

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 20 OF 2002

MUIA MUTUNGI ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NZISA NDONYE

NDULU NDONYE ::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

The Respondent has moved this court under S. 3A Civil Procedure Act and Order XLI Rules 8 B(2) and 31 (2) seeking orders that the Memorandum of Appeal filed herein be struck out and alternatively the appeal be dismissed for want of prosecution and costs be provided for. The application is based on 2 grounds that the court has no jurisdiction to entertain the appeal as it contravenes provisions of S 8(1) of the Land Disputes Tribunal Act (No. 18 of 1990) and that it is almost two years since it was filed and no steps have been taken towards prosecuting the appeal.

The application is supported by the affidavit of Kioko Advocate for Respondent and a replying affidavit was sworn by Kiusya Advocate for appellant.

The court has considered the affidavits filed and submissions of both counsels.

A look at the court file shows that since the matter was filed on 8.3.2002 no other action has ever been taken by the appellant towards prosecution of the case.

Though the appellants counsels claims that the file was misplaced at the registry, there is no proof of that. She has not produced a single letter to the Executive officer or Deputy Registrar seeking the said file. The appellant found the file at the registry when the application was filed. It is not true that the file has been missing.

The applicant moves this court under Order 41 Rule 31 (2) Under Rule 3(1) it is provided that 3 months after the giving of directions under Rule 8 B, the appeal shall be set down for hearing by appellant and if the appellant does not, the Respondent can set it down for hearing or apply for its dismissal. In the present case no directions had been taken and so the respondent does not have the capacity to apply for its dismissal. Under R 31 (2) it provides that after one year of service of memorandum of appeal, if appeal is not set down for hearing the Deputy Registrar shall by notice to the parties list it before a judge for dismissal. In the present case it is the Respondent who has moved the court not the Deputy Registrar. It seems that under Order 41 there is no specific provision allowing the Respondent/Applicant to move the court for dismissal of an appeal for want of prosecutions before directions are taken. Since nothing was being done by the appellants, may be the Respondent should have set the appeal for directions so that the appellant would have been given time within which to prepare his appeal.

Appellant/Respondent also contends that there are no proceedings from the Land Disputes Tribunal but she has not made any effort to get the proceedings save for the letter written by Deputy Registrar asking for the proceedings on 13.3.2002 nearly same time when the appeal was filed. There has been no reminder. It is obvious that the Appellant/Respondent has been very lax and actually went to sleep after filing the appeal and has only been awakened by this application. It is however not possible to have the appeal struck out for want of prosecution under the provisions of law cited.

The alternative prayer sought by applicant is that this court has no jurisdiction to hear this matter being emanated from Land Disputes Tribunal and that the appeal lies to Provincial Appeals Committee Tribunal

by virtue of 8 (1) of the Land Disputes Tribunal Act. Under S 8 (9) Land Disputes Tribunal Act a party may appeal from the decision of the Appeals Committee to the High Court on a point of law. A reading of the memorandum of appeal filed in court clearly shows that the appeal is a 1st appeal from Land Disputes Tribunal and the judgement of G. W. Ngenye DM II. Under that Act this court can only entertain a 2nd appeal. The appellant has skipped the hierarchy and is before the wrong forum. Under Order 41 R 8B 2, the applicant can make an objection on jurisdiction before directions and the court finds that the applicant has rightly done so. This court lacks jurisdiction to entertain this appeal and it is hereby struck out with costs to the Applicant/Respondent.

Dated, read and delivered at Machakos this 25th Day of March, 2004

R. V. WENDOH

JUDGE