



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 18 OF 2019

ANTHONY KABIRU KABUKU.....APPELLANT/RESPONDENT

VERSUS

MWENDE WAMUGUNDA.....1ST RESPONDENT/APPLICANT

JACKSON WAMUGUNDA.....2ND RESPONDENT/APPLICANT

CHARLES MAINA.....3RD RESPONDENT/APPLICANT

JOSPHAT MWANGI.....4TH RESPONDENT/APPLICANT

RULING

1. By a Notice of Motion application dated 12th February 2021 and supported by the affidavit of the 4th Respondent/Applicant of even date, the Applicants herein approached the Court seeking the following orders:

i. That the appeal filed herein be dismissed for want of prosecution;

ii. That the costs of this application be provided for.

2. The Applicant's prayers are grounded on the following premises:

a. That pursuant to the judgement in Chief Magistrate Court at Kerugoya Case No. 50 of 2018, Anthony Kabiru Kabuku Vs Mwendu Wamugunda & 3 Others, on 18th July 2019, the Appellant/Respondent herein filed a Memorandum of Appeal on 30th October 2019;

b. That it has been 1 year and 3 months since the memorandum of appeal was filed, yet the Appellant/Respondent has not taken any further steps to prosecute his Appeal;

c. That the delay herein and the Appellant/Respondent's failure to prosecute the appeal constitute an abuse of process of the Honourable Court and is highly prejudicial to the Respondents/Applicants;

d. That in the circumstances, it is important and in the interest of justice that the application be allowed.

3. The Applicant's application is opposed vide a replying affidavit filed on 08th April 2021 in which the Appellant/Respondent avers that the application is misconceived, incompetent and an abuse of court process. That his advocates did on 20th July 2019 apply for certified copies of proceedings and judgement but are yet to be furnished with the same. That the appeal has not been admitted for hearing and directions are yet to be given in accordance with *Order 42 Rule 13 of the Civil Procedure Rules, 2010*. That he is keen to prosecute the appeal and the delay has been occasioned by conditions beyond his control. The Appellant/Respondent thus prays for the application to be dismissed with costs.

4. The Court has considered the notice of motion application and rival affidavits.

The provisions for dismissal of an appeal for want of prosecution are captured under *Order 42 Rule 35 of the Civil Procedure Rules, 2010* as follows:-

“Order 42, rule 35 - Dismissal for want of prosecution.

35. (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”.

From the foregoing provision, an appeal can be dismissed for want of prosecution in two instances. The players in the dismissal process and the associated timelines are different for the two scenarios presented.

In the first instance, the process is set into motion by the Respondent, three months after the directions under rule 13 have been given and the appeal is yet to be set down for hearing.

In the second instance, the key player is the registrar, who, in the event that a year has lapsed since the service of the memorandum of appeal without the appeal being set down for hearing, he shall after notifying the parties, list the appeal for dismissal before a judge. The case of ***Protein & Fruits Processors Limited & another Vs Diamond Trust Bank Kenya Limited [2015] e K.L.R*** reinforces this interpretation, thus:

“From the above rule, it is clear that an appeal can be dismissed for want of prosecution on two instances. Firstly, where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42 Rule 13 or; secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing. In respect of each of these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.”

It is thus clear that dismissal by a Respondent can only be undertaken once direction have already been given, and upon the lapse of three months thereof without the setting down of the appeal for hearing.

In the present case, the Appellant avers that directions are yet to be given in the matter. The reason for this, is that their advocates are yet to be furnished with certified copies of proceedings and judgement, despite their prayers filed on 20th July 2019 to be so supplied. The appeal therefore is yet to be admitted and no directions have been given.

The question of the manner in which the court ought to deal with issues of delay has been the subject of deliberation in superior courts. Two of those decisions are especially instructive. See ***Eastern Produce Kenya Ltd Vs Rongai Workshop & Transporters Ltd & Another [2014] e KLR and in Ikta Vs Kyumbu [1984] KLR 441*** where it was held as follows:

“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.

Thus, even the delay is prolonged, if the court is satisfied with the plaintiff’s 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 the discretion of the court.”

The Court is satisfied that the Appellant has made some effort towards applying for the proceedings and judgement for the purpose of receiving directions and having the matter set down for hearing. To this end, the application is dismissed and the following orders/directions are given:-

a. That the Deputy Registrar

i. Forwards to this Court, the original trial Court’s record together with typed proceedings; and

ii. Supplies the Appellant with certified proceedings within 21 days of today;

b. That the Appellant prepare, file and serve the record of Appeal upon the Applicants/Respondents within 14 days upon the expiry of 30 days;

c. That the parties appear before the Deputy Registrar to confirm compliance with the order and taking a date for directions on the hearing of Appeal;

d. That the costs of this application to abide the outcome of the appeal.

RULING READ, SIGNED AND DELIVERED PHYSICALLY AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of :-

1. Mr. Asimwe holding brief for Kebuka Wachira
2. Applicant/Advocate – absent
3. Kabuta, Court clerk – present.