and certified copies of court proceedings including judgment herein to enable them file the Record of Appeal. He explains that he was informed by their advocates that the registry was finalizing typing of proceedings. He insists the instant application lacks merit and should be disallowed.

No party filed submissions to canvass the instant application despite the Court directing them to do so, on 13th October, 2021.

Analysis and Determination:

Upon consideration of the Notice of Motion application dated the 11th August, 2021 including the respective affidavits, the only issue for

determination is whether the Appeal should be dismissed for want of prosecution.

The Respondent has sought for the Appeal to be dismissed for want of prosecution on the ground that there is no stay of execution pending Appeal, three (3) years have lapsed since the Judgement in the Lower Court was delivered and the Appeal has never be set down for directions. The Appellants in their response insist they are anxious to have the Appeal determined. Further, they have applied and paid for typed and certified copies of court proceedings including judgment to enable them prepare as well as file the record of appeal.

The relevant provision on dismissal of an appeal for want of prosecution is provided for under Order 42 Rule 35(1) which states thus:

“Unless within three months, after granting 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.”

From perusal of the proceedings herein including the annexures to the replying affidavit, I note the Appellants applied for typed proceedings and judgment on 24th August, 2021 after the instant application had been filed. Further, I note there was an application seeking stay of execution pending appeal which was dismissed on 22nd March, 2019. The principles to be considered while considering an application for dismissal of appeal for want of prosecution were restated by the Court of Appeal in **Peter Kipkurui Chemoiwo –vs- Richard Chepsergon [2021] eKLR** and these include whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. (**See also the decision of Ivita –v- Kyumba [1984] KLR 441 and Mwangi S. Kimenyi v Attorney General & another [2014] eKLR**). While, in the case of **Jurgen Paul Flach Vs Jane Akoth Flach, Nakuru Civil Appeal No.119 of 2012**, the court rightly stated that where directions had not been issued, dismissal of an appeal for want of prosecution cannot be granted.

Based on the facts as presented while relying on the quoted legal provisions and associating myself with the decisions cited above, I find that the Respondent has not demonstrated how there is a prolonged and inexcusable delay which is causing a grave injustice to it. Further, I find that since the Appeal has never been set down for directions in accordance with Order 42 Rule 13 of the Civil Procedure Rules, it is premature to seek for its dismissal for want of prosecution. I opine that the Appellants explanation in the replying affidavit is plausible and in relying on Article 50 of the Constitution, I will grant the Appellants a chance to be heard in order to ensure there is substantive justice.

In the circumstance, I find the Notice of Motion Application dated 11th August, 2021 premature and will disallow it. Costs will be in the cause.

I direct that the Appeal be set down for directions within thirty (30) days from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE