



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. APPEAL NO. 32 OF 2019**

**JAMES NGARI MAKAMBI.....APPELLANT/RESPONDENT**

**VERSUS**

**PAULINE MUTHONI NGARI.....RESPONDENT/APPLICANT**

**RULING**

1. I am called upon to determine the motion on notice dated 4/1/2021 filed in court on 20/1/2021. The motion is expressed to be brought under **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 42 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules, 2010, and all other enabling provisions of Law.** The prayers sought in the application are as follows:

- 1. That this honourable court be pleased to strike out and/or dismiss the memorandum of Appeal filed herein.**
- 2. That the honourable court be pleased to lift and/or discharge the orders for stay of execution in Embu CMCC 81/1989 issued on 16/8/2018.**
- 3. That this honourable court be pleased to issue any other orders it deems just and fit to grant.**
- 4. That the costs of this application be borne by the appellant/respondent.**

2. The applicant – **Pauline Muthoni Ngari** – is the respondent in this appeal while the appellant in the appeal – **James Makambi** – is the respondent in the application. The respondent in this application is said to have sought leave to file an appeal out of time. He was granted the leave. He filed a memorandum of Appeal on 18/11/2019. But that appears to be all that he did. He never listed the matter for directions and didn't prepare the record of appeal.

3. It turns out that the respondent is enjoying orders of stay of execution granted by the court on 16/8/2018 and, being in occupation and/or possession of the disputed land, is in no hurry to prosecute the appeal. The disputed land is **parcel No. Evurore/Nguthi/2300** and the lower court judgement regarding its ownership was in favour of the applicant herein. The applicant would wish to have the respondent evicted. But the order of stay as well as the appeal herein stand in the way. This application is meant to get both the order of stay and the appeal out of the way.

4. According to the applicant the delay in filing the record of appeal is inordinate and inexcusable and it prejudices her rights. The supporting affidavit that came with the application elaborates the grounds on which the application is based and also provides some history and antecedents relating to and/or surrounding the matter.

5. The respondent in the application responded via grounds opposition dated 12/2/2021 and filed on 15/2/2021. According to the respondent, the typed proceedings and judgement in Embu CMCC 81/1989 only became available or ready on 8/1/2021. It was pointed out that as yet, no notice of admission of appeal has been issued and that according to **Order 42 Rules 35 (1) and (2) of the Civil Procedure Rules, 2010**, dismissal for want of prosecution can only take place once directions are given. This court was asked to dismiss the application with costs.

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 24/3/2021. According to the applicant the court should determine whether the appeal should be dismissed for want of prosecution and whether the order of stay now in force should be lifted or discharged.

7. On whether the appeal should be dismissed, the applicant submitted, *inter alia*, that the Memorandum of appeal was filed way back in November 2019 and since then, the only other thing that has happened is this application itself. According to the applicant, the respondent should have listed the appeal for directions within 21 days after filing his memorandum of appeal. This was not done and the respondent therefore ran afoul of the provisions of **Order 42 Rule 13 (1) of the Civil Procedure Revised Rules, 2010.**

8. Further, after taking such taking of directions, the appeal should be listed for hearing within three (3) months failing which the applicant himself could list it or apply for dismissal for want of prosecution. If none of this is done, the registrar of the court is supposed to list the appeal for dismissal within a period of one year. All this is according to the provisions of **Order 42 Rules 1 and 2 of the Civil Procedure Rules, 2010**. The respondent in this application is said to have failed to comply with the timelines and guidelines given by the law. The situation is said to have been that way for over 2 years now. The case of **Haron E. Ongechi Nyaberi Vs British American Insurance Co. Ltd [2012] eKLR** was cited for guidance.

9. The applicant submitted further that the grounds of opposition filed by the respondent are actually a confirmation that the delay surrounding the matter is indeed inordinate and/or inexcusable.

10. A related aspect of the matter raised by the applicant is that the appeal has already been rendered nugatory as the respondent has already filed another suit – **ELC No. 33/2018, Embu** – against the current registered owner, one Dominic Muthui Muchiri, which is still pending.

11. As regard discharge or lifting of the orders of stay, it was submitted that the court should allow the prayer sought in order to uphold the dignity of this court as there exists this appeal and a suit, both filed by the respondent, which may have different outcomes and thus embarrass the court. Additionally, the respondent was said to be unlikely to suffer any prejudice as he already enjoys an order of inhibition granted to preserve the title of the suit land.

12. The respondent's submissions were filed on 16/4/2021. He admitted that the Memorandum of Appeal was filed on 18/11/2019. But the records required to enable the respondent to move the matter forward have posed a challenge. The lower court record, for instance has not yet been made available. The appeal is yet to be admitted and directions are yet to be given. The cases of **Benard Onyonka Vs Nation Media Group [2019] eKLR, Pin Point Solutions Limited & Another Vs Lucy Waithegeneni Wandari [2020] eKLR**, and **Brenda Nawekulo Uruma Vs Robert Otieno Matete [2020] eKLR** were cited for the proposition that directions must have been given before an appeal can be dismissed for want of prosecution.

13. The respondent asserted that he has all along been willing to prosecute his appeal but the records required to enable him to do so have not yet been made available. The court was urged to dismiss the application.

14. I have considered the application, the response made to it, and the rival submissions. I have also had a look at the court file generally. It seems to me true as the respondent has alleged that the appeal has not yet been admitted and directions also have not yet been given. The law is as put by the respondent. You can only apply to dismiss the appeal for want of prosecution if directions have been given. The reason for this is simple. At the stage of giving directions, the court can even summarily dismiss or reject the appeal. But if the appeal is not rejected, the court directs the manner the appeal is to be heard. It is at this stage that the appellant effectively takes over to steer the case in court. If the appellant causes delay that is inordinate and inexcusable, the appeal can be dismissed for want of prosecution.

15. In this particular matter, the respondent is not entirely to blame. The court itself has its share of blame. The lower court record was not made available immediately. As things stood, the respondent could not move the matter forward. The appeal needed to be admitted and directions needed to be given. For the court to admit the appeal and give directions, some lower court documents required to be made available. It is this court's experience that sometimes, even with the best of intentions, it is not always possible to work optimally and comply with the timelines given. This is so largely because of resource challenges and/or constraints. Lack of lower court record always serve to impede the progress of an appeal. This seems to be what happened here.

16. If the court agrees with the applicant and allows the application under consideration, I think it would be overlooking the fact that part of the delay relating to its matter has occurred because its very own system has not delivered as it should. It will be making the respondent carry a cross that is not entirely his own.

17. From a purely factual perspective, it is clear that both the respondent and the court are to blame. And it might be more so for the court than the respondent. It stands to reason therefore that considerations of conscientiousness would require the court to decline to allow the application.

18. From a legal perspective, the law is as stated by the respondent. It is captured well in **Bernard Onyonka's case (supra)** and in **Pin Point Solutions Limited case (supra)**. One may go further and cite the case of **Jurgen Paul Flach Vs Jane Akoth Flach [2014] eKLR** where the same position had been expressed by Kasango J much earlier. Simply put, the law would not allow dismissal of an appeal for want of prosecution if admission of the appeal has not been done and/or directions given.

19. Given what I have observed so far, I think that had the applicant thought about the issue more deeply and broadly, she would have found that it was both inapt and inopportune to ask for dismissal of the appeal for want of prosecution. It would have dawned on her that the respondent is not entirely to blame.

20. The upshot is that the application herein is for dismissal. I hereby dismiss it with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF JUNE 2021.**

In the presence of M/s Maina for respondent/Applicant and M/s Mutua for Rose Njeru for appellant.

Court Assistant: Leadys

**A.K. KANIARU**

JUDGE

23.06.2021