



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A. CASE NO. 4 OF 2015

(FORMERLY HIGH COURT CIVIL APPEAL NO. 89 OF 2007)

CHOMBA SALIM.....APPELLANT

VERSUS

WAMUNYU LABAN MUCHIRA.....RESPONDENT

RULING

1. By a notice of motion dated and filed on 29th June 2017, brought under the provisions of Order 17 Rule 2(2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21) the Appellant sought the following orders;

a. That service of this application on the Defendant/Respondent in the first instance be dispensed with and the same be heard ex-parte.

b. That this honourable court be pleased to set aside the dismissal order made on 21st June 2017 and that the suit be re-instated and/or revived (sic).

c. That this honourable court be pleased to fix this case for hearing at an early date and/or the suit be fixed for hearing de novo (sic).

d. That this honourable court be pleased to make an order of stay of execution proceedings in this case and also in Kerugoya Senior Resident Magistrate's Court LDT Case No. 9 of 2004 till the final determination of this suit (sic)

2. The said application was seeking the setting aside of the order made on 21st June 2017 dismissing the appeal for want of prosecution. It was also seeking a stay of execution proceedings in Kerugoya SPMCC Land Disputes Tribunal Case No 9 of 2004. The application was based upon the various grounds shown on the face of the motion. It was also supported by the supporting affidavit sworn by the Appellant on 29th June 2017.

3. The gist of the said application was that the delay in prosecuting the appeal was not intentional; that there were no Environment and Land Court judges available to hear the appeal; that all along he was waiting for the court to take steps to set down the appeal for hearing; and that he had a good appeal with chances of success.

4. The Respondent filed a replying affidavit sworn on 27th October 2017 in opposition to the said application. It was contended that since the filing of the appeal in 2007, the Appellant had neither filed a record of appeal nor taken directions on the hearing of the appeal. It was further stated that the appeal had previously been fixed for notice to show cause why it should not be dismissed for want of prosecution in 2015 when the Appellant was given a chance to prosecute the appeal.

5. The Respondent further denied that there were no Environment and Land Court Judges to hear the appeal for the period of delay and contended that the appeal had been rightfully dismissed for want of prosecution. She, therefore, urged the court to dismiss the said application with costs.

6. The court has considered the Appellant's said application, the affidavit in support thereof and the replying affidavit in opposition thereto. The court has also considered the Appellant's further affidavit sworn on 9th February 2018 and the respective submissions of the parties.

7. The main question for consideration is whether or not the Appellant has made out a case for reinstatement of the appeal which was dismissed on 21st June 2017. The court record shows that the memorandum of appeal was filed in 2007. The Appellant does not appear to have taken any steps to set down the appeal for directions or file a record of appeal in order to progress his appeal.

8. The court record shows that at least three (3) notices for dismissal of the appeal for want of prosecution were issued by the court. The first is undated but was scheduled for hearing on 15th October 2013. The second is dated 5th August 2014 and was scheduled for hearing on 19th September 2014. The third notice was scheduled for hearing on 21st April 2015 when the Appellant informed the High Court that he had been sick for some time hence was unable to prosecute his appeal. He requested the court to indulge him since he was ready to prosecute the appeal. The court granted his request and transferred the appeal to the Environment and Land Court. It is note-worthy that the Appellant did not inform the court that he was unable to prosecute his appeal due to unavailability of Environment and Land Court Judges or that he had been waiting for the court to prosecute the appeal on his behalf.

9. The Appellant does not appear to have taken steps towards prosecution of the suit for another two (2) years in consequence of which the court listed the matter for dismissal on 20th April 2017. On the said date, none of the parties attended court. The court, therefore, extended the notice to show cause to 21st June 2017 and directed that the parties be served again.

10. When the matter was listed on 21st June 2017, the Appellant informed the court that he had been sick for about 4 years and that he had all along been waiting for the court to inform him to proceed with the appeal. For reasons recorded on that day, the court was not satisfied with the explanation and proceeded to dismiss the appeal for want of prosecution obviously under Order 42 Rule 35 (2) of the Civil Procedure Rules, 2010.

11. The court has noted that the explanation offered by the Appellant that he was waiting for the court to nudge him to prosecute the appeal is totally inconsistent with what he told the High Court on 21st April 2015 when he urged the court to accommodate him. He was recorded as saying that he was ready to pursue the appeal further. The Appellant cannot, therefore, be heard to claim that all along he was waiting for a signal from the court to enable him prosecute the appeal which has never been prosecuted for more than ten (10) years and which had been threatened with dismissal for want of prosecution on several occasions.

12. The court fully considered the explanation given by the Appellant before dismissal of the appeal for want of prosecution on 21st June 2017. No new grounds, facts or circumstances have arisen to warrant a review or reversal of that order. In my view, the Appellant is simply trying to ask this court to sit an appeal over its own decision. This court has no such appellate jurisdiction. The Appellant, is however, at liberty to pursue an appeal before the Court of Appeal as intimated in his notice of appeal dated 27th June 2017.

13. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 29th June 2017 and the same is hereby dismissed in its entirety with costs to the Respondent.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 31st day of MAY, 2018.

In the presence of Mr Siro holding brief for Mr Andande for the Appellant and Mr Abubakar holding brief for Ms Wangechi Munene for the Respondent.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

31.05.18