



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 130 OF 2018

(FORMERLY CIVIL APPEAL NO. 252 OF 2011)

JENIFFER KANG'ETHEAPPELLANT

VERSUS

MIRIAM WANJALA.....RESPONDENT

RULING

1. For determination is the Notice of Motion dated 9th June 2017 brought under Section 1, 1B, 3 and 3A of the Civil Procedure Act, and Order 42 Rule 35 (1) of the Civil Procedure Rules in which the Respondent/Applicant is seeking for the following orders:

- 1. That this Honourable Court be pleased to dismiss the Appeal herein for want of prosecution.**
- 2. That the costs of this application be provided for.**

2. The application is premised on the grounds that:

- i. It is now 6 years since this appeal was preferred and no attempt has been made to prosecute it, neither has the Appellant attempted even to cause the same to be listed for giving direction under Order 42 Rule 13 of the Civil Procedure Rules, 2010.**
- ii. Failure by the Appellant to prosecute this appeal is causing the Respondent underserved loss, damage and prejudice.**
- iii. It is apparent the Appellant has lost interest in this appeal.**

3. The application is supported by the affidavit of Miriam Wanjala, the applicant sworn on 9th June 2017 in which she deposes that she has been compelled to take this action since it is obvious that the Appellant has lost interest in this Appeal and there are no signs that she will ever prosecute it. That the appeal was filed sometime in the year 2011 simultaneously with an interlocutory application for stay dated 27th December, 2011. She avers that the said application was heard on 27th January, 2012 and was allowed by consent of the parties in terms of the consent filed on the same day. That thereafter the Appellant went on with her life as if the appeal is not there. The applicant states that her advocates have sent several letters to the Appellants advocates calling upon them to have this Appeal prosecuted but there was no response. The applicant further states that the appellant's tenancy was terminated by the Tribunal on account of failure to pay rent, and it appears that the appellant has not changed because since the adoption of the consent herein, the Appellant has never paid rent on her own volition unless she is coerced by auctioneers. The applicant avers that this trend is weighing her down economically since she is a widow with only the subject premises as her source of income. That the Appellant is taking advantage of this Appeal to remain in the applicant's premises since there is an order of stay and is deliberately failing to prosecute the appeal for she knows that it does not have any chances of success. The applicant therefore prays that the appeal be dismissed for want of prosecution for it is apparent that the Appellant is not ready to prosecute the same.

4. The application is opposed by the Appellant/Respondent who filed a preliminary objection on the following grounds:

- i. That the Application before the court is incurably defective, bad in law, misconceived and an abuse of the court process.**
- ii. That the provisions of law cited and/or relied upon do not apply and/or are irrelevant to the orders sought.**
- iii. That there are no good grounds or at all that have been advanced as to warrant the granting of the orders sought.**

iv. That if the orders sought by the Respondent/Applicant are granted then the plaintiff (sic)/Respondent shall suffer great prejudice and thereby compromising the plaintiff (sic)/Respondent's right to justice.

5. Mr. Odongo, counsel for the Respondent/Applicant relied entirely on the affidavit in support of the application.

6. Ms. Mburu Kariuki & Company Advocates for the Appellant/Respondent submitted inter alia, that the appeal was compromised by the consent entered by the parties on 27th January 2012. They further submitted that the parties entered into an agreement dated 21st June 2012 in which the applicant allegedly received the sum of Kshs.100,000/= from the Respondent being payment of deposit and rent in respect of the suit premises. It was their submission that the conduct of the parties terminated the tenancy that was the subject of this appeal and that together with the fact that costs had already been paid pursuant to the consent referred above, the appeal was overtaken by events and was therefore rendered nugatory.

7. I have considered the application. The only issue for determination is whether the appeal should be dismissed for want of prosecution. Rule 35(1) of Order 42 of the Civil Procedure Rules under which the application is brought provides that:

“(1) Unless within three months after giving of direction 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.”

8. The parties herein on 27th January 2012 entered into a consent in respect to the application dated 27th December 2011 which was seeking orders of stay pending appeal. The court adopted the said consent as an order of the court. Since then, it is clear that no action was taken on the appeal until the present application was filed.

9. For an appeal to be liable for dismissal for want of prosecution under the provision of Rule 35 (1) directions must have been issued under Order 42 Rule 13 and three months lapsed without any action being taken by the appellant. Such directions have not been issued in this matter. That said, it is the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions. Rule 11 of Order 42 required that once an appeal has been filed, the appellant should, within thirty days, cause the matter to be listed before a judge for directions under Section 79B of the Act. Rule 13 (1) of the same Order also directs that:

“On notice to the parties delivered not less than twenty-one days after the date of service of the Memorandum of Appeal the appellant shall cause the appeal to be listed for the giving of direction by a judge in chambers.”

10. It is not in dispute that it has been above five and half years since the Memorandum of Appeal was filed on 27th December 2011 and the time the present application was filed on 9th June, 2017. A perusal of the file shows that since 27th January, 2012 no action has been taken by the Appellant. From a reading of the provisions of order 42 cited above, it is the appellant's duty to set the appeal in motion by having it listed for direction. This ought to have been done within 30 days of filing of the appeal. The appellant did not take any such step and has not provided any reasons for such failure. On the contrary, it is the appellant's submission that the appeal has been overtaken by events and therefore has been rendered nugatory. That in my view is an admission that the appellant deliberately failed to take steps to have the appeal in motion. It is clear that the appellant has no intention to take any steps on the appeal.

11. I am therefore inclined to find that this application has merit. The same is allowed and the appeal is dismissed with costs to the applicant.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Hamadi holding brief for Ms. Nduku for Appellant/Respondent

Ondieki holding brief for Odongo for Respondent/Applicant

Yumna Court Assistant

C.K. YANO

JUDGE

26/2/19