



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC APPEAL NO. 28 OF 2014
(Formerly NYERI HCCA NO. 51 OF 2014)

MICHAEL THUKU KIMANI.....APPELLANT

-VERSUS-

MARY WAMBUI GACHANJA *alias*

MARY WAMBUI MWANGI.....1ST RESPONDENT

PETER KIBOTE MWANGI.....2ND RESPONDENT

JOHN MWANGI MUTHUA.....3RD RESPONDENT

RULING

1. Mary Wambui Gachanja alias Mary Wambui Mwangi (hereinafter referred to as the respondent/applicant), filed the notice of motion dated **28th September, 2016** seeking to dismiss the appeal herein for want of prosecution.
2. The application is premised on the grounds that there has been inordinate delay in prosecution of the appeal; that the delay is prejudicial to her and that its mete and just that the appeal be dismissed with costs to her.
3. The application is supported by the affidavit (supporting) of the respondent/applicant in which the grounds on the face of the application are reiterated.
4. In reply and opposition to the application, the appellant filed the affidavit (replying) he swore on 28th October, 2016 in which besides detailing what he has done in a bid to get the appeal ready for hearing, has deposed that he has filed an application in the lower court seeking review of the judgment which is the subject matter of this appeal.
5. He denies the allegation that he has lost interest in the appeal and contends that unless the appeal is heard on its merits, he stands to suffer irreparable harm.
6. When the application came up for hearing, counsel for the appellant informed the court that the appellant has filed an amended memorandum of appeal.

7. Because directions have not been given in respect of the appeal he submitted that the application of the appeal, is premature and urged the court to admit it instead of dismissing it.

8. The respondent/applicant in addition to the grounds on the face of the application herein, complained that she has not been served with the record of appeal. Pointing out that the appellant has filed an application for review of the judgment which is the subject matter of this appeal before the lower court, the respondent/appellant told the court that she is not ready to proceed with the two proceedings at the same time.

9. In view of the foregoing, the respondent/applicant urged the court to dismiss the appeal.

10. In a rejoinder, counsel for the appellant admitted that he has not served the appeal but explained that he has not done so because the appeal is yet to be admitted.

11. Concerning the delay in getting the appeal admitted and made ready for hearing, he informed the court that the appellant's previous advocate had on three occasions tried to get directions in respect of the appeal in vain.

12. He admitted that there is an application for review pending before the lower court but explained that he would apply for stay of those proceedings pending the hearing and determination of the appeal.

Analysis and determination

13. It common ground or not in dispute, that the appeal herein is yet to be admitted. It is also common ground that there is an application for review of the judgment which is the subject matter of this appeal pending before the lower court.

14. Although counsel for the appellant informed the court that he would apply for stay of the proceedings pending before the lower court, before that application is either withdrawn or stayed as counsel wants to do, the truth of the matter is that there are proceedings pending in another court that are likely to have a bearing on the outcome of this appeal. For instance, one wonders what would be the need of proceeding with the appeal should the lower court either review or set aside the judgment which is the subject matter of the appeal.

15. The fact that there is a pending application for review and an appeal raises a question of law, to wit, whether an appeal and application for review can co-exist?

16. The answer to that question is found in **Order 45 Rule 1** as read with **Rule 2** of the Civil Procedure Rules which provide as follows:

“Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but for which no appeal has been preferred; or

b. ...

And who from the discovery of new and important matter or evidence which, after exercising due diligence was not within his knowledge or could not be produced by him at the time when the decree was made...may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of the appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

17. It is clear from the foregoing provisions of the law that an application for review and an appeal cannot run concurrently except in the circumstances contemplated in **Order 45 Rule 2** (supra).

18. As the pending application for review is not by a person who is not appealing, I find the parallel proceedings herein to be in breach of the aforementioned provisions of the law which do not contemplate a situation that an appeal and an application for review will co-exist. A party has to make an election, whether to go for review or to appeal.

19. Whereas from the explanation offered by counsel for the appellant I am satisfied that the appeal herein is not due for dismissal (the appeal is yet to be admitted) and direction in respect thereof be issued, given the fact that the application for review pending before the lower court has not been withdrawn as confirmed by counsel for the appellant, I dismiss this appeal with costs to the respondent/applicant because it cannot run concurrently with the application for review.

Orders accordingly.

Dated signed and delivered at Nyeri this 27th day of November, 2017.

L N WAITHAKA

JUDGE

Coram

Mr. Peter Mwangi for the appellant and Interested party

Mary Wambui Gathanja/Mwangi – 1st respondent

N/A for 2nd & 3rd respondents

Court assistant - Esther