



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 515 of 2003**

**MUYA MARY MWANGI.....APPELLANT**  
**VERSUS**  
**MARY WANGARE JANE .....RESPONDENT**

**RULING**

1. The application before court is the Chamber Summons dated 13/10/2009, brought by the Respondent under Section 3A of the Civil Procedure Act and Order XLI Rule 31 of the Civil Procedure Rules. The Applicant prays that the Appellant's appeal be dismissed for want of prosecution with costs to the Respondent. The application is premised on grounds that:—

(i) *Since 29<sup>th</sup> November, 2005 when Visram J set aside the previous dismissal order dated 1<sup>st</sup> July 2005 and directed that the appeal forthwith be set down for hearing the appellant has not taken a single prosecutorial step on the matter.*

(ii) *The appellant's failure to prosecute his appeal even after obtaining the order dated 29<sup>th</sup> November, 2005 amounts to abuse of process.*

(iii) *Justice looks both ways and the respondent has suffered manifest prejudice from the protracted litigation hereof which the appellant is demonstrably not intent to have finally determined.*

(iv) *The suit premises constitutes family land and the appellant has no legal right to continue exclusively enjoying the same.*

2. The application is also supported by the affidavit of Mary Wangare Jane sworn on 13/10/2009. The deponent reiterates the averments on the face of the Chamber Summons application and asks the court to dismiss the Appellant's appeal for want of prosecution.

3. There is no opposition to the application which was duly served upon M/s Muhuhu advocate for the Appellant.

4. The history of this appeal is brief. The dispute concerns a parcel of land known as Dagoretti/Thogoto/64. The award of the Dagoretti Land Disputes Tribunal was read to the parties by the court on 10/06/1999 and stood over to 15/07/1999 for making the award a judgment of the court. On 15/07/1999, the court noted that an appeal appeared to have been lodged against the award. The court then stood the matter over generally. On the 5/09/2001, the appeals award was read to the parties, with the right of appeal within 60 days. On the 7/11/2001, the appeals award was confirmed as a judgment of the court; and the Executive Officer of the court was empowered to sign all relevant documents in respect of Dagoretti/Thogoto/64 in favour of the Plaintiff/Applicant.

5. On the 13/08/2003, the Appellant filed her Memorandum of Appeal. On the 01/07/2005, the Appellant's appeal was dismissed for want of prosecution. The Appellant thereafter filed an application to set aside the dismissal order and on the 29/11/2005, the application was allowed. The dismissal order was set aside and the appeal reinstated for hearing on the merits.

6. At the hearing of this application, Mr. Njagi for the Respondent argued that since the 29/11/2005, the Appellant had taken no step to set down the appeal for hearing. The Respondent's counsel contended that the Appellant had lost interest in the appeal for two reasons:- (a) that though served with the application the Appellant did not file either grounds of opposition or a replying affidavit to controvert the application and (b) that though the Appellant was duly served with a hearing notice for the application, the Appellant did not turn up for the hearing of this application. Counsel for the Respondent submitted that unless the appeal is dismissed, the court would be aiding the Appellant in abusing the process of the court. Counsel for the Respondent relied on two authorities which have been considered by the court.

7. This applicant has invoked the inherent power of the court under section 3A of the Civil Procedure Act to make such orders as would meet the ends of justice in this case. The Respondent also invoked rule 31 of Order XLI of the Civil Procedure Rules. If the Respondent had invoked only rule 31 of Order XLI of the Civil Procedure Rules, the application would have been incompetent and liable to be struck out. The reason why a Respondent's application under Order XLI rule 31(2) would be incompetent is because the rule gives the duty of listing an appeal that has not been listed for hearing within a year of the Memorandum of Appeal being served lies with the Registrar. The Registrar is required to

give notice to the parties and then list the appeal before a judge in chambers for dismissal.

8. In the instant case, the Appellant took no action from 29/11/2005 until the filing of the instant application on 13/10/2009. That indeed is a long time in the life of a keen litigant. The Appellant has not done anything to justify the maintenance of this appeal in the court registry. In particular, the Appellant has not moved the court for directions under Order XLI Rule 8B of the Civil Procedure Rules, nor has the Appellant compiled and filed her record of appeal.

9. In the circumstances of this case, I find that the Appellant has been guilty of inordinate delay in prosecuting this appeal. The Appellant has not told the court why she has failed to prosecute the appeal which was once dismissed for want of prosecution on 01/07/2005. Litigants coming to the court seeking justice must act diligently and not with indolence. It is a principle of natural justice that a court of law will not come to the aid of an indolent litigant. There is no reason why the court should aid the Appellant in this case. It is clear to the court that the Appellant has lost interest in her appeal.

10. Accordingly, I allow the Respondent's application by way of Chamber Summons dated 13/10/2009. The appeal herein is hereby dismissed for want of prosecution. Costs of the application and of the appeal shall be paid to the Respondent.

Orders accordingly.

**Delivered and Dated at Nairobi this 19<sup>th</sup> day of January, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Njagi (present) for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Weche – court clerk