Digoi v Seurei (Environment and Land Appeal E001 of 2024) [2024] KEELC 6982 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6982 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E001 OF 2024

EO OBAGA, J

OCTOBER 24, 2024

BETWEEN

ANDREW DIGOI .... APPELLANT

AND

AUGUSTINE KIMELI SEUREI .... RESPONDENT

RULING

1. By a Notice of Motion dated 3rd July, 2024 and filed under Certificate of Urgency, the Applicant sought the following orders:-
   - i. Spent
   - ii. The Memorandum of Appeal dated 01/01/2024 be struck out.
   - iii. The entire appeal be dismissed for want of prosecution and/or failure to comply with court orders
   - iv. The costs of this Application be borne by the Appellant/respondent.
2. The application is premised on six grounds thereon and on the Applicant's Supporting Affidavit sworn on even date. It is his contention that the trial court judgment was delivered in the matter on 24/04/2023 in his favor. Aggrieved by the said judgment, the appellant lodged an appeal vide a memorandum of appeal dated 01.01.2024.
3. However, despite filing his memorandum of appeal on 01/01/2024; the appellant has neither filed nor served the record of appeal and is therefore not keen on prosecuting the appeal despite the typed proceedings being ready for over two months.
4. It is his claim that the appellant is using the appeal as a delay tactic to deprive him from enjoying the fruits his judgment especially since there are orders for stay of execution in place enabling him

to continue occupying the suit property. He thus urged the court to dismiss the appeal for want of prosecution with costs.

5. The matter came up for hearing of the application on 18/9/2024, on the said date, only counsel for the applicant was present. Despite being served with hearing notice, the application and the other necessary documents and an affidavit of service duly filed to that effect, the appellant's counsel failed to attend court.

6. The applicant's counsel relied on the grounds outlined in the application and the supporting affidavit and reiterated that the main ground was the undue delay occasioned in prosecuting the appeal despite the proceedings being ready. It was his submission that the acts of the appellant amount to a delaying tactic aimed at preventing him from enjoying the fruits of his judgment.

7. Despite being served and given an opportunity to respond to the application and the allegation made thereunder; the appellant did not file any response. The application is thus not challenged and the allegations made thereunder uncontroverted. Be that as it may, I must restate the duty of a court to determine the application on merit even though the same has not been challenged. In Gichinga Kibutha vs Caroline Nduku (2018) eKLR, the Court held that: -

> " It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

8. This court is of the considered view that the sole issue arising for determination is whether the Application is merited to warrant the striking out and/or dismissal of the appellant's appeal.

9. It is the applicant's contention that the appeal is being used as a delay tactic to prevent him from enjoying the fruits of his judgment; that the appellant has not taken any steps to file the record pf appeal and have the appeal determined despite the typed proceedings being ready for over two months. He thus maintains that the memorandum of appeal should be struck out for want of prosecution.

10. The respondent/appellant did not file any response to the said allegations and/or give an explanation for the delay caused in filing the record of appeal despite being duly served with the said application.

11. In determining an application of this nature, this court has a duty to weigh the prejudice likely to be caused to the appellant who has a right to an appeal against the prejudice caused to the respondent who has an equal right to enjoy the fruits of his judgment in the interest of justice. This court will consider all the facts of the case and ensure fairness to both parties.

12. The question that therefore follows is whether the delay of over 7 months after the filing of the memorandum of appeal on the part of the appellant is inordinate to warrant the striking out if the appeal.

13. It is common ground that there is no prescribed timelines and/or limit on the filing of a Record of Appeal, particularly where no directions on the filing of the same have been issued by the court. Section 79G only provides the timelines for the filing of a Memorandum of Appeal.

14. I have perused the court record and I have noted that no order has been issued by this court on the timelines of filing the Record of Appeal. I must however point out that the failure to give directions on the timelines within which a record of appeal must be filed does not give the appellant the liberty to abuse the same; there is a legitimate expectation that a record of appeal should be filed within a reasonable time. Certainly, a 7 – 9 months' delay in filing a record of appeal especially where typed proceedings of the trial court are ready, amounts to an inordinate delay.

15. The appellant did not give any sufficient cause, basis or an accurate and reasonable demonstration for the reason of delay in prosecuting the appeal despite the certified typed proceedings being ready for purposes of filing a record of appeal.

16. The applicant has also urged the court to dismiss the memorandum of appeal for want of prosecution. Order 42 provides the guidelines on the conduct of appeal and the requisite steps that ought to be taken and the contemplated directions. Order 42 Rule 35 (2) of the Civil Procedure Rules stipulates as follows:

> " If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal"

17. Further, Order 42 Rule 13 of the Civil Procedure Rules places the onus on the appellant of ensuring that the appeal is listed before the judge for directions. However, out of practice; the cause listing of a matter before the judge for directions can only be done after the filing of a Record of Appeal in accordance with the provisions of Rule 13(4) of the Rules.

18. The judgment of the trial court was issued on the 24/4/2023, the memorandum of appeal was filed on 1/1/2024 which is 9 months after delivery of the judgment. The instant application was filed 6 months after filing the memorandum of appeal and at the time no record of appeal had been filed. I must state that at the time of writing this ruling, 9 months after the filing of the memorandum of appeal, no record of appeal has been filed. 12 months have not lapsed since the filing of the memorandum of appeal.

19. The bottom line however, is that directions must have been given before an appeal can be dismissed for want of prosecution. The Applicant has not pointed out whether or not directions had already been issued in the matter.

20. It is well settled in law that striking out pleadings is a draconian measure that courts should employ very cautiously and sparingly and only in the clearest of cases. Article 50(1) of *the Constitution* guarantees every person the right to have their dispute resolved in a fair hearing.

21. Investment Limited vs G4s Security Services Limited (2015) eKLR where court held :-

> " This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of *the Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of *the Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.

22. In view of the foregoing, it is the finding of this court that the applicant has not made out a proper case to warrant the striking out and/or dismissal of the memorandum of appeal.

CONCLUSION

23. In the upshot, I accordingly find that the Application dated 3rd July, 2024 is not merited and the same is hereby dismissed with no orders as to costs.

24. Further, the appellant is hereby directed to file his Record of Appeal within 14 days from the date of this Ruling which shall be served upon Mukabane & Kagunza Advocates forthwith by the court. In default thereof, the memorandum of appeal shall be deemed struck out.

It is so ordered.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 24TH DAY OF OCTOBER, 2024.

E. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

M/s Matoke for M/s Koskei for Respondent/Applicant.

Court Assistant – Laban

E. OBAGA

JUDGE

24TH OCTOBER, 2024