

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Civil Appeal 77 of 2000

HARRISON MAINA KARIUKI.....1ST APPELLANT

JOHN KIMANI KARIUKI.....2ND APPELLANT

ISAAC NGANGA KARIUKI.....3RD APPELLANT

VERSUS

JANE WAITHIRA MUNGAI.....1ST RESPONDENT

MUNGAI MUTEMBEI.....2ND RESPONDENT

RULING

The applicants in the chamber summons dated 16th February 2009 are the respondents in this appeal. They have applied to this court to have the respondents' appeal filed on 23rd June 2000 dismissed for want of prosecution. They contend that no steps have been taken to have the said appeal heard yet the respondents are enjoying restraining orders issued by way of a stay of execution granted on 20th July 2000. For the sake of clarity the applicants shall hereinafter be referred to as '*the applicants and the respondents as the appellants.*' The application is opposed on the strength of a replying affidavit sworn on 9th June 2009 by the 3rd appellant on his own behalf and that of his co-appellants. He depones that the delay in prosecuting the appeal was caused by the appellants' advocates M/s Waiganjo & Co. whom the appellants had instructed to prosecute the appeal, only for them to realise that the same was done, when this application for dismissal of the appeal was served upon them.

On the 10th May 2000 the Provincial Land Dispute Appeals Committee, Central Province, upheld the award of the Nyahururu Land Disputes Tribunal of 3rd March 2000 to the effect that LR No. Nyandarua/South Kinangop/245 be subdivided in a manner that would ensure that the applicants herein were granted 2.225 hectares of the suit land. Being dissatisfied with the said award the appellants filed this appeal.

Under Order 41 rule 31(1) of the Civil Procedure Rules a respondent in an appeal is entitled to either set down the appeal for hearing or apply for its dismissal if no action is taken within three months after directions are issued, by the court, for the hearing of the appeal under rule 8B. If after one year after service of the memorandum of appeal the appeal has not been set down for hearing, the registrar of the High Court is empowered to list the appeal before a Judge for its dismissal, with due notice to the parties. Directions in this appeal were issued on the 3rd November 2000 and the appeal accordingly admitted for hearing. The same was listed twice without being reached. On 28th August 2000 the parties to the appeal were notified by the court of the need to take a mutually acceptable date for the hearing of the appeal. Although, as stated above, the appellants blame the delay on their advocates and allege to have dismissed their advocates (*for laxity*) on or about 3rd June 2009, there exists in the court record a letter dated 22nd July 2002 written to the appellants and copied to the court by the said advocates, under cover of which the appellants were informed of the said advocates' inability to continue representing them in the matter and advising them to arrange alternative representation. The appellants attempt to blame their indolence on the said advocates is therefore unfounded. All facts considered, it is clear to me that the appellants appear not to have had any intention to have the appeal heard and determined since the

restraining orders of 20th July 2000 served them well, in that, they have continued to enjoy the use of the suit land despite the award of the tribunal made in favour of the applicants. I find that the application is meritorious and the reasons given why the same should not be allowed are neither valid nor satisfactory. In the interests of justice the application is hereby allowed with the result that the appeal herein is accordingly dismissed with costs to the applicants.

Dated signed and delivered at Nakuru this 30th day of October, 2009

M. G. MUGO

JUDGE