



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC CA NO. 2 OF 2016

CLEMENTINA ADERO OYUGI.....APPELLANT

VERSUS

FREDRICK APOLLO MWAMU.....RESPONDENT

RULING

1. This application before me for determination is a Notice of Motion dated 3/4/2018 and filed on 4/4/2018. It is expressed to be brought under Rules 83 and 84 of the appellate Jurisdiction Act, Sections 3 and 3A of the Civil Procedure Act (cap 21), and articles 48, 50 and 57 of the Constitution of Kenya, 2010. The Applicant in the application – **FREDRICK APOLLO MWAMU** – is the Respondent in the Appeal herein, which he asks the court to treat as withdrawn or to strike it out altogether. The Respondent in the application – **CLEMENTINA ADERO OYUGI** - is the Appellant.

2. The application came with four (4) prayers but only three – prayers 2, 3 and 4 – are for consideration at this stage. The prayers for consideration are as follows:

Prayer 2: That the memorandum of appeal filed herein

by the Appellant be deemed to have been withdrawn and the same be struck out with costs forthwith.

Prayer 3: That in the alternative the honourable court be

pleased to strike out the memorandum of appeal herein filed on 7/3/2016 for failure to take essential steps in the proceedings.

Prayer 4: That costs of the appeal and this application

be awarded.

3. The application is anchored on several grounds including that the Appellant has failed to take tangible steps to move the appeal forward since the memorandum of appeal was filed on 7/3/2016; that since then, it has been two years of inaction; and that the Applicant has been prejudiced as she has no place of abode, the Appellant having already caused her eviction.

4. It is clear the parties had a suit in the lower court – CMCC NO. 49 of 2015, Busia – which concerned a sale of land deal that had gone sour. The Appellant was the Defendant. He lost the case. He filed this appeal which the Respondent feels is taking too long to be prosecuted and/or finalised.

5. The Respondent in the application (who is the Appellant in the appeal) responded to the application vide a replying affidavit filed on 17/4/2018. He accused the Applicant of intending to derail the appeal after allegedly realising that the appeal is water-tight. He denied that he has deliberately delayed the appeal and explained that his appeal has to be admitted by the court first before it is fixed for hearing. He said that the court has not yet taken that step. He also explained that the Deputy Registrar of this court wrote to the lower court on 6/5/2016 asking for the record of the lower court proceedings and that by the time the Applicant was filing this application, the lower court record had not yet been forwarded.

6. And noting that the lower court record had taken rather long to be forwarded, the Respondent wrote a letter dated 21/3/2018 asking to be supplied with lower court proceedings in order to prepare her appeal. According to the Respondent, any delay is beyond his control and he should not therefore be blamed for it. He said that the appeal relates to the emotive matter of land and should therefore not be terminated without hearing it on the merits.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 31/5/2018. Overall, the Applicant reiterated and amplified what her application contained and urged the court to allow the application. Two decided cases – **BRUCE MUTIE MUTUKU T/A DIANI TOUR & TRAVEL Vs EQUITY BANK LIMITED: HCCA No. 92 of 2013, MOMBASA** and **FERRUZ OMAR MOHAMED & 4 others Vs AHMED MOHAMMED HONEY: CA No. 58 f 2015, MALINDI** – were offered to drive home the message that it always rests on appellant to cause the appeal to be mentioned for directions and not the Deputy Registrar. It was stated that the appeal can be terminated if the appellant's conduct is found to be undeserving of court's mercy or if found to be calculated to deny the respondent the fruits of victory.

8. The Respondent's submissions were filed on 18/5/2018. The thrust and tenor is aligned to her replying affidavit and the substance is actually a rendition of the same affidavit.

9. I have considered the application, the response made, and the rival submissions. I have had a look at the rest of the court file generally. It is true that there is apparent delay in moving the appeal forward but it is not true that the appellant is fully to blame for the situation. There is quite some bit of the delay that can be blamed on the court system. I find it shown that the lower court record took rather long to be forwarded to this court. As I write this ruling, I notice that the record of appeal is ready and the lower court file is with us. The case law cited by the Applicant is correct but it is not proper to travel that route in this case.

10. It is usually a draconian step to terminate a matter without hearing the parties. Given the circumstances prevailing in this case, the Appellant would feel maltreated by the judicial system if his appeal is terminated yet the delay is largely attributable to factors beyond his control. The best way forward is to expedite the appeal. It is upon the Appellant to be more fleet-footed to ensure that things move forward. He should act with all due dispatch to ensure the appeal is heard.

11. I therefore decline to allow the application herein. I dismiss it instead. Costs will be in the cause.

Dated, signed and delivered at Busia this 21st day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Appellant: Present

Respondent: Absent

Counsel for the Appellant: Present

Counsel for the Respondent: Present

Court Assistant: Nelson Odame