



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
E&L APPEAL NO. 5 OF 2014
(formerly Civil Appeal No. 21/2005)

JOHANA CHEPKURUI

KIBIWOTT Alias JOHANA A. CHEPKURUI.....APPELLANT/APPLICANT

VERSUS

MICAH CHEBOI KIBIWOTT.....RESPONDENT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of notice of Motion dated 15th March 2017. The Appellant/Applicant seeks for the following orders:

1. Service be dispensed with in the first instance.
2. The order given and issued on 2.3.2016 in the Eldoret High Court Civil Appeal No. 27 of 2007 between the appellant/applicant and the respondent/respondent be and is hereby set aside forthwith.
3. The status quo provided for in the court order as in the ruling of 2.12.2009 in ELDORET HCC CIVIL APPEAL No. 21 of 2005 between the appellant/applicant and the respondent/respondent be and is hereby maintained.
4. Costs to the defendants/applicants.

The application is supported by the annexed affidavit of JOHANA CHEPKURUI KIBIWOT and the grounds on the face of the application. This matter was brought under certificate of urgency on 16th March 2017 whereby the court certified the same as urgent and ordered the applicant herein to serve the application for inter parte hearing on 10th April 2017.

On 10 April 2017 when the matter came up for hearing, Mr. Choge indicated to the court that Mr. Kiboi Counsel for the respondent was not ready to proceed as he was in Kericho Environment and Land Court handling case No. 92/16 which had been prefixed before this matter. He also sought for more time to get further instructions.

Mr. Cheptarus Counsel for the applicant submitted that he had served the application on the respondent's Advocates who received the same under protest. He urged the court to grant orders of status quo as per the application. The court ordered that the status quo be maintained and scheduled the hearing of application on 29th May 2017.

On 29th May 2017 when the application came up for hearing inter partes, Mr. Cheptarus Counsel for the applicant indicated to the court that he had just been served with a replying affidavit which he sought for leave to respond to. Leave was granted and the matter was fixed for hearing of application on 27th June 2017.

Applicant's Counsel's Submission

The application came up for hearing as scheduled when Mr. Cheptarus Counsel for the applicant argued the Notice of Motion. Mr Kiboi Counsel for the respondent neither appeared nor sent a representative.

Counsel for the applicant urged the court to grant the orders as prayed for in the application. He submitted that there were two appeals in the High court namely 21/05 and 27/07 which were consolidated on 8/4/14. He further submitted that parties had agreed by consent to transfer Miscellaneous Application No. 87/12 to the Environment and Land Court where the current file was subsequently opened.

Counsel also stated that none of the parties was aware of the court order made on 2/3/16 in Civil Appeal No. 27/07 in which the appeal was dismissed for want of prosecution and the file closed. Mr. Cheptarus submitted that it was only recently that the applicant learnt of the order when the respondent went to the ground to interfere with the status quo. Counsel prayed that the order dismissing the appeal be set aside and the appeal be set down for hearing. He further submitted that there would be no prejudice to both parties as they would have an opportunity to be heard.

I have looked at the replying affidavit of the respondent sworn on 10th April 2017 which states that the court exercised its powers judicially on dismissing the suit for want for prosecution pursuant to order 42 rule 35 of the Civil Procedure rules 2010. The respondent also avers that he had filed an application for dismissal of the appeal for want of prosecution but he had not prosecuted it.

The respondent has not stated in the affidavit why he had not prosecuted the application. He just states that it had not been prosecuted as intended.

Issues and determination

The issues for determination are as to whether the applicant is entitled to the orders he is seeking for and whether there has been inordinate delay in setting down the appeal for hearing.

This case has a long history of files being transferred from one court to another and consolidation of suits. It is not in doubt that this was an appeal from the Chief Magistrates Court. It is also not in doubt that two appeals were consolidated and a Misc Application transferred to the Environment and Land Court in respect of this same matter. Finally, it is also not in dispute that the court dismissed this appeal on its own motion for want of prosecution.

I notice that at one point the respondent filed a Misc. Application No. 87/12 for reconstruction of a skeleton file for Eldoret Civil Appeal No. 21/05. This application culminated into a consent order transferring the matter on 8/4/14 for hearing and determination. The appellant states that he was never served with a notice to show cause why the appeal should not be dismissed for want of prosecution. I would give the appellant the benefit of doubt as to the service as the court record does also not show whether the parties were served or not.

On the issue whether there has been inordinate delay in listing the appeal for hearing, I wish to state that the delay can be blamed on the many happenings which I have mentioned above being the transfer, the

consolidation and the missing file prompting the application for a skeleton file. The respondent chose the option of making an application to dismiss the appeal for want of prosecution as provided under order 42 rule 35. The other option was to set down the appeal for hearing after the directions had been taken if he felt that the appellant was not taking any steps.

The respondent took the step to file an application for dismissal for want of prosecution but never prosecuted the application. No reason has been advanced as to why this never happened.

The court exercised its discretion to dismiss the appeal for want of prosecution under the law. The law requires that the Registrar gives notice to the parties and list the matter before the Judge for dismissal. I find that there is no proof that the parties were notified of the dismissal of this appeal.

I therefore make the following orders:

1. That the order dated 2/3/16 in Eldoret HCC. Civil Appeal No 27/07 is set aside.
2. That the status quo provided for in the court order as per the ruling dated 2/9/09 in ELDORET HCC CIVIL APPEAL NO 21/05 between the appellant and the respondent be and is hereby maintained.
3. This appeal should be fixed for hearing within 30 days failure of which it stands dismissed.
4. Costs in the Cause.

Dated and delivered at Eldoret on this 13th day of July, 2017.

M. A. ODENY

JUDGE

Ruling read in open court in the presence of:

Mr. Cheptarus for Appellant/Applicant.

No appearance for Respondent.

Mr. Koech – Court Assistant.