



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 97 OF 2013

PAULINE MUTHONI.....APPELLANT

VERSUS

ESTHER MUTHONI.....APPLICANT

RULING

1. The respondent filed an application dated 30/1/14 seeking to dismiss the appeal for want of prosecution. It is based on the ground that the appeal was filed on 18/03/2008 and it is over 10 years yet she has ignored, failed and/or refused to prosecute the appeal. That she is enjoying a stay of execution by the lower court and consequently is not in a hurry to finalize the appeal.
2. The appellant in response stated that application lacks merit since she has prosecuted her appeal and what is pending is filing written submissions as ordered by court to dispose the appeal fully. That there is no inordinate delay in prosecuting the appeal and the application is premature.
3. The background of this matter is that the appellant filed a Memorandum of Appeal on 18/3/2008. The appeal was duly admitted and listed before the Judge for directions. On 19/4/14 directions were given by Hon. Justice Limo who ordered that the appeal be disposed of by way of written submissions. None of the parties filed submissions. Nearly two years later when the matter was mentioned before the Judge on 12/10/16 none of the parties had filed submissions. The parties requested for Fourteen (14) days to file the submissions. They were ordered to file submissions and fix a fresh date at the registry.
4. The respondent Esther Muthoni then filed this application on 30/4/2014 seeking dismissal for want of prosecution of the application dated 28/3/2008 which was seeking stay of execution of the decree and the entire appeal.
5. When the application came up for hearing, the counsel holding brief for the counsel for the applicant indicated that the appellant wished to compromise the appeal and had written to the counsel for the respondent with a view to settle the appeal outside court.
6. The counsel for the respondent confirmed that indeed Mr. Kahiga for the appellant had written to him on without prejudice basis which he considered as an afterthought as the letter was written on the eve of the hearing of the application.
7. The court ordered the parties to file written submissions. For the respondent it was submitted that the appeal has been pending in court for the last Ten years. The appellant has failed, ignored and/or neglected to prosecute the appeal despite the appeal having been admitted for hearing and directions given way back on 11/1/2014. That the appellant has been enjoying stay of execution and abusing court process. That a delay of Ten years is inordinate and has not been explained in any manner whatsoever.
8. For the applicant it was submitted that the applicant is the one who took steps to ensure that the appeal is heard and determined and it is therefore not true that the appellant has done nothing to prosecute the appeal or that she has lost interest. That the appellant has been trying to explore an out of court settlement but the letters to the respondent had gone unanswered. That the delay is not inordinate. That the applicant ought to have moved the court under **Order 42 rule 35 Civil Procedure Rules**. The application is brought under wrong provisions of the law.
9. The appellant submits that she be pardoned for the delay and allow her to take appropriate steps to prosecute the appeal.
10. I have considered the application and the submissions.

Order 42 Rule 35 of the Civil Procedure Rules:

“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.”

Refer to **Mohamed Adan & 2 others v Hadija Hassan Mohamed & 2 others (Suing as the legal representative of the estate of Ali Noor Ibrahim Karu (Deceased) [2014] eKLR**

11. In this case, the appellant had delayed for a period of only four months and the court held;

In the circumstances of this matter, I am of the view that the short delay of a few months in prosecuting the appeal by the appellants cannot justify the dismissal of the entire appeal for want of prosecution. Such an action will in my view, deny the appellants the benefit of substantive justice. I will thus not allow the application.

However it is obvious to me that the counsel for the appellants went to sleep after filing the appeal. They are not even aware that the appeal has already been admitted by the court to hearing. As such, though I will dismiss the application herein, I will award costs of the application to the applicants.

12. As per the proceedings of the file, the appeal was admitted for hearing on 18/03/2008. On 16/01/2013 the Court in Embu ordered that the file be transferred to Kerugoya. On 27/05/2014, the appellant was informed that the appeal had been admitted for hearing and he was required to prepare and file record of appeal which he did on 18/07/2014.

13. On 19/11/2014, the Court directed that parties file written submissions, serve and take mention date to confirm the same. On 10/03/2016, the parties took a date for hearing on 04/08/2016 on which date it was taken out since the court was on vacation. On 08/09/2016 the matter was listed for mention on 12/10/2016 and on the said date, parties had not filed submissions whereby the court ordered the appellant to pay CAF. Thereafter, the respondent filed the application for dismissal of the appeal.

14. It seems that after the court ordered the parties to file written submission, the appellant went to slumber for about 15 months then he proceeded to have the matter listed on two occasions but no submissions were filed. To date it has been a total of 4 years since the court ordered that submissions be filed and he is yet to comply.

15. The appellant is guilty of laches and has not explained why it has taken him such a long time to file submissions. Since the time the court ordered the appellant to file submissions, it is now nearly Five years. A delay of nearly Four years is no doubt inordinate. Equity aids the vigilant and not the indolent. I find that the application has merits. I allow it as prayed. I order that the appeal be dismissed with costs for want of prosecution.

Dated at Kerugoya this 13th Day of November 2019.

L. W. GITARI

JUDGE