



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Njagi Gachura (Deceased) (Civil Appeal  
9 of 2002) [2024] KEHC 9294 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9294 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 9 OF 2002**

**LM NJUGUNA, J**

**JULY 30, 2024**

**IN THE MATTER OF THE ESTATE OF NJAGI GACHURA  
(DECEASED)**

**BETWEEN**

**MITHAMO NJAGI ..... 1<sup>ST</sup> APPLICANT  
MARY MUTHONI NJAGI ..... 2<sup>ND</sup> APPLICANT  
ALICE GICHUGU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PETER GITARI KAMAU ..... 1<sup>ST</sup> RESPONDENT  
JUSTUS GITARI MUCHIRA J ..... 2<sup>ND</sup> RESPONDENT  
DANIEL MARUI KABIRU ..... 3<sup>RD</sup> RESPONDENT  
MBURIA NGARI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**JOHNSON NYAGA MAINA ..... RESPONDENT  
FESTUS NDICHU PHILIP ..... RESPONDENT  
AGNES WAMBUI NDICU ..... RESPONDENT  
ELENECO MUCHIRA WAWIRA ..... RESPONDENT  
EDWARD GITARI GACHAU ..... RESPONDENT  
JANE WANGARI MAGANJO ..... RESPONDENT**



## RULING

1. The applicants have filed a notice of motion application dated 25<sup>th</sup> September 2023 seeking the following orders:
  1. That the court should dismiss the appeal for want of prosecution;
  2. That a court order do issue for the cancellation of all title deeds issued to third parties and who are not beneficiaries to the estate;
  3. That there be an order of eviction against the third parties who are not beneficiaries of the estate;
  4. That the title deed be issued to the beneficiaries as per the grant issued in Kerugoya Succession cause no. 139 of 1999; and
  5. That the applicant be awarded costs of the suit.
2. The applicants deposed that a grant was issued in the estate of the deceased and it was confirmed on 13<sup>th</sup> March 2002. That the respondents appealed against the findings of the court during confirmation but the appeal was never prosecuted. That the court issued a restraining order against the respondents who, regardless, proceeded to register the land illegally and they obtained title deed. That third parties have taken possession of the land leaving the beneficiaries destitute. That the administrator/ 1<sup>st</sup> applicant never signed any documents enabling registration of the title deed. They also stated that their efforts to obtain searches for the properties have not borne any fruit.
3. The 4<sup>th</sup> appellant/respondent filed a replying affidavit with the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants/respondents and he deposed that the application lacks merit since there was a consent that the appeal be stayed pending hearing of Embu HCCC 113 of 2005 which was transferred to High Court at Kerugoya and Nyeri and is currently Kerugoya ELC case No.18 of 2018. That the parties are the same in the ELC matter and that it is in the interest of justice that the ELC suit be finalized before the appeal herein can be heard.
4. The 4<sup>th</sup> respondent also filed a replying affidavit with the authority of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, stating that the applicant sought similar orders through Kerugoya ELC case No.540 of 2013 and he urged the court to dismiss the application.
5. The court directed the parties to file written submissions and they complied save for the applicants.
6. The appellants submitted that the application does not satisfy the requirements for dismissal of the appeal since directions were not given after filing of the record of appeal. They relied on Order 42 Rule 35 of the Civil Procedure Rules and the cases of Alfred Mutua Ndutu v Peter Musau Wambua (2019) eKLR, George Gatere Kibata v George Kuria Mwaura & another [2017] eKLR and Kirinyaga General Machinery v Hezekiel Muriithi Ileri (2007) eKLR in support of their argument. They stated that the subject matter and parties are the same in this case and in Kerugoya ELC case no. 18 of 2018 (formerly Embu HCCC 113 of 2005).
7. It was their submission that the applicants will not suffer any injustice if the orders are denied but the appellants will suffer greatly if the orders are granted. As to whether the titles should be cancelled, it was their submission that the application has not complied with the rules of evidence as required under sections 107, 108 and 109 of the Evidence Act. That the applicants have made allegations but they have



not produced any proof, including indicating the impugned properties or copies of the titles. They urged the court not to order cancellation of the titles since that is the substance of the appeal which has not been heard.

8. The respondents submitted that the applicants are seeking dismissal of the appeal and substantive orders at the same time. That they have also failed to inform the court that they have sought similar orders through Kerugoya ELC case no. 540 of 2023 against the respondents. They relied on the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR and urged that the court should not dismiss an appeal before directions are given.
9. The issue for determination herein is whether the orders sought should be granted.
10. The applicant has sought several orders as enlisted hereinabove. The first one is dismissal of the pending appeal. It is the appellants' argument that the court has not given directions in the appeal thus the same cannot be dismissed if it was never admitted in the first place. They relied on the cases of *Alfred Mutua Ndutu v Peter Musau Wambua* (2019) eKLR, *George Gatere Kibata v George Kuria Mwaura & another* [2017] eKLR, *Njai Stephen v Christine Khatiala Andika* [2019] eKLR and *Kirinyaga General Machinery v Hezekiel Muriithi Ireri* (2007) eKLR where the general sentiment of the courts was that an appeal could not be dismissed if directions had not been given.
11. I have perused the court record in this matter from the beginning and I find that on 03<sup>rd</sup> February 2003, the appeal was admitted by Hon. Justice H. Okwengu. It was followed by a chamber summons application 13<sup>th</sup> May 2004 which was set down for hearing on 18<sup>th</sup> October 2004. On the said hearing date, Hon. Justice Lenaola (as he then was) confirmed the appeal for hearing. On 19<sup>th</sup> January 2005, the appellants' advocate, Mr. Magee sought leave from the court to file a supplementary record of appeal since the record was incomplete. Hon. Justice Lenaola granted him leave and on 02<sup>nd</sup> February 2005, he ordered that the appeal be heard on 13<sup>th</sup> April 2005. On the said date, the court adjourned the matter to 07<sup>th</sup> June 2005 when the appellants' advocate informed the court that:

“we discussed the matter within the family and agreed that the appeal be allowed but the land no longer exists”

The respondent stated:

“I agree.”
12. The court ordered that the appeal be mentioned on 05<sup>th</sup> December 2005 to enable the parties file proceedings for recovery of the land. The interested parties moved the court through an application dated 19<sup>th</sup> July 2011 seeking to be enjoined to the proceedings and in the same application, they sought restraining orders over parcel numbers Kabare/Kiritine/1718, 1717, 1716, 1715 and 1719 pending determination of the appeal. Hon. Justice H.I. Ong'udi recorded a consent order on 25<sup>th</sup> March 2012 in which the prayers sought were granted. That is the last activity in this matter until the application herein was filed.
13. From the foregoing chronology of events, the appeal was admitted and even set down for hearing. Thus, the appellants' advocate is not being truthful in his allegation that the court did not give directions in the appeal. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.



14. After the parties told the court that they had agreed that the appeal be allowed although the properties were not in existence, the court ordered thus:

“Appeal S.O. for mention on 05<sup>th</sup> December 2005 to enable the parties file proceedings for recovery of the land. Proceedings to be supplied to parties on payment”

15. The matter was stood over in order to allow the parties to file recovery proceedings of the properties. There was no consent order entered on that day. In this case, the appeal would have been allowed but without the suit properties being in existence, the court refrained itself from adopting the consent as the order of the court and instead scheduled the matter for mention at a later date. As it were, the parties did not attend court on 05<sup>th</sup> December 2005, neither did they move the court on the appeal at any other time until now.

16. That is to say that the appeal was not conclusively determined. It was the appellants’ obligation to move the court once the properties were located, for any further orders as would have been necessary to expedite the appeal to its logical conclusion. It has been about 12 years since the appeal was last in court and there has been no effort on the part of the appellants to conclude the appeal. In fact, it is still not known whether the properties were recovered or not.

17. From the appellants’ conduct in the proceedings since filing of the appeal, they are not keen on concluding the same by any means. Even in this application, they have offered this court half-truths regarding its own record. It is unfortunate that the appellants and the respondents have also jointly deposed and submitted that the issues herein are similar to those raised by the applicants in Kerugoya ELC case no. 18 of 2018, whose record I have perused and it shows that it was dismissed on 08<sup>th</sup> March 2023 for want of prosecution. In the eyes of the law, the appeal herein is still active more than 20 years after it was filed and the appellants have not provided a sufficient explanation for the delay in prosecuting the same.

18. The right of the appellants to be heard in the appeal should be balanced against the rights of the applicants to their judgment by the trial court. In my view, the appellants are unconscionably denying the applicants their rights to enjoy the fruits of their judgment by failing to have the appeal prosecuted to its logical conclusion. That being said, parties must not be left to litigate forever; litigation must come to an end at some point, hopefully sooner rather than later. The court in the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2007) eKLR stated thus regarding the principle of finality:

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.”

19. In fact, failure by the appellants, or the respondents for that matter, to move the court for conclusion of the appeal or to obtain final orders after all this time, amounts to an abuse of the court process. In the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) e KLR 229, the Court of Appeal stated as follows;

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.



- 20. In my view, the appeal is ripe for dismissal. I also note that through the application herein, the applicants seek orders for cancellation of titles, restoration of the titles to the beneficiaries and eviction of the third parties (purchasers). Once the appeal is dismissed, these orders cannot be granted through this application since the application stems from the said appeal. In any event the orders can be sought for before another forum since the applicants succeeded at the trial court.
- 21. Prayer 1 of the application is hereby allowed as prayed. Each party to bear its own costs of the appeal.
- 22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the 1st Applicant/Respondent  
 ..... for the 2nd Applicant/Interested Party  
 ..... for the 3rd Applicant/Interested Party  
 .....for the 1st Appellant/Respondent  
 .....for the 2nd Appellant/Respondent  
 .....for the 3rd Appellant/Respondent  
 .....for the 4th Appellant/Respondent  
 and  
 ..... for the 1st Respondent  
 ..... for the 2nd Respondent  
 ..... for the 3rd Respondent  
 .....for the 4th Respondent  
 ..... for the 5th Respondent  
 ..... for the 6th Respondent

