



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC APPEAL NO 32 OF 2019

VERONICA MWIKALI NDUNDA.....APPELLANT

VERSU

JOHN MJUTHOKA NDUNDA.....1ST RESPONDENT

PETER NGEKE NDUNDA.....2ND RESPONDENT

JACKSON MUTUA NDUNDA.....3RD RESPONDENT

RULING

1. By a Notice of Motion Application dated the 30th of October 2021, brought under Order 42 Rule 13 and Rule 35 sub- rule (1) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act, the 1st respondent sought for the following orders:-

a. That the Appellant's Appeal be dismissed for want of prosecution

b. That the cost of this application be provided for.

2. The application is premised on the grounds on the face of the application namely:-

a. That the Appellant filed the memorandum of appeal on the 9th of December 2019.

b. That it has been over one year since the memorandum of appeal was filed without the respondent being served with the record of appeal.

c. That the Appellant has not taken steps to set the appeal for directions as per Order 42 of the Civil Procedure Rules

d. That the Appellant has a duty to prosecute the appeal to full conclusion failure to which the court should dismiss it for want of prosecution.

e. That the ends of justice shall be served upon granting the application.

3. The application is supported by the affidavit of John Muthoka Ndunda the 1st respondent herein sworn on the 18th of October 2021 who reiterates the grounds on the face of the application.

4. The application is opposed by the Appellant vide the replying affidavit sworn on the 28th of October 2021. She averred that the instant Appeal was with regards to the failure by the court to allow her to be heard in Kilungu ELC 97 of 2013. She argues that there were pending Appeals No. 31 of 2019 and No. 7 of 2019 involving the same parties which were yet to be admitted. She further averred that the Appeal had been set for directions on several occasions and the directions given were to the effect that the matter be mentioned alongside the other related Appeals. She further averred that she was in the process of finalizing the record of appeal which was voluminous.

ANALYSIS AND DETERMINATION

5. I have considered the application herein, the affidavits by both parties and the submissions by the appellant and I find that the only issue

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

6. The Applicant has brought this application under Order 42 Rule 13 and Rule 35 sub rule 1 amongst other provisions of the law.

7. Order 42 Rule 11 of the Civil Procedure Rules provides as follows:-

“Upon filing the Appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.”

8. Order 42 Rule 12 of the Civil Procedure Rules provides that:-

After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

9. It is clear that if a judge refuses to dismiss the appeal summarily under section 79B of the Act, the Registrar is to notify the appellant to serve the memorandum of appeal on every respondent within seven days.

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

1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the appellant shall cause the appeal to be listed for giving of directions by a judge in chambers.

2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of costs of such typing whether in advance or otherwise.

4. Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the record and that such of them as are not in the possession of either party have been served on that party., that is to say;

a. The memorandum of appeal

b. The pleadings;

c. The notes of the trial magistrate made at the hearing

d. The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

e. All affidavits, maps, and other documents whatsoever put in evidence before the magistrate;

f. The judgment, order or decree appealed from and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

i) a translation into English shall be provided of any document not in that language;

ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a) (b) and (f).

11. It is evident that under Order 42 Rule 13(4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the Record of Appeal is duly filed. Once directions are issued by the court and the appellant fails to fix the Appeal for hearing, the Respondent may be at liberty to set down the Appeal for dismissal under Order 42 Rule 35.

12. The Respondent brought this application under Order 42 rule 35 (1) which stipulates as follows:-

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.

13. It is therefore clear that, directions must be given before an application for dismissal of the Appeal for want of prosecution is made.

14. In **Morris Njagi & Another v Mary Wanjiku Kuria (2017) e KLR** the court held that:-

A party can only apply for dismissal where directions have been given under order 42 Rule 35 (1).

15. The Respondent in his grounds in support of his application stated that the Appellant had not taken any steps to set the matter for directions. I have carefully perused the court record and I find that the matter was never set before a judge for directions. There is no indication that directions had been given. I am of the view that since no directions have been given in the Appeal, the Applicant (1st Respondent) herein cannot move the court to dismiss the Appeal for want of prosecution.

16. It therefore follows that the Appeal herein cannot be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. Furthermore, there is no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower Court file and proceedings had been forwarded to ELC Makueni for the Registrar to proceed as aforesaid.

17. In the spirit of Article 50 of the Constitution which provides for fair hearing, I find that the Appellant herein has a right to have her day in court.

18. The upshot of the foregoing is that the application dated 30th of October 2021 lacks merit and the same is dismissed with costs.

19. To progress this matter further, the Appellant is hereby directed to file and serve the record of Appeal within sixty days from the date of this ruling.

20. In the event the Appellant fails to file the record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

RULING DELIVERED READ DATED AND SIGNED VIRTUALLY THIS 15TH DAY OF DECEMBER, 2021

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Kemboi – Court Assistant

Mr Mwariri for the Respondent/Applicant