



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KAJIADO**

**ELC CASE NO. 951 OF 2017**

**JECINTA PERE.....1<sup>ST</sup> APPELLANT**

**NJENGA MARIBEL.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**LUCAS KIENGWA OKARA**

**T/A KENANGWA ENTERPRISES.....1<sup>ST</sup> RESPONDENT**

**OLE KEJUADO COUNTY COUNCIL.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Respondents' Notice of Motion Application dated the 7<sup>th</sup> May, 2018, brought pursuant to article 159 (2) (b) of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 35 (2) of the Civil Procedure Rules and all the other enabling provisions of the law. They are seeking for the following orders:

1. THAT the Honourable Court be pleased to dismiss the appeal herein for want of prosecution.
2. THAT in the alternative to prayer 1 above, the Honourable Court be pleased to direct the Registrar to list the appeal herein before a judge in chambers for dismissal.
3. THAT the orders of stay of execution of decree given in Milimani CMCC 9710 of 2002 on 31<sup>st</sup> October, 2003 and 24<sup>th</sup> May, 2004 be vacated.
4. THAT the cost of this application be provided for.

The application is based on the grounds, which in summary is that more than fourteen (14) years since the filing of the Memorandum of Appeal the appellants have not taken any steps towards the conclusion of the appeal herein and to date the same has never been set down for directions.

The application is supported by the affidavit of Joseph Mwichigi Kinuthia who is the advocate in conduct of the Appeal on behalf of the Respondents where he deposes that this matter was filed by the 1<sup>st</sup> Respondent as CMCCC No. 9710 of 2002 in the Chief Magistrate's Court Milimani in the first instance. He explains that the lower court determined that the 1<sup>st</sup> Respondent is the rightful proprietor of plot numbers 143 and 144 Ongata Rongai and granted a permanent injunction restraining the Appellants from interfering with the said plots. He avers that the execution of the Decree was stayed by order of the lower court given on 31<sup>st</sup> October, 2003 pending an appeal by the Appellants in the High Court. Further, that on the 19<sup>th</sup> March, 2004, the trial court imposed conditions on its orders given on the 31<sup>st</sup> October, 2003 upon application by the 1<sup>st</sup> Respondent and it is this order which the Appellants appealed against. He contends that the Appellants lodged this Appeal through a Memorandum of Appeal filed on 29<sup>th</sup> March, 2004 and served the Defendants' advocates on 31<sup>st</sup> March, 2004. He states that since filing of the Memorandum of Appeal, the Appellants' have not taken any steps towards its conclusion and to date the same has never been set down for directions. Further, that the Respondents have engaged the Appellants to list the Appeal for directions but to no avail.

The application is opposed by the Appellants whose advocate MOHAMMED MUNIR CHAUDHRI filed a replying affidavit where he deposed that there has been no delay whatsoever in the prosecution of the Appeal herein and the delay if any has been as a consequence of the multiple applications filed. He confirmed that the Appeal herein was filed on the 25th day of July, 2006 and the Record of Appeal served upon the Respondents on the 12th October, 2006. He referred to various letters dated the 10th March, 2009; 17th December, 2009 and 28th October, 2010 respectively from the Deputy Registrar, High Court of Kenya and addressed to the Chief Magistrates Court, Nairobi, where

the Deputy Registrar upon their instigation sought for the Lower Court File in C.M.C.C. No. 9710 of 2002 to be transferred to the High Court, Civil Appeals Registry for purposes of having the Appeal listed for directions and its eventual disposal. He averred that the same was not done. He stated that the Respondents also wrote several letters dated the 15th November, 2010 and 2nd February, 2011 which were received by Chief Magistrates Court, Milimani Commercial Courts on the 16th November, 2010 and 4th February, 2011 requesting for the Court file to be traced and forwarded to the High Court to facilitate the Appeal to be mentioned for directions. He averred that the Respondents proceeded to illegally evict the Appellants tenants and demolish the premises on the suit property using an Order illegally obtained from the Lower Courts. Further, the Appellants filed an Application for enforcement of the Stay Orders vide the Chamber Summons Application dated and filed on 16th November, 2011 and Orders were issued accordingly. Further, that Appellant filed a Notice of Motion Application dated the 18th November, 2011 seeking to cite the Respondents for contempt He reiterates that in opposition to the aforementioned Applications, the Respondents did file an Application seeking to set aside the Orders issued for enforcement as well as Stay vide their Notice of Motion Application dated the 24th November 2011. He further states that Honourable Lady Justice Ang'awa (as she then was) ordered parties to maintain status quo and take directions on the main Appeal but the Lower Court file could not be traced. Further, that the Appellants also filed a Chamber Summons Application dated 20th March, 2012 while the Respondents filed a Notice of Motion dated the 17<sup>th</sup> April, 2012 where each party was seeking to re-construct the missing Lower Court File. He explains that there was a pending ruling to an application which was delivered on the 14th September 2016. Further, that the Appellants being aggrieved with the said Ruling filed a Notice of Appeal to the Court of Appeal and wrote a letter requesting for certified copies of the proceedings and the Ruling. He further avers that on 23rd January, 2017 the Respondents sought to transfer the matter to the Environment & Land Court and filed a Notice of Motion Application dated 19th January, 2017, and parties recorded a consent on 20th April, 2017 to have the matter transferred to the Environment & Land Court. Further, on 30th June 2017, the Respondent filed another application seeking to have the matter transferred to the Environment and Land Court, Kajiado and eventually the consent to transfer the matter to Kajiado was recorded on the 9th November, 2017. He contends that on the 12th April, 2018 the Respondents served them with a mention notice dated the 10th April, 2018 for purposes of admitting the Appeal for hearing.

Parties filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon considering the Notice of Motion dated the 7<sup>th</sup> May, 2018 including the supporting as well as the replying affidavits and submissions filed herein, the following are the issues for determination:

- Whether the Appeal filed herein should be dismissed for want of prosecution.
- Whether the Order of Stay of execution of decree given in Milimani CMCC 9710 of 2002 on 31<sup>st</sup> October, 2003 and 24<sup>th</sup> May, 2004 be vacated.

As to whether the Appeal should be dismissed for want of prosecution. The Respondents' submitted that under Order 42 Rule 35 of the Civil Procedure Rules, an Appeal can be dismissed for want of prosecution where there has been failure to list the Appeal for hearing for three (3) months after directions have been made or, if after one year of service of the Memorandum of Appeal, the Appeal has not been listed for hearing. From a perusal of the Court file, I note that no directions have been given in respect of the Appeal herein, in accordance with Order 42 rule 13 of the Civil Procedure Rules. This in essence means the Appeal has not been admitted as required. In the case of **Jurgen Paul Flach v Jane Akoth Flach [2014] eKLR**, Justice Hellen Omondi declined to dismiss an appeal for want of prosecution and cited in approval the case of **Kirinyaga General Machinery v. Hezekiel Mureithi Ireri** HCC No.98 of 2008 where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., observed 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 second scenario is that contemplated under Order 42 Rule 35 (2). Unlike Rule 35(1) which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under subrule (Rule 35(2), if, within one year after 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.’

In relying on this case, it is my considered view that directions ought to be taken first in accordance with the Civil Procedure Rules, before a party can move the Court to dismiss the Appeal for want of prosecution. In the current circumstances, I am hence unable to dismiss this Appeal until directions are taken.

On whether the stay of execution pending appeal should be vacated or set aside. I note that the orders were granted on 31<sup>st</sup> October, 2003 and 24<sup>th</sup> May, 2004 respectively. I note the Appeal has been pending for too long due to many interlocutory applications filed by the respective parties and it is my view that this contributed to the delay in setting the Appeal down for hearing. The Appellant claimed the Respondents had already evicted the tenants and demolished structures on the suit land, despite the Stay Order, which averments were not controverted. No sufficient reasons have been furnished in court to set aside the orders of stay of execution that had been granted. Further, the Respondent has not demonstrated the prejudice he continues to suffer if the orders for stay of execution granted in the Magistrates' Court subsisted. It is against the foregoing that I will decline to set aside nor vary the said orders.

In the circumstances, I find the Notice of Motion Application dated the 7<sup>th</sup> May, 2018 not merited and disallow it.

Costs will be in the cause.

Since the Appeal has been pending for too long, I direct that the same be set down for directions within the next 60 days from the date hereof.

**Dated signed and delivered in open court at Kajiado this 19<sup>th</sup> day of December, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**