



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 23 OF 2019

CLAUDIA ALEXIOUS MUINDIAPPELLANT

VERSUS

ROSE KATILE MUTUA.....1ST APPLICANT/RESPONDENT

MESHACK MUTUA MUSAU.....2ND APPLICANT/RESPONDENT

RULING

1. In the Notice of Motion dated 16th June, 2020, the Respondents/Applicants have prayed for the following orders:

a. That the Memorandum of Appeal dated 17th June, 2019 and filed on the same date by the Appellant be struck out.

b. That costs of this Application be borne by Appellant.

2. The Application is supported by the Affidavit of the 2nd Respondent/Applicant who has deponed that the Appellant filed the Memorandum of Appeal on 17th June, 2019 challenging the Judgment of the lower court.

3. The 2nd Respondent/Applicant deponed that since then, the Appellant has not complied with the provisions of Order 42 Rule 11 of the Civil Procedure Rules and Section 79B of the Civil Procedure Act which requires the fixing of the Appeal for directions before a Judge within thirty (30) days.

4. The 2nd Respondent/Applicant deponed that although the Judgment by the trial court was delivered on 21st May, 2019, the Appeal was filed on 17th May, 2019 and that it was not until 16th August, 2019 that they were served with the Memorandum of Appeal.

5. The 2nd Respondent finally deponed that the Appellant has been indolent in prosecuting the Appeal; that the Appellant has not made any effort to have the Appeal admitted or fixed for hearing and that it is in the interest of justice that the Appeal be struck out.

6. In response, the Appellant's advocate deponed that the orders sought are untenable and a nullity because there is no Appeal yet to be admitted capable of being dismissed; that on 24th May, 2019, he did a letter to the Executive Officer requesting for typed proceedings to enable him prepare a Record of Appeal and that the Application should be dismissed. Both the Appellant and Respondents' advocates filed submissions which I have considered.

7. The record shows that the Appellant filed the Memorandum of Appeal challenging the decision of the lower court on 17th June, 2019. The decision of the lower court being challenged was rendered by Hon. C. A. Ocharo in Machakos Chief Magistrate's Court ELC Case No. 3 of 2018 on 21st May, 2019.

8. The Memorandum of Appeal was therefore filed within the prescribed period of thirty (30) days from the date when the decision was rendered (*See Section 79G of the Civil Procedure Act*).

9. The 1st Respondent is seeking to have the Appellant's Memorandum of Appeal struck out on the ground that since the same was filed, the Appellant has never taken any action or complied with the provisions of Order 42 Rule 11 of the Civil Procedure Rules and Section 79B of the Civil Procedure Act. Section 79B of the Act provides as follows:

“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.”

10. On the other hand, Order 42 Rule 11 of the Civil Procedure Rules provides as follows:

“11. 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.”

11. The Appellant’s advocate deponed that he has not been able to file a Record of Appeal because he is yet to be supplied with the typed and certified copies of the proceedings.

12. My understanding of the provision of Section 79B of the Civil Procedure Act as read together with Order 42 Rule 11 of the Civil Procedure Code is that after filing the Memorandum of Appeal, and upon the Appellant filing the Record of Appeal, the said Record of Appeal should be placed before the Judge for perusal and either summarily reject the Appeal or allow it to proceed to hearing.

13. Indeed, what is to be perused by the Judge is the entire Record of Appeal, and not just the Memorandum of Appeal. It is trite that the Record of Appeal should contain certain information and documents enumerated under Order 42 Rule 13(4) of the Civil Procedure Rules. Order 42 Rule 13(4) provides as follows:

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court 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).”

14. The dismissal of an Appeal for want of prosecution is provided for under Order 42 Rule 35 of the Civil Procedure Rules. Order 42 Rule 35(1) and (2) provides as follows:

“35. (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.”

15. An Appeal can therefore only be dismissed firstly within three (3) months after the giving of directions by the Judge, on the Application of the Respondent and secondly by the court on its own Motion within one (1) year after the service of the Memorandum of Appeal.

16. As already observed above, the Appellant has not filed a Record of Appeal, meaning that no directions can be given by the Judge under Section 79B of the Civil Procedure Act and Order 42 Rule 13(4) of the Civil Procedure Rules. That being the case, the Respondent cannot move the court to have the Appeal to be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules because no “*Appeal*” has been filed.

17. If indeed the delay to file a Record of Appeal for the purpose of taking directions is inordinate, then the Respondent should have prompted the Registrar of this court to serve the Appellant with a Notice to show cause why the Memorandum of Appeal should not be dismissed for want of prosecution pursuant to the provision of Order 42 Rule 35(2) of the Civil Procedure Rules.

18. However, considering that there is no evidence before the court to show that the Appellant was furnished with typed and certified proceedings of the lower court, any effort by the Registrar of this court to have the Memorandum of Appeal dismissed for want of prosecution would be futile because the Record of Appeal can only be compiled and filed after the Appellant has been furnished with such proceedings.

19. In view of the fact that the Appellant has not filed the Record of Appeal due to unavailability of the typed proceedings of the lower court, and in view of the provisions of Section 79B of the Civil Procedure Act and Orders 42 Rules 13(4) and 35 of the Civil Procedure Rules, I find and hold that the Respondents' Application dated 16th June, 2020 is unmeritorious.

20. The Application dated 16th June, 2020 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE