



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and procedure*
3. *Subject of Subordinate Court Case*

Land

- 3.1 *LR Gatari/Nembure/526 4 acres*
- 3.2 *Original defendant, Njue Mweambiri (now deceased) had two wives*
 - a) *Njoka Wa Njathika (children 2 sons, 3 daughters*
 - b) *Joyce Ruguru*
(Children 4 sons)
- 3.3 *Original defendant transfers land to 2nd wife only.*
 - 3.4 *1st wife deceased.*
 - 3.5 *3 children of 1st wife sue original defendant,*
their father for share of land
12th January 1996.
- 3.6 *Original defendant raises objection that court has no jurisdiction to hear a suit on trust.*
- 3.7 *trial hearing 28th July 2000 court adjourns to allow file PMCC 202/94 to be brought to court on 11th August 2000.*
- 3.8 *On 11th August 2000 Preliminary Objection raised – defendant deceased –on jurisdiction to hear trust.*
- 3.9 *Land Disputes Tribunal only have powers.*
 - 3.10 *Ruling by Principal Magistrate.*

The objections upheld. Dismissed plaintiff's suit (8th September

2000).

3.11 *Appeal to High Court 14th September 2000*

3.12 *Application dated 8th April 2002 and filed
23rd April 2002 to dismiss appeal for want
of prosecution.*

3.13 *Application granted (Visram J) but set aside
10th July 2007
(Visram J)*

3.14. *21st July 2008 hearing adjourned Kubo J*

3.15 *No action taken by parties.*

3.16 *application 30th January 2012 to dismiss appeal
Suit for want of prosecution.*

4. *Application 30th January 2012*

Hon. Magistrate erred in law and fact

a) *Order 42 r 13(1) Civil Procedure
no action taken by appellant.*

Suit/appeal be dismissed.

b) *Advocates for appellant served absent.*

c) *Pryaed application be allowed.*

5. *Held:*

Upon perusal of file

i) *Land matter*

ii) *Subdivision of land during pendency
of case.*

iii) *Allegation of fraud.*

iv) *Application delivered.*

Appeal suit be set down for hearing.

6. Case Law:

7. Advocates :

- i) P K Njoroge instructed by M/s P K Njoroge & Co Advocates for appellant
- ii) L Muguso instructed by for M/s Muguso & Co Advocates for respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 465 OF 2000

KARIUKI MUCHIRI

NTHIGA MUCHIRI

FELIS NJURA NJUE APPELLANTS/ ORIGINAL
PLAINTIFFS

VERSUS

JOSEPH NJAGI NJUE

SIMON PETER NJUKI MUCHIRI

JAMES RUGURU NJERU

REGISTRAR OF LANDS EMBU
RESPONDENTS/ ORIGINAL DEFENDANTS

*(Being an appeal from the Ruling and Order of G C Mutembei Esq, Senior Principal magistrate, in
CMCC 9 of 1996 delivered on 8th September 2000 in Embu)*

R U L I N G

Application to dismiss appeal for

Want of prosecution

Dated 30th January 2012

I. INTRODUCTION

1. The applicant herein is Mary Ruguru Njeru, the 4th respondent original 4th defendant. She brings this application dated the 30th January 2012, seeking orders that the appeal before this court be dismissed for want of prosecution.
2. The grounds being that the appeal had been filed on the 14th September 2000 against a ruling of the trial magistrate issued on 8th September 2000 that dismissed a subordinate court case against her and others.
3. That whereas the appeal came for hearing on 21st July 2008 but was adjourned, no action had been taken by the appellant to set down the appeal for hearing. She prayed that this court do dismiss the appeal.
4. The respondent/appellant was served but failed to attend court. Should this appeal be dismissed?

II BACKGROUND

5. The subject of the subordinate court covers land, being LR Gatari/Nembure/526 consisting of 4 acres. This land was owned by one Njue Mwambiri (now deceased.) he is alleged to have had two wives.
6. In his lifetime, it is alleged that the said Njue Mweambiri transferred land to his 2nd wife. By now his 1st wife was deceased. The children of the 1st wife sued Njue Mweambiri their father for a share of the land on 12th January 1996. In the defence Njue Mweambiri (the original defendant) raised defence that the issue raised was one of trust. That the court had no jurisdiction to hear the said claim.
7. A trial commenced with one witness on 28th July 2000. The court adjourned to bring up file PMCC 202/94 for further hearing on 11th August 2000. A Preliminary Objection was raised that Njue Mweambiri was now deceased. There was therefore no jurisdiction to hear the “trust” related cases by the court.
8. The only person who had jurisdiction to do so was the Lands Disputes Tribunal.
9. The trial magistrate upheld the objection and dismissed the entire suit on 8th September 2000. The plaintiffs filed appeal on 14th September 2000.
10. No action was taken thereafter. The applicant filed application dated 8th April 2002 and filed on 23rd April 2002 to dismiss this appeal suit for want of prosecution. Whereas the application was granted by Visram J, it was set aside upon application on 10th July 2007 by Visram J.
11. Directions were taken on 7th December 2007 (Waweru J) and hearing set for 21st July 2008 (Kubo J). The appeal hearing was adjourned before it was finalized. There was no action taken by the parties.
12. The applicant/4th respondent filed the present application dated 30th January 2012 seeking to dismiss the appeal for want of prosecution.

III APPLICATION 30TH JANUARY 2012

13. The application was brought under Order 42 r 13 (1) Civil Procedure Rules. That no action had been taken by the appellants to have this appeal heard. The appeal, she prayed be dismissed.
14. The advocates for the appellant were served but absent. The application was heard ex parte under Order 12 Civil Procedure Rules.
15. The grounds of the application being that the appellant has not been diligent to have the appeal heard and finalized.

IV FINDINGS

16. Upon perusal of the subordinate court file and the appeal file, this court upon noting that the issue herein concerns land, and upon noting that the subordinate court file had issues with missing court files, fraud, the sub-division of land during the pendency of the suit in the subordinate court, all these matters bring issues to be deliberated, heard and or agitated between the parties, this court is of the view that this is not a fit case to be dismissed for want of prosecution.
17. The court is aware of Order 42 r 13(1) Civil Procedure Rules where a party has taken no action in an appeal after directions have been given within 3 months, the appeal upon application may either be set down for hearing or alternatively be applied to be dismissed for lack of prosecution.

18. Recognizing that delicate issue of land, the courts not easily having available dates to hear matters, the deputy registrar in the appeal section not effectively able to process files to court, this court is of the view that under Order 42 r 13(1) Civil Procedure rules the applicant should set this appeal for hearing.

19. The application is accordingly rejected and dismissed. The respondent/applicant being absent, there would be no orders as to costs.

DATED THIS 29TH DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

iii) *P K Njoroge instructed by M/s P K Njoroge & Co Advocates for appellant*

iv) *L Muguso instructed by for M/s Muguso & Co Advocates for*

respondent