

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT AT ELDORET

ELC APPEAL NO.15 OF 2018

BRENDA NAWEKULO ULUMA.....APPLICANT/PLAINTIFF

VERSUS

ROBERT OTIENO MATETE.....RESPONDENT /DEFENDANT

RULING

This ruling is in respect of an application dated the 14th November, 2019 seeking orders that:-

- a) Spent
- b) THAT the Honourable Court be pleased to dismiss the matter/appeal herein for want of prosecution and compliance.
- c) THAT costs the appeal & of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT’S CASE

Counsel for the applicant submitted that the legal framework for dismissal of a suit for want of prosecution is founded on the Civil Procedure Rules (CPR) Order 17 Rule 2 which provides as follows:-

"2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order."

Mr Omusundi submitted that the purpose and intent of Order 17 Rule 2 Civil Procedure Rules 2010 is that a court may, suo motto, dismiss a suit for want of prosecution or upon application of either party to the suit.

Counsel relied on the e case of **Ivita -vs- Kyumbu(1984) KLR 441** where the court held as follows:

"The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".

Further in the case of **Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, the court restated the test as follows:-

1. *When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one*

side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

Counsel submitted that the applicant has deponed that the Respondent lodged this Appeal on 29th September 2018 and that more than twelve (12) months down the line the respondent has not proceeded to prosecute the same and that the same has now been overtaken by event and spent.

That the Respondent herein sought stay of execution of decree of the trial court pending hearing and determination of the appeal on the 29th October, 2018 which was court issued orders of status quo with an order that the appeal be fast tracked.

Counsel therefore urged the court to allow the application as prayed and dismiss the appeal for want of prosecution with costs to the applicant.

RESPONDENT'S CASE

In reply to the application the Respondent filed a replying affidavit and stated that his failure to file the record of appeal was not intentional but the delay by the Court Registry to supply him with the copies of typed proceedings to allow him compile the record of appeal.

Counsel submitted that the issue which arises for determination is whether this appeal should be dismissed for want of prosecution. That from the record, the memorandum of appeal was filed on 29th September 2018 and that the appeal has not been admitted as provided under Section 79B of the Civil Procedure Act. Which provides that:

"Before an appeal from a sub-ordinate 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 Order 42 rule 35 (2). Order 42 rule 35 (1) and (g) provides:

"(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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) 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 to the parties list the appeal before a judge in chambers for dismissal.

Counsel submitted that the rule provides for two situations where an application for dismissal can be made. The respondent can only apply if, after directions have been given, the appellant has not taken action to set down the appeal for hearing. The second is where the Registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing. However, the Applicant has brought her Application under

Order 17 Rule 2 of the Civil Procedure Rules which deals with dismissal of suits for want of prosecution. The applicant is not in order to have brought the application under the said provisions of law.

Counsel relied on the case of **Elem Investment Ltd. -Vs- John Mokora Olwoma [20151 eKLR Aburili J** stated:

"a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been a failure to admit the appeal for hearing three months after directions have been given under Order 42 rule 13 Civil Procedure rules or secondly if after one year of service of memorandum of appeal the appeal has not been listed for hearing.

It was counsel's submission that the appeal has neither been admitted nor directions have been taken which is a requirement for dismissal for appeal under 42 rule 35 (2) as was held in the case of **Rosarie (EPZ) Limited -VStanlex Mbithi James (2015) eKLR** where the court stated:

"Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.

Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The issue for determination is as to whether the appeal is ripe for dismissal for want of prosecution and whether the application is merited.

Order 42 Rule 11 of the Civil Procedure Rules states;

Upon filing of 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.

Order 42 Rule 12 of the Civil Procedure rules states;

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.

Order 42, Rule 35(2) states;

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.

Order 42 rule 35 (1) is to the effect that an appeal cannot be dismissed before directions have been given by the court. The respondent can only apply if, after directions have been given, the appellant has not taken action to set down the appeal for hearing. The second option is where the Registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing.

In these two scenarios, the procedure is different. In the first scenario, the respondent is given the option to either list the appeal for hearing or apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.

The court must seek to determine whether the appeal was placed before a judge for directions. There is no evidence that the appeal had been admitted and placed before the judge for directions.

In the case of **Morris Njagi & another v Mary Wanjiku Kiura [2017] eKLR** the court held;

A party can only apply for dismissal where directions have been given. This is under Order 42 rule 35 (1) Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 rule 35 (2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal.

The respondent was at liberty to have the register list the matter in terms of order 42 rule 35 and failed to do so. That was the option available to him at this point. In **Morris Njagi & another v Mary Wanjiku Kiura** (supra) the court held;

“I am of the view that since no directions have been issued in the appeal the applicant (respondent) cannot move the court to dismiss the appeal for want of prosecution.”

I find that the application lacks merit and is therefore dismissed with costs to the respondent. Parties to fasttrack the admission of this appeal and taking of directions within 30 days.

DATED and DELIVERED at ELDORET this 29TH DAY OF October, 2020

DR. M. A. ODENY

JUDGE