



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CIVIL APPEAL NO. 27 OF 2015**

**MARY WANGU**

**MWANGI RUCATHI**

**GEORGE MUNUHE MAINA**

**NANCY WANJIKU WACHIRA**

**MILLICENT NJOKI RUCHATHI.....APPELLANTS/RESPONDENTS**

**VERSUS**

**MURIITHI RUCATHI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**MANAGER MWEA IRRIGATION SCHEME.....2<sup>ND</sup> RESPONDENT**

**RULING**

**BACKGROUND**

The Applicants who are the Respondents in the appeal have moved this Court under **Order 2 Rule 15, Order 42 Rule II and 13, Order 51, Rule 1 CPR**. They are seeking the following orders:

***(1) Spent***

***(2) That this Appeal be struck out with costs for being scandalous, frivolous, vexatious and abuse of the Court process of this Honourable Court.***

***(3) That the orders of the SRM's Court Wanguru (Hon. Kimutai, SRM) Delivered on 14<sup>th</sup> December 2006 and SRM's Court Wanguru (Hon. Nyaboke, RM) Delivered on 22<sup>nd</sup> June 2015 in Wanguru SRM Misc. Succession No. 22 of 2004 be confirmed as valid and subsisting.***

***(4) That the Appellants/Respondents be condemned to pay the costs of this application.***

***(5) That this Honourable Court be pleased to issue any other or further orders as it may deem fit and just to grant.***

The application is supported by an affidavit of Muriithi Rucathi also sworn on 2<sup>nd</sup> May 2017. The application is opposed with a replying affidavit sworn by Mary Wangu the 1<sup>st</sup> Appellant/Respondent. The Appellants also filed grounds in opposition to the said application.

**APPLICANTS CASE**

The application is based on the ground that judgment in Wanguru SRM Misc Succession No. 22 of 2004 was delivered in his favour. Peris Muthoni Rucathi (deceased) appealed in ELCA No. 19 of 2013 (Kerugoya) and the Court ruled that the Appeal abated due to her death and confirmed judgment in Wanguru SRM Misc. Succession No. 22 of 2004. The ruling has not been appealed against neither has it been reviewed and/or vacated. The Respondents filed an application in the Wanguru Court seeking to review the judgment but he raised a Preliminary Objection on locus and jurisdiction whereby the Court upheld his Preliminary Objection. It is against the ruling of the

Preliminary Objection that the Appellants have appealed to this Court and not the judgment. He stated that given the foregoing, the Appeal is res-judicata and stands no chance of success.

The Appellant further contend that even if the Appeal is properly before Court, the Respondents have not taken any steps towards prosecuting the same. In addition, the Applicants argued that the Respondents are intermeddlers since they have not taken out letters of administration.

#### RESPONDENTS CASE

The Respondents in their response stated that the original licensee of rice holding No. 1693 was Philip Rucathi Mukambi (deceased) who was their father together with the Applicant. After his demise, his wife Peris Muthoni Rucathi filed the current suit to be nominated as the successor and the Applicant objected since he had been nominated by the deceased. The late Peris Rucathi filed the Appeal in ELCA No. 19 of 2013 and after her demise, the Applicant sought for matter to be marked as abated which was allowed. Thereafter, ELCA No. 19 of 2013 was never heard on merit and is therefore not res-judicata. The applicant then sought to be put in possession of the rice holding and they applied for review which was dismissed since they were not parties to the suit and it was functus officio. They argued that the appeal has high chances of success and the proceedings of the lower Court are in the process of being finalized and that they can compile and file their record of appeal any time.

#### LEGAL ANALYSIS AND DECISION

The first issue that emerges from that application is the position in ELCA No. 19 of 2013. The appellant in that appeal was Peris Muthoni Rucathi (deceased) who had appealed against the decision in Misc Succession Cause No. 22 of 2004 (Wang'uru) delivered on 14<sup>th</sup> December 2006. Unfortunately, the appellant passed on and the appeal abated as per the ruling dated 31<sup>st</sup> July 2014 where the Court proceeded to confirm the judgment delivered on 14<sup>th</sup> December 2006 as valid. Thereafter, the appellants herein proceeded to file the present appeal being ELCA No. 27 of 2015 on 15<sup>th</sup> October 2015 against the judgment in Misc. Succession Cause No. 22 of 2004 (Wanguru) delivered on 28<sup>th</sup> September 2015. In that ruling, the Court held that the appellants lacked locus standi to move the Court and that they first had to be enjoined as parties and that it was functus officio.

I have considered the affidavit evidence in favour of and in opposition to this application. I have also looked at the submissions by counsels and the applicable law. **Order 2 Rule 15 CPR** reads as follows:

**“O. 2 R.15 (1)**

***At any stage of the proceedings, the Court may order to be struck out or amended any pleading on the ground that:***

- (a) It discloses no reasonable cause of action or defence in law; or***
- (b) it is scandalous, frivolous or vexatious; or***
- (c) it may prejudice, embarrass or delay the fair trial of the action or;***
- (d) it is otherwise an abuse of the process of the Court”.***

Whereas a party in an appeal is at liberty to move the Court for any orders at any stage of the proceedings, directions must be first taken **under Section 79 B CPA** as read with **Order 42 Rule 13 and Order 42 Rule 35 CPR**. **Section 79 B CPA** reads as follows:

***“79B Before an appeal from a subordinate Court to High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient grounds for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79 C, reject the appeal summarily”.***

Faced with a similar application, Hon. Lady Justice M. Kasango (as she then was) in the case of **Kirinyaga General Machinery Vs Ezekiel Mureithi Ileri HCCC No. 98 of 2008**, (unreported) held as follows:

***“It is clearly seen from that rule that before the respondent can move the Court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under Rule 8B. Directions have never been given in this matter. The directions having not being given, the orders sought by the respondent cannot be entertained”.***

The position obtained in that case is similar to the instant case. This appeal has not been admitted and directions given under **Order 42 Rule 35(1) Civil Procedure Rules, 2010**. I also note that **Order 2 Rule 14 CPR** is another saving provision where the Courts have an obligation to ensure that substantive justice rather than technicalities are observed. That Section reads as follows:

***‘No technical objection may be raised to any pleading on the ground of any want of form’.***

In the case of **Rosavie (EPZ) Ltd Vs Stanlex Mbithi James (2015) e K.L.R**, the Court in dismissing an application for dismissal stated:

***“The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35(1), and the second is where no steps have been taken to prosecute the appeal within one year after the service of the Memorandum of Appeal i.e. Order 42 Rule 35(2). Under the first scenario, it is the respondent to move the Court while under the second scenario, the Section is by the Registrar”.***

I agree with that decision. In the instant case, no directions have been taken. The applicable provision for dismissal is **Order 42 Rule 35(2)** which provides as follows:

***“O. 42 R. 35(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”.*** (Emphasis mine)

From a plain reading of that provision, it is clear that it is upon the Registrar to list the appeal before a Judge in Chambers for dismissal. Since the directions have not been given and the Registrar did not list the matter for dismissal, I find this application lacking in merit and the same is hereby dismissed with costs.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 25<sup>th</sup> day of October, 2019.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**25<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

- 1. Mr. A.P. Kariithi holding brief for Wangechi Munene*
- 2. Mr. Ombachi holding brief for Kebuka Wachira*
- 3. Okatch – Court clerk – present*