



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC APPEALS CASE NO. 1 OF 2016**  
**[FORMERLY NYANZA PROVINCIAL APPEALS COMMITTEE**  
**LAND CASE NO.374 OF 1997]**

**JAPHETH OTIENO AKUMU.....APPELLANT**

**VERSUS**

**EZEKIEL ONYANGO AKUMU .....RESPONDENT**

**RULING**

1. **Ezekiel Onyango Akumu**, the Respondent, filed the notice of motion dated 23<sup>rd</sup> May 2016 seeking for the appeal filed by **Japheth Otieno Akumu**, the Appellant, be dismissed for want of prosecution and costs of the entire suit to be borne by the Appellant. The application is based on the four grounds summarized as follows;

- a) That the appellant has not taken any steps to prosecute the appeal for over 12 (twelve) years since filing it.
- b) That the delay has meant that the Respondent cannot enjoy the fruits of the judgment hence causing great anxiety and loss to him.

The application is supported by the Respondent's affidavit sworn on the 23<sup>rd</sup> May 2016 in which he depones to among others, the following;

- a) That the appeal was filed on or about 22<sup>nd</sup> July 2002 in respect of the Provincial Appeal Committee case No.374 of 1997 and the Appellant has not taken any steps to prosecute it.
- b) That the delay has left the respondent with a judgment which he cannot execute.

2. The application is opposed by the Appellant through his replying affidavit sworn on the 5<sup>th</sup> October 2016 in which he depones to the following among others;

- a) That the appeal was not filed in court but before the Provincial Appeal Tribunal on or about 22<sup>nd</sup> July 2002.
- b) That no stay of execution order was issued and that he did not know that the appeal had been transferred to the court before being served with the application subject matter of this ruling.

c) That the judgment issued on the 10<sup>th</sup> December 1998, in Land Case No.374 of 1997 is now stale, and incapable of execution.

d) That the Respondent had moved the Siaya Law court vide the notice of motion dated 17<sup>th</sup> November 2015, seeking for the court's executive officer to execute the transfer documents for land parcel **Siaya/Mulaha/1013** in his favour but the application was dismissed with costs.

e) That this application should be dismissed with costs.

3. That the counsel for the parties appeared before the court on the 23<sup>rd</sup> November 2016, when directions on filing and exchanging written submission were given. The counsel for the Respondent filed their written submissions dated 22<sup>nd</sup> February 2017 while counsel for the Appellant filed theirs dated the 28<sup>th</sup> February 2017.

4. The following are the issues for determination by the court;

a) Whether the Respondent has made a reasonable case for the dismissal of the appeal.

b) What orders to issue

c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence tendered by both parties, written submissions by both counsel and come to the following conclusions;

a) That from the affidavit evidence by both parties and the documents attached therein, including a copy of the Land Disputes Tribunal proceedings in Land Case No.374 of 1997 over land parcel **Siaya/Mulaha/1013**, it is clear that the Respondent had lodged that dispute against the appellant. The dispute was heard on 3<sup>rd</sup> June 1998 and a visit to the suit land made on the 8<sup>th</sup> June 1998 upon which the tribunal rendered its judgment allowing the Respondent's claim. The Tribunal also made the following order;

“the Land Registrar and Surveyor to go to the site, execute the subdivision on parcel **No.1013/Mulaha Siaya**, give claimant Ezekiel Onyango Akumu and objector Japheth Odhiambo Akumu their parcels, issue title deeds respectively following the old demarcation on the ground and also per their father, Mzee Norman Akumu's wish before death in 1983.”

b) That any party not satisfied with the decision of the Land Disputes Tribunal was required to file an appeal with the Provincial Appeals Committee in 30 days in accordance with **Section 8(1) of the Land Disputes Tribunal Act Chapter 303 A of Laws of Kenya**, now repealed. That according to both parties the Appellant filed his appeal on or about 22<sup>nd</sup> July 2002, which was over four years since tribunal award of 8<sup>th</sup> June 1998. The appeal was therefore filed outside the time and there is nothing to indicate that leave to file the appeal out of time was applied for or obtained.

c) That the main basis of the Respondent's application is that the Appellant has stayed for over 12 (twelve) years without taking steps to prosecute the appeal. The court has gone through the Appellant's replying affidavit and found there is nothing to explain the delay. The Appellant only appear to take issue with the Respondent's attempts in moving the Siaya Magistrates Court and this court, and seeks for this application to be dismissed with costs. The court expected the Appellant to at least show his preparedness to take steps to have the documentation in the appeal completed, and the same set down for hearing at the earliest ,now that he has come to know the appeal has been transferred to this court.

d) That upon the repeal of the **Land Disputes Tribunal Act under Section 31 of the Environment and Land Court Act No.19 of 2011**, the Hon the Chief Justice issued directions on

how the matters pending before the Land Disputes Tribunals and Appeals Committees were to be handled. The matters pending before the Appeals Committee were to be forwarded to this court for hearing and determination. The record contains a letter dated 27<sup>th</sup> March 2012, addressed to the court's Deputy Registrar by the Provincial Commissioner, Nyanza Province, forwarding 39 appeal records, and at number 27 is that relating to Appeal case number 374 of 1997 for the parties herein.

e) That once the appeal was forwarded to this court, its processing was to be guided by the rules of procedure of the court. That however, there is no indication as to whether the Appellant made any follow up towards prosecution of his appeal when it was before the Appeals Committee or after it was transferred to this court. That it was only after an

Appellant had filed his appeal documents that the court could give directions under **Section 79B of Civil Procedure Act Chapter 21 of Laws of Kenya.**

f) That the application herein invokes the provisions of **Order 42 Rule 35 (1) of the Civil Procedure Rules** which deals with dismissal of appeals for want of prosecution. That as pointed out above, the Appellant has never taken any steps to prosecute his appeal since filing it on 22<sup>nd</sup> July 2002 before the Appeals Committee, and or after it was transferred to this court in 2012, and given the current reference in 2016. The Respondent's application therefore has merit.

6. That having come to the finding above, the court allows the Respondent's notice of motion dated 23<sup>rd</sup> May 2016 in the following terms;

a) That the Appellant's appeal in respect of Land Disputes Tribunal Case No, 374 of 1997, filed with the Nyanza Provincial Appeals Committee on the 22<sup>nd</sup> July 2002 and transferred to this court under the forwarding letter dated 27<sup>th</sup> March 2012, is hereby dismissed for want of prosecution.

b) That each party bears his own costs in this appeal both before this court and the Appeals Committee.

Order accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF DECEMBER 2017

In presence of;

Appellant                      Absent

Respondent                    Absent

Counsel                        Mr. Onyango for Kiwino for Appellant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**20/12/2017**

20/12/2017

S.M. Kibunja Udge

Oyugi/Joane court assistant

Parties absent

Mr. Onyango for Kowino for Appellant

Order : Ruling dated and delivered in open court in presence of Mr. Onyango for Kowino for the Appellant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**20/12/2017**