REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL CASE NO. 174 OF 2011

KIKPOSGEI CHEPKURUI CHELELGO.....1ST APPELLANT/APPLICANT

ISAAC KIPKOSGEI.....2ND APPELLANT/APPLICANT

AMBROSE KIPKOSGEI.....3RD APPELLANT/APPLICANT

VERSUS

LUKA CHEPKURUI CHELELGO.....1ST RESPONDENT

ERNEST CHEPKURUI CHELELGO.....2ND RESPONDENT

RULING

INRODUCTION

There are three applications on record. The first application is an application for dismissal for want of prosecution filed on 27th January 2015. The second and third applications are for substitution of parties filed on 1st July 2016 and 7th November 2017.

The application for dismissal for want of prosecution determines whether the other wo applications are of any importance. They have not been opposed and if the appeal subsists the prayers should be granted.

The grounds for the application for dismissal, in summary, were;

a) The appellants have not moved the courts since 19th March 2013

b) The existence of the appeal is prejudicial and unjust.

APPLICANT'S CASE

The appellants have no interest in the suit and it is prejudicial to the applicants as they cannot enjoy the fruits of their judgment. There is a decree dated 16th December 2011 and the eviction order cannot be enforced due to the conservatory orders.

The 1st appellant died on 12th November 2014 and the suit abated in 2015, a year later. No steps were taken to revive the suit. Under Order 42 Rule 11, the appellant was to set the matter down for directions within 30 days and for 7 years the same has not been done. This is an unreasonable period.

No record of appeal has been served. The appellants only wanted interim orders. From 2013, it is the respondents who have been moving the court. The appellants have nothing to show that they have been keen to get the record of appeal. Under *Order 42 rule 11*, the applicant had the duty to set the appeal down for directions in 30 days since 2011. The time has since lapsed.

The appellants need to file an application to enlarge time. Further, they have not complied with *Order 50 Rule 6*, *Section 79* of the *Civil Procedure Act* and *Order 42 Rule 11.*

RESPONDENT'S CASE

As per paragraph 10 of the affidavit dated /filed 6th November 2017, the appeal is not admitted and therefore there is no appeal. The applicant should come under *Section 79B* of the *Civil Procedure Act* and should have taken issue with the Deputy Registrar to have the matter placed before the court for dismissal or directions. The application is premature.

They have not been supplied with court records by the court. Parties are in negotiations and the 1st Appellant passed away thus there have been letters of administration issued and an attempt to substitute the parties. After substitution they intend to revive the suit. Directions have not been taken as documents have not been supplied and parties have not been substituted.

ISSUES FOR DETERMINATION

The only one major issue for determination is;

WHETHER THE APPEAL SHOULD BE DISMISSED FOR WANT OF PROSECUTION

The applicant has not shown that he took steps to obtain the court records over the period of 7 years. There are no letters or applications for typed proceedings filed. How is the court to determine that indeed he has been keen to procure the proceedings? In the absence of any proof of the same, I conclude that there has been no effort to set down the appeal for directions by the appellant, to effect its hearing and determination.

The appellant cannot seek redress under *Order 42* when they did not take any steps to set down the matter for hearing. Equity aids the vigilant, not the indolent.

The applicant referred to the case of ***Morris Njagi & Ano v Mary Wanjiku Kuria [2017] eKLR*** wherein the application, for want of prosecution, was dismissed as it was not properly before the court. Being a high court case the court is not bound by the decision. Further, the particulars in that case with regards to time, an essential component, differ greatly with this case. In that case the appeal was only pending for a year as compared to the present appeal which has been pending for 7 years.

There was no effort to revive the suit even before the demise of the 1st Appellant. There was no effort to set it down for directions or hearing. The option of the respondents of writing to the deputy registrar is not a mandatory one.

While *Order 42 rule 35* requires that the appeal be set down for directions before an appeal can be dismissed, *Section 79B* of the *Civil Procedure Act* provides;

> **Summary rejection of appeal**
>
> **Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.**

Further, the court must establish whether there is an abuse of the court process by the appellant. The fact that the appeal has been pending without any record of appeal or any attempt to set it down for hearing or directions for 7 years by the appellant, is one that should be greatly considered. Considering that they continue to enjoy conservatory orders. Further, under *Order 42 rule 11* the appellant has to set the appeal down for hearing within 30 days which have since lapsed.

The requirement for a letter to be written to the deputy registrar for the file to be placed before the court for dismissal is procedural and does not touch on substance. The main goal is that the file be placed before a judge to decide the fate of the suit. Further, litigation should not be infinite, it should come to an end. Some of the parties have passed away, is the respondent to be held hostage by an appellant who is not keen to prosecute his case?

In ***Microsoft Corporation -Vs- Mitsumi Computer Garage Limited [2001] 1 EA 127 at page 132*** Ringera J. stated: -

> ***"… I am of the firm view that it is in the overall interests of justice that procedural lapses should not be invoked to defeat applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party."***

Order 50 Rule 6 provides;

> ***"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed…"***

The appellant is already out of time as per Order 42 rule 11 and would have been better suited to apply for enlargement of time. The intention of the drafters was that matters proceed expeditiously. 7 years is an unreasonable delay in prosecuting a matter, moreso an appeal.

Section 3A of the *Civil Procedure Act* provides that:-

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for***

the ends of justice or to prevent abuse of the process of the court."

I find that the failure to set down the appeal for directions and the apparent lack of following up to obtain the court proceedings is an abuse of the court process. It is my finding that the appellants are using the pendency of the appeal to enjoy the conservatory orders and do not intend to prosecute the appeal. The application is allowed with cost to the Applicant.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **5th** day of **April** 2019.

In the absence of;

The Appellant

The Respondent

And in the presence Mr. Mwelem - Court assistant