



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC APPEAL NO 2 OF 2018

ESTHER NYAMBURA KAMAU.....APPELLANT/RESPONDENT

VS

CATHERINE WANGARI THIGA.....RESPONDENT/APPLICANT

RULING

1. On the 15/7/15 the Appellant being dissatisfied with the entire decision and ruling of Hon B N Kituyi (SRM) delivered on the 15/5/15 in CMCC No 446 of 2014 Murang'a filed a Memorandum of Appeal which interalia sought to set aside the orders of the said learned Magistrate as well as the costs of the appeal. The ruling delivered by the said learned Magistrate concerned an issue of whether or not the suit was resjudicata on account of a previous suit in CMCC 343 of 2014 involving the parties. The learned Magistrate found that CMCC No 446 of 2014 was not resjudicata because the previous suit between the said parties had been struck out for want of form and therefore was not heard and determined on its merits.

2. On the 16/7/17 the Respondent filed a Notice of Motion under order 42 rule 35(2) of the Civil Procedure Rules and sought the following orders;

- a. That the appeal be dismissed with costs.
- b. That alternatively and without prejudice to (a) above the appeal be struck out with costs for being incompetent
- c. That costs of the application be provided for.

3. The Application is premised on the grounds;

- a. That the Memorandum of Appeal was filed on the 15/6/15 and the Appellant has not bothered to set down the matter for hearing
- b. The Appellant is not interested in prosecuting the appeal.
- c. The delay is contrary to the overriding objectives of the Civil Procedure Act
- d. The appeal is incurably and incontestably incompetent
- e. It is just and mete so order.

4. The application is supported by the supporting affidavit of Mr Mwaniki Warema learned Counsel for the Respondent who deponed interalia that it is two years since the Memorandum of Appeal was filed and no steps to prosecute the same has been taken by the Appellant. Further that the delay is hindering the Respondent from realizing the fruits of the judgment in the lower Court. That the Appellant is guilty of inexcusable and inordinate delay. Finally, that the appeal arose from a dismissal of a preliminary objection which is not appealable as of right.

5. The Respondent opposed the application by filing grounds of opposition on 24/7/18 which are expressed in the following grounds;

- a. The Appellant has diligently followed up with the proceedings from the Court registry but has not been notified that the same are available to enable her file her record of appeal.

- b. That the Appellant is desirous of filing her appeal and is willing to file the record of appeal once the proceedings become available.
- c. That the Respondent will not be prejudiced in any way if the appeal is heard on merits since she is enjoying injunctive orders.
- d. The Appellant has an arguable appeal with high probability of success.

6. The Applicant submitted that under the provisions of Order 42 rule 35(2) of the Civil Procedure Rules no steps have been taken to set the appeal down for hearing and the same is for dismissal. That the Respondent has not filed any evidence to support the ground that no proceedings have been availed to her or that she has diligently sought the proceedings from the Registry.

7. Further that section 75 of the Civil Procedure Act and Order 43 of Civil Procedure Rules provides for the procedure to follow in appealing against orders or decrees of the Court. Order 43 rule 1 (2) provides that appeals from other orders not listed in rule 1 shall lie with the leave of the Court. An appeal against a preliminary objection is not automatic and leave of the Court is mandatory which leave was not sought nor granted. On that ground the appeal is therefore incompetent. She relied on the cases of **Peter Nthenge Vs Samuel Wambua Kamami (2015) EKL**R where the Judge upheld an application where the leave of the Court had not been sought nor granted in an appeal. In the case of **Kenya Commercial Bank Limited Vs Manaseh Esipeya (1999) EKL**R the Court held that ;

“ where a preliminary issue allowing misjoinder, limitation, lack of jurisdiction or resjudicata fails and a suit is permitted, no preliminary decree arises but only an order, the unsuccessful party has a right of appeal with leave of the Court and accordingly the appeal was incompetent for want of leave.”

8. The Respondent submitted that she has not prepared the Record of Appeal because the proceedings are not ready despite her efforts to follow up with the Executive Officer of the Registry on the same. She pleaded with the Court to exercise discretion in her favour to allow the appeal be heard on its merits. She submitted that section 79B of the Civil Procedure Act read together with Order 42 rule 35 provides for the mode and procedure of dismissing appeals for want of prosecution. Order 42 rule 35(1) sets out the conditions to be met as thus; directions must have been issued under order 42 rule 13; three (3) months must have lapsed after the issuing of the directions; the appeal has been set down for hearing within the said three months after issuing of directions.

9. She submitted that directions have not been issued by the Court under section 79B of the Civil Procedure Act as per the mandatory requirements. That the appeal has not been admitted and therefore a dismissal order under order 42 rule 35(1) would be mute.

10. Secondly, she submitted that the second instance an appeal may be dismissed is under Order 42 rule 35(2) which provides that the Registrar shall list the appeal before the judge for dismissal if within one year after the service of the memorandum of appeal, the appeal has not been set down for hearing. That in the instant suit the Registrar has not listed the appeal before the judge for dismissal. She submitted that the applicant's application is therefore premature and the same should be dismissed with costs. She relied on the case of **Karanja Robert & Gloria Bus Company Vs David Kwia Mukula (2018 EKL**R which stated;

“indeed allowing the present application would be shutting out he appellants from accessing the Court when the delay was clearly on the part of the lower Court in forwarding certified copies of the proceedings to this Court.”

Determination

11. I have considered the application and the submissions of the parties and the only matter validly for determination is whether the appeal can be dismissed for want of prosecution.

12. The procedure for filing appeals against any order or judgment of the Court is by way of filing Memorandum of Appeal. To that extent the Appellant has complied.

13. Upon filing the appeal, the internal process of the Court is that the original file of the Court from which the appeal germinates from is transmitted to the Environment and Land Court. Upon receipt of the lower Court file the Environment and Land Court under section 79B of Civil Procedure Act considers the record and the Memorandum of Appeal upon which it determines whether to admit or reject the appeal. This is an internal process relating to case management by the Court for which the parties are not involved. This procedure has not been completed in respect of the present appeal.

14. Going by the matters set out in the preceding paragraph the Appellant cannot be blamed for failing to list her appeal for hearing neither is it available for the Respondent to apply to dismiss the appeal for want of prosecution.

15. In the circumstances I make the following orders;

- a. The Notice of Motion dated the 16/7/17 is dismissed with costs to be paid to the Appellant.

- b. The Deputy Registrar of this Honorable Court is directed to call for the original file of the lower Court and place the same in the record of this appeal for determination by the Court as required under section 79B of the Civil Procedure Act within the next 30 days from the date of this ruling.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANGA THIS 6TH DECEMBER, 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

TM Njoroge HB for Ndegwa for the Appellant.

Ms Githinji HB for Warima Mwaniki for the Respondent.

Irene and Njeri, Court Assistants