



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A. CASE NO. 14 OF 2017

(FORMERLY CIVIL APPEAL NO. 92 OF 2006)

DUNCAN NDWIGA.....1ST APPELLANT

MUSYOKA DUSYA.....2ND APPELLANT

PANWEL GITONGA PAUL MULINGE.....3RD APPELLANT

MICHAEL MUCHIRI.....4TH APPELLANT

VERSUS

TANA & ATHI RIVER DEVELOPMENT AUTHORITY.....1ST RESPONDENT

KENYA ELECTRICITY GENERATING CO. LTD.....2ND RESPONDENT

RULING

1. The 2nd respondent filed a notice of motion dated 22nd August 2017 under Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21) seeking dismissal of the appeal against it for want of prosecution.
2. The said application was based on the grounds that one year had lapsed since the appeal was last mentioned in court; that the Appellants had failed to set down the appeal for hearing; and that there had been inordinate delay in prosecuting the appeal.
3. The said application was supported by the supporting affidavit sworn by Mr Joe Kathungu, the advocate on record for the 2nd Respondent. He reiterated the grounds set out on the face of the motion and stated that it was clear that the Appellants had lost interest in prosecuting the appeal. The court was, therefore urged to dismiss the appeal for want of prosecution.
4. The Appellants did not respond to the said application and neither did they appear at the hearing of the said application. A perusal of the record shows that the firm of Duncan Muyodi & Co Advocates which was previously on record for the Appellants was granted leave on 20th July 2017 to cease acting for them for lack of instructions. The record also shows that on 5th March 2018 the 1st Appellant filed a letter dated 26th February 2018 in which he denied having instructed an advocate to file the appeal on his behalf.
5. The main question for determination is whether or not the 2nd Respondent has made out a case for dismissal of the appeal for want of prosecution. At the outset, it is clear that the 2nd Respondent based its application on the wrong provisions of the law. **Order 17 of the Civil Procedure Rules** deals with prosecution and dismissal **suits** for want of prosecution. The relevant provisions for prosecution and dismissal of **appeals** are to be found in **Order 42 Civil Procedure Rules**. The defect is, however not fatal.
6. **Order 42 Rule 35 of the Civil Procedure Rules** provides as follows;

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

7. The court file indicates that the appeal was admitted on or about 20th June 2013 for hearing before one judge. The record also shows that the record of the Magistrate's court was forwarded to the Deputy Registrar of the High Court at Embu for purposes of this appeal on 12th March 2013.

8. The record further indicates that the matter was mentioned before the Deputy Registrar on 3 different occasions between 2014 and 2015 but the Appellants' counsel informed the court that he was still waiting for instructions from his clients to enable him deal further. The Appellants' counsel eventually filed an application to cease acting for Appellants for lack of instructions on 10th May 2017.

9. On the basis of the material on record, the Appellants have failed to prosecute their appeal for nearly 4 years now. They did not file any affidavit to explain the delay. In fact, the 1st Appellant wrote a letter to the court denying having instructed an advocate to file an appeal on his behalf. So, as things stand now, there is no explanation for the delay. In my view, the 2nd Respondent has made out a case for the dismissal of the appeal for want of prosecution under **Order 42 of the Civil Procedure Rules**.

10. The upshot of the foregoing is that the court finds merit in the 2nd Respondents' notice of motion dated 22nd August 2017. Consequently, the Appellants' appeal is hereby dismissed with costs to the 2nd respondent. For the avoidance of doubt, the entire appeal is hereby dismissed and not just the appeal against the 2nd Respondent. However, costs are awarded to the 2nd Respondent only.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of **MARCH, 2018**.

In the presence of Mr Joe Kathungu for the 2nd Respondent, Ms Njuguna for the 3rd Appellant, (Paul Mulinge) and in the absence of the other parties.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

21.03.18