IN THE COURT OF APPEAL

AT ELDORET

[CORAM: KARANJA, OKWENGU & SICHALE JJ.A.]

CIVIL APPEAL NO. 58 OF 2018

BETWEEN

PETER KIPKURUI CHEMOIWO.....APPELLANT

VERSUS

RICHARD CHEPSERGON.....RESPONDENT

(Being an Appeal from the Ruling and Orders of the Environment and Land Court at Eldoret (M. Odeny,J.) dated 23rd January, 2018

in

E.L.C. Appeal No. 11 of 2015)

****

JUDGMENT OF THE COURT

This is an appeal against the decision of the Environment and Land Court (**Odeny .J**) dismissing the appellant's appeal for want of prosecution.

Briefly, the appeal emanates from a dispute over the ownership of **Parcel No. Baringo/Kapropita/283** (the suit land). **Richard Chepsergon,** the respondent herein filed suit in the Senior Resident Magistrate's Court (SRM) at Kabarnet and named **Peter Kipkirui Chemoiwo**, the appellant herein as the defendant. In the suit, the respondent alleged that in 1985, he became the absolute proprietor of the suit land pursuant to a transmission from his deceased grandfather; that upon his grandfather's demise in 1985, one **Kibet Chemoiwo** encroached the suit land by moving the boundary of the plot by approximately 37 meters and illegally caused the relevant Registry Index Map to be changed. The respondent lodged a complaint before the Lands Office and the Land Registrar ruled that the amendment of the Registry Index Map was not lawful and ordered that it reverts to its original position and that despite the said amendment, the appellant who is a relative of the said **Kibet Chemoiwo** has continued to occupy the respondent's land.

The appellant's version was, however different. He claimed to have been born on the suit land and subsequently inherited the suit land from his father **Kibet Chemoiwo**. He also alleged that there was an implied trust upon which the respondent was enjoined to hold and/or a constructive trust in favour of his late father's estate.

In a Judgment entered on **27th August, 2012,** the SPM's Court found in favour of the respondent. It stated:

> ***"In conclusion, I find that the plaintiff has proved that he is the lawful proprietor of the land parcel No. Baringo/Kapropita/283. I also find that the defendant's occupation or possession of the same has no legally recognized basis and he is held to be in unlawful occupation. I grant the orders sought by the plaintiff in terms of prayer (a) and (b).***
>
> ***As for the prayer for damages, I find that the defendant was just going by the arrangement his father had with the plaintiff's grandfather and father. It would therefore not be appropriate to punish him with damages***".

Dissatisfied with this judgment, the appellant filed an appeal in the High Court vide a memorandum of appeal dated **15th September, 2012** and subsequently filed an application for stay of execution dated **2nd October 2012** wherein interim orders for the maintenance of the status quo were issued pending *inter partes* hearing.

The interim orders were periodically extended by the court for three years until the matter was transferred to the Land and Environment Court in Eldoret on **30th November 2015**. As there was no action in the matter, the respondent filed an application dated **1st December 2017** seeking to dismiss the appellant's appeal for want of prosecution.

When the application came up for hearing on **23rd January 2018**, **Mr Kahiga,** learned counsel for the then applicant (now respondent) urged the trial court to expunge the appellant's replying affidavit filed on **22nd January, 2018** (and served upon him in the morning of **23rd January, 2018)** for failing to meet the procedural requirements of service under **Order 51 Rule 14(2)** of the **Civil Procedure Rules** and that he be allowed to proceed ex-parte under **Order 51 Rule 14(4**). On the other hand **Mr. Matheri,** learned counsel holding brief for **Mr. Angu** for the respondent then (now appellant) argued that procedural technicalities should not negate the merits of the case.

In an *ex-tempore* ruling, the court expunged the appellant's replyingaffidavit for offending the rules of procedure. The Court stated:

> ***"This matter was called out in the morning and was placed aside for 11.a.m. to proceed. Counsel did not state that they would want the matter to be put at 2.30 p.m. In the morning counsel had wanted directions to be taken in respect to the main appeal. There is a replying affidavit which was filed yesterday and served on the counsel for the applicant today morning. The said replying affidavit is hereby expunged from the court record as it offends the rules of procedure.***
>
> ***Matter to proceed exparte this is an old matter which was concluded in 2012 and till now no steps have been taken to hear the Appeal".***

Mr. Kahiga proceeded to urge the motion for the dismissal of the appeal for want of prosecution. Thereafter the court delivered its ruling. It stated;

> ***"This application is not controverted as the replying affidavit was expunged from the court record. This case was concluded in 2012 and up to now the Appellant has not taken steps to fix the Appeal for hearing. The Appellant has been enjoying orders of status quo to the detriment of the Respondent. An application for stay was filed by the Appellant but the same has never been prosecuted. Litigation must come to an end. The successful litigant must be allowed to enjoy the fruits for the judgment. The Respondent went to sleep when he got the orders of status quo. The court has inherent jurisdiction to deal with such application to dismiss appeals for want of prosecution. It is also guided by article 59 (sic) of the Constitution. This Article applies both ways to the applicant and the respondent"***

It is this ruling that has precipitated the present appeal. The appellant filed 9 grounds of appeal in a memorandum of appeal dated **2nd May 2018** faulting the learned Judge for ***"... becoming an activist of the system ...***; ***failing to ascertain whether the appeal had been admitted and orders issued for hearing; failing to note that the duty to prepare an appeal vests in the Deputy Registrar under Order 42 of the Civil Procedure Rules and not the appellant; ordering the matter to proceed ex-parte in the absence of counsel for the appellant for an application whose date was taken without invitation to the appellant; failing to note that failure to admit the appeal for hearing amounts to unfair administrative hearing contrary to Article 47 of the Constitution; striking out the appellant's affidavit which was paid for on the 19th January 2018, 4 days before the hearing day; holding that the appellant had not prosecuted his application dated 2nd October 2012 when the appellant filed his submissions on 22nd April 2014 and could not be expected to write a ruling on behalf of the court; failing to appreciate the gravity of the land matter and dismissing the appeal on a technicality contrary to Article 159 of the Constitution; striking out the appeal despite the fact that the appellant had compiled a record of appeal"*** .

When the matter came up for hearing before us on **18th November 2020,** learned Counsel **Mr. Angu** appeared for the appellant and briefly highlighted the appellant's written submissions dated **6th November 2020**. It was submitted that the delay in prosecuting the appeal was occasioned by the delay in not admitting the appeal for hearing on time by the Court and the non-issuance of directions under **Section 79 (b)** of the **Civil Procedure Act**. Counsel explained that the appellant had indeed made efforts to confirm whether the appeal had been admitted for hearing and referred us to their letters to the Deputy Registrar dated **2nd December 2016** and **7th December 2017** which were both copied to the respondent. As for the alleged failure to abide by procedural timelines in filing and serving the replying affidavit, counsel explained that the same had been paid for on **19th January 2018** but the file could not be traced in the registry. **Mr. Angu** further faulted the learned Judge for acting unfairly by refusing to adjourn the matter to 2.00 p.m (on **23rd January, 2018**) and instead ordered the matter to proceed ex-parte in his absence whilst counsel holding his brief had explained that he would be available in the afternoon. Citing the case of **Esanji and Another vs. Solank (1968) EA** counsel submitted that the administration of justice requires that the substance of all disputes should be investigated and decided on their merit(s) and that error(s) should not necessarily deter a litigant from the pursuit of his right. We were urged to reconsider the matter and reinstate the appeal.

Learned counsel **Mr. Mwangi** who appeared for the respondent relied on the respondent's written submissions and list of authorities dated **9th November 2020**. Citing the case of **Alfred Mutuku Muindi V Rift Valley Railways (Limited) [2015] eKLR**, counsel contended that the learned Judge exercised her discretion judiciously in dismissing the suit for want of prosecution and that this Court has no basis to interfere with that decision. In his view, the appellant was indolent as the Memorandum of appeal was filed on **15th September 2012,** the record of appeal filed on **5th July 2013** and that the above notwithstanding, the appellant failed to set down the appeal for hearing. In addition, it was submitted that the issue of whether or not the appeal was admitted was not an issue before the trial court. The fact of the matter was that since **30th November 2015** when the High Court made an order to transfer the matter to the Environment and Land Court, the appellant who was enjoying interim orders, had not taken any steps to prosecute the appeal until the respondent filed the application to dismiss the appeal on **1st December 2017.** Urging us to dismiss the appeal, counsel emphasized that judgment in the lower court was entered on **27th August, 2012** but the respondent had been denied possession of the suit land on the basis of stay orders pending appeal and consequently the delay in prosecuting the appeal was inexcusable and remained unexplained.

We have considered the record, the grounds of appeal, the rival submissions, the authorities cited by the parties as well as the law. The

central issue for our consideration is whether the trial court exercised its discretion in a judicious manner in dismissing the appellant's suit for want of prosecution. This Court can only interfere with the trial court's discretion if the appellant demonstrates that the court misdirected itself in some matter and as a result has arrived at a wrong decision, or it is manifest that the judge was clearly wrong as a result of which an injustice occurred.(**Mbogo & Another v Shah [1968] EA 96**) In **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** this Court stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

The respondent filed the application for dismissal of the suit under **Order42 Rule 35 (1)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. S.35 (1) of the CPR provides:

> "35 **(1)**
>
> ***Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

In analyzing the matter, the learned Judge correctly appreciated the principles in dismissing an appeal for want of prosecution as espoused in various cases such as **in Ivita –v- Kyumba [1984] KLR 441;** that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay**.** In view of this the learned Judge concluded that the appellant had not taken any steps to prosecute his appeal since the matter was concluded before the lower court in the year 2012. The learned Judge further held that that the appellant had also filed an application for stay of execution which was never prosecuted yet the appellant enjoyed status quo orders to the detriment of the respondent who was unable to enjoy the fruits of his judgment allowing him exclusive possession of the land.

From our own assessment of the matter, the learned Judge did not err. The appellant filed his memorandum of appeal on **15th September, 2012**, filed an application for stay of execution on **2nd October, 2012,** obtained interim orders maintaining status quo on **3rd October, 2012** pending hearing and determination of the application and filed the record of appeal on **5th July, 2013**. Thereafter, the appellant made no effort to prosecute his appeal and was only roused from slumber when the respondent filed his application to dismiss the appeal for want for prosecution.

The appellant's explanation before us as to why he did not file his replying affidavit within the set time limits was not put forward before the trial court and it was within the court's mandate to expunge the same from the record and proceed with the matter ex-parte. Furthermore, the record shows that on the day of the hearing the appellant's advocate sent another counsel to hold his brief and to request the court to issue instructions on the hearing of the appeal instead of the respondent's application. The record clearly shows that said advocate did not request for a further time allocation at 2p.m as alleged by the appellant.

In the end, we find that there is nothing on record to show that the appellant offered any cogent explanation for the delay in prosecuting his appeal. In our view, the respondent who has been denied the fruits of his judgment for so many years is bound to suffer more prejudice than the appellant in the circumstances. The ends of justice will not be served in keeping the appeal alive when the appellant has not been interested in taking any action since filing his record of appeal on **5th July, 2013** until he was prompted by the respondent's application.

We also consider it in bad taste for the appellant's counsel to have referred to the trial judge as an "***activist of the system***". The learned Judge considered the application, its merits and demerits and came to the conclusion, rightly so in our view, that the appellant had failed and/or neglected to prosecute his appeal. Such provocative language on the part of counsel is unacceptable and shall not be tolerated.

Be that as it may, the upshot is that given our analysis above, we find no sufficient basis to justify our interference with the discretion of the trial court in dismissing the appellant's appeal for want of prosecution. This appeal is therefore dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 19th day of February, 2021.

W. KARANJA

…….……..

JUDGE OF APPEAL

HANNAH OKWENGU

…….……..

JUDGE OF APPEAL

F. SICHALE

…….……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR