



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELCA CASE NO. 38 OF 2021

ROSE ADHIAMBO ORACHO & 2 OTHERS.....APPELLANTS

VERSUS

JAMES ORACHO WIRE & 4 OTHERS.....RESPONDENTS

RULING

Application for dismissal of an appeal for want of prosecution: Application allowed.

Introduction

1. By a plaint dated 22/03/2018 and a subsequent amended plaint dated 9/04/2018 the appellants instituted suit against the respondents. A background of the relationship amongst the parties to the appeal is of importance. The 1st appellant is a first wife of the 1st respondent while the 2nd and 3rd appellants are sons to the 1st respondent. The appellants alleged that the 1st respondent in collusion with the other respondent's fraudulently subdivided and sold the family land known as title numbers **BONDO/USENGE/2140** and/or **BONDO/USENGE/3136 (the suit properties)** to the 2nd and 3rd respondents. The appellants sought various reliefs from the court: (i) The transactions between the 1st, 2nd and 3rd respondents on the suit properties be nullified, (ii) The 1st respondent be restrained from dealing with the suit properties without the consent of his spouses, and, (iii) A declaration that the suit properties were illegally acquired by the 2nd and 3rd respondents.

2. The respondents filed a joint defence dated 17/04/2018. The 1st and 2nd respondents contended that the transaction on the sale and purchase of a portion of **BONDO/USENGE/2140** to the 2nd respondent was above board. The 3rd respondent contended he was a stranger to the suit. After hearing the parties, the court by its judgement dated 30/7/2019, dismissed the appellants' suit with costs.

3. Aggrieved and dissatisfied by the judgement, the appellants filed a memorandum of appeal dated 14/08/2019 and a record of appeal dated 7/12/2020. The court set the appeal down for directions on 10/03/2020 and 30/07/2020 but the parties failed to attend court. The respondents' advocates took the initiative of setting down the appeal for directions on diverse dates of 12/11/2020 and 11/12/2020 but the appellants equally failed to attend court. This chain of events led to the filing of the instant motion by the 2nd respondent.

Respondents' case

4. The motion dated 12/07/2021 seeks to dismiss the appeal for want of prosecution with costs on the ground that despite filing a memorandum and record of appeal, the appellants have failed and or ignored to either attend court or prosecute the appeal and this infers that the appellants have lost interest in the appeal. The 2nd respondent's affidavit in support of the motion dated 13/07/2021 reiterated the grounds set out in the motion and urged that it would be in the interests of justice if the appeal is dismissed for want of prosecution.

Appellants' case

5. Despite service, the appellants have neither filed a response to the motion nor tendered written submissions. Though the motion is unopposed, this court has to determine the motion on its own merits.

2nd Respondent's submissions

6. The 2nd respondent filed written submissions dated 16/10/2021 in support of her case. She contended that the appellants have not taken any steps to prosecute the appeal from the time they filed their record of appeal dated 7/12/2020 and that they have severally failed to attend

court which was a clear indication that they have lost interest in the appeal. In urging the court to allow the motion, the 2nd respondent placed reliance on **Article 159(2)(b)** of the **Constitution**, **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**, **Order 42 Rule 35(1)** of the **Civil Procedure Rules** and the case of **Utalii Transport Company Limited & 3 others vs NIC Bank & Another (2014) eKLR**.

Analysis and determination

7. Having considered the motion, supporting affidavit, court record and written submissions, this court is of the considered view that the only issue falling for determination is whether the appeal should be dismissed with costs for want of prosecution.

I will proceed to analyze the legal and jurisprudential framework on the issue.

8. Though the 2nd respondent has moved this court under the provisions of **Order 17 Rule 3** of the **Civil Procedure Rules** the legal framework for dismissal of an appeal lies with **Order 42 Rule 35 (1) and (2)** of the **Civil Procedure Rules**. In the interests of the justice, this court considers that the anomaly is curable by the provisions of **Article 159 (2) (d)** of the **Constitution** which provides that justice shall be administered without undue regard to technicalities.

9. **Order 42 Rule 35 (1) and (2)** of the **Civil Procedure Rules** provides: -

“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.

10. **Order 42 Rule 13** of the **Civil Procedure Rules** reads as follows: -

“Upon notice to the parties ... after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers...the judge in chambers may give directions concerning the appeal generally...”

11. Looking at the provisions of **Order 42 Rule 35 (1)** of the **Civil Procedure Rules** and **Order 42 Rule 35 (2)** of the **Civil Procedure Rules**, it appears that there are only two scenarios under which an appeal can be dismissed for want of prosecution. In the first scenario, the respondent is granted authority to move the court in an appropriate manner after three months of directions while in the second scenario it is the registrar who is granted jurisdiction to initiate the dismissal process. These two scenarios cannot be invoked in the circumstances of this case because neither have directions been given in accordance with **order 42 Rule 13** of the **Civil Procedure Rules** nor has the registrar set the dismissal process in motion.

12. If **Order 42 Rule 35 (1) and (2)** of the **Civil Procedure Rules** does not envisage a dismissal of an appeal for want of prosecution in the manner sought by the appellant, what is the remedy available to respondents where appellants have failed to take any steps to prosecute the appeal despite notices by the court and respondents? The answer to this lies with **Article 159 (1) (b)** of the **Constitution** which provides that justice shall not be delayed, **Sections 1A** and **1 B** of the **Civil Procedure Act** which provides that the overriding objective of the Act is to among others, ensure expeditious disposal of the suit and **Sections 3A** of the **Civil Procedure Act** which clothes courts with discretionary jurisdiction to make orders necessary for the ends of justice to be met.

13. Though the dismissal of a suit for want of prosecution is a drastic and draconian action, the court is called upon to weigh and balance the rights of the appellants who are aggrieved and dissatisfied by the decision of the lower court and that of the respondents who wish to enjoy their constitutional right for the appeal to be determined without undue delay.

14. The case of **China Road & Bridge Corporation v John Kimenye Muteti [2019] eKLR** quoted the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584** where Kneller, J set out the parameters for dismissal of the suit for want of prosecution as follows:

“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances...If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault”.

15. From the court records, the appellants have not taken any steps to prosecute the appeal from the time they filed the record of appeal on 7/12/2020 which is close to one year ago. The case has come up in court close to 8 times either at the instigation of the court or the respondents but the appellants have not made any attempts whatsoever to attend court. The instant motion was served upon the appellants and equally too, the respondents failed to proffer a response to the motion. It is the considered view of this court that though one year is not an inordinate period of time, the conduct of the appellants demonstrates that they have lost interest in the appeal. In upshot, it is the finding of this court that the motion is merited. Since costs follow the event, I award costs to the respondents.

16. Ultimately, I make the following disposal orders: -

a. The appeal is dismissed.

b. Costs to the respondents.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF NOVEMBER, 2021

In the Presence of:

Ms. Lugano for the respondent – present

N/A for the appellants

Court assistant – Sarah Ooro

HON. A. Y. KOROSS

JUDGE

11/11/2021