

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO. 11 OF 2018

JULIET KWAMBOKA ONGWAE T/A KAHAWA KULTURE.....APPELLANT

VERSUS

MOCHA PLACE LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 11th October 2019 the applicant who is the Respondent in the appeal herein filed an application pursuant to order 50 rule 1, order 42 rule 35 (2) of the Civil Procedure Rules sections 1A, 1B and 3A of the Civil Procedure Act and Articles 27, 47, 48 and 159 2(b) and (d) of the Constitution 2010. The applicant seeks that the appeal filed by the Appellant vide the Memorandum of Appeal dated 23rd September 2018 and filed on 24th September 2018 be dismissed for want of prosecution.

2. The application is based on the grounds stated on the face of the Notice of Motion, key among them being that the appellant has not taken any steps to prepare the appeal for hearing. It is also based on the supporting affidavit of Josephat Mwangi Moracha sworn on the 11th October 2018 in which he gives a chronology of events since the case was filed. He depones that the appellant filed an appeal against the ruling of S. K Onjoro SRM issued in CMCC No. 389 of 2018 dismissing her application for injunction. Together with the appeal, the appellant filed an application for stay of execution which was dismissed on 16th November 2018. Following the dismissal of her application, the appellant vacated the demised premises and handed over vacant possession of the demised premises to the applicant. Since then, she has not taken any steps to prepare the appeal for hearing as she has not filed a certified copy of the order appealed from nor has she obtained a certified copy of the proceedings to enable her file the Record of Appeal. He therefore prays that the appeal be dismissed for want of prosecution.

3. The application is opposed by the Respondent through her Ground of Opposition dated 18th October 2019 in which he states that following the dismissal of her application for stay of execution pending appeal on 12th October 2018, the parties informally consented and mutually agreed that the appellant withdraws from the suit premises voluntarily by December 2019. The appellant has since vacated the demised premises and paid all the rent thus compromising the appeal and she therefore prays that the matter be marked as settled with no order as to costs.

4. The application was canvassed by way of written submissions and counsel for the applicant filed his submissions.

5. The singular issue for determination is whether the appeal should be dismissed for want of prosecution.

6. It is not in dispute that the Respondent is no longer interested in pursuing this appeal. In her Grounds of Opposition, the appellant has clearly stated that the suit has been compromised as she has handed over the demised premises and the parties have settled the matter. Perhaps what the appellant ought to have done was formally withdraw the appeal in order to forestall such an application.

7. Order 42 Rule 35 (2) of the Civil Procedure provides that:

“If within one year after service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, the registrar shall on Notice of the parties list the appeal before a judge in chambers for dismissal. This was the position taken by the court in **Kerugoya High Court Civil Appeal No. 17 of 2015 Morris Njagi & Another v Mary Wanjiku Kiura.**

8. In view of the foregoing I find merit in the application and I hereby dismiss the appeal for want of prosecution.

The costs of the application shall be borne by the Appellant.

Dated, signed and delivered at Kisii this 28th day of February 2020

J.M ONYANGO

JUDGE