



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 31 OF 2017

SMM.....APPELLANT

VERSUS

FNK.....RESPONDENT

(Being an Appeal from the Ruling of Resident Magistrate's Court at Mutomoin

Maintenance Cause No. 2 of 2014 delivered on 11th March, 2015

by Hon. Sandra Ogot-(RM)

RULING

1. In the Notice of Motion dated 3rd June, 2019, the Appellant is seeking for the following orders:

- a. That the case that had been dismissed/closed for want of prosecution is reinstated.***
- b. That the case is transferred to the High Court at Kitui so that the Appellant can prosecute the case.***
- c. That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Appellant who has deponed that he was married to the Respondent; that the Appeal relates to a Maintenance Cause No. 2 of 2014 which was filed in the Principal Magistrate's Court in Mutomo, Kitui County and that although he filed the Appeal in Machakos High Court, the file was transferred to the High Court in Kitui.

3. According to the Appellant, his then advocate, Dickson R.T. Konya, died and was unable to follow up on the matter; that he later on discovered that the matter had been dismissed for want of prosecution and that this court does not have jurisdiction to handle the matter. The Appellant deponed that the Appeal should be reinstated to enable him get justice and that the Appeal should be transferred to the High Court at Kitui for hearing and disposal. The Application was not opposed by the Respondent.

4. The record shows that the Appellant filed a Memorandum of Appeal on 4th March, 2015 in the High Court in Machakos. The said Appeal was in respect of the Ruling of the Resident Magistrate delivered on 11th March, 2015 in Mutomo Maintenance Cause No. 2 of 2014.

5. Considering that Mutomo Law Court is under the jurisdiction of the High Court in Kitui, the file was transferred to Kitui High Court for hearing in the year 2015. However, the Appeal was never prosecuted. On 26th July, 2017, the Appeal came up for Notice to show cause why it should not be dismissed for want of prosecution. On perusal of the file, the High Court in Kitui transferred the file to this court because "it is a land matter."

6. When the matter came up before me on 25th September, 2017, neither the Appellant nor the Respondent were in court. This court dismissed the matter on the said date for want of prosecution.

7. The Appellant has deponed that there was confusion when this matter was transferred from the High Court in Machakos to the High Court in Kitui; that the Appeal is in respect to a Maintenance cause of action and that this court did not have jurisdiction to dismiss the Appeal.

8. Although this Appeal was filed in the Machakos High Court, the matter was transferred by the Machakos High Court *suo moto* to the Kitui

High Court on 3rd September, 2015. This was because Mutomo Law Court falls within the jurisdiction of Kitui High Court.

9. Although the lower court file is not before me, the perusal of the Memorandum of Appeal shows that the dispute between the Appellant and the Respondent is in respect of the Maintenance of the children of the marriage between the two. Indeed, in one of the Grounds of Appeals, the Appellant has deponed that “*the learned trial Magistrate erred in law and fact by proceeding to adjudge the Appellant to be paying a monthly maintenance of Kshs. 8,000 per child without giving reasons for the same as well as considering the current welfare of the Appellant and what was agreed upon before the Children’s Officer, Athi River.*”

10. Considering that the matter before the lower court in Mutomo was purely a Maintenance cause, and has nothing to do with land or environment, this Appeal should not have been transferred to this court. Indeed, this court did not have the requisite jurisdiction to determine the dispute, or dismiss the Appeal for want of prosecution.

11. In the circumstances, the order of this court of 10th July, 2019 dismissing the Appeal is a nullity for want of jurisdiction. The High Court in Kitui is the proper forum to hear the Notice to show cause why the Appeal should not be dismissed for want of prosecution.

12. For those reasons, I allow the Notice of Motion dated 3rd June, 2019 in the following terms:

a. The order of this court of 25th September, 2017 dismissing the Appeal for want of prosecution is set aside.

b. The Appeal is hereby transferred to the High Court, Kitui, for hearing of the Notice to show cause why the Appeal should not be dismissed for want of prosecution.

c. Each party to pay his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE