

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 57 OF 2016

KAHINDI KAMBI THEBE APPLICANT

VERSUS

KARISA CHARO NYAMAWIRESPONDENT

RULING

1. I directed that cause be shown why this matter should not be dismissed for want of prosecution. Nothing was filed in response thereto. Neither did counsel for the applicant appear to show any cause.
2. The background is that the parties herein had a land dispute which they presented before the Land Disputes Tribunal at Kaloleni. The complainant was Karisa Charo Nyamawi and the respondent was Kahindi Kambi Ngebe (the applicant herein). The matter was heard in the year 1999. In brief, the complaint of Mr. Nyamawi, as I can discern from the proceedings of the Tribunal, was that the applicant came with the Chief of the area and affected the boundaries of his land to his detriment. The result was that about 30 acres of land was given to the applicant. The Tribunal, after hearing the dispute, made an award in favour of the complainant Mr. Nyamawi. They held that the applicant had no right in the land and had to vacate it. The decision of the Tribunal was adopted as a judgment of the court in Kaloleni Magistrate's Court, Land Award Case No. 39 of 1999. The award was adopted on 22 September 1999. It appears as if the applicant moved to file an appeal before the Provincial Land Disputes Appeal Committee, for I have seen a draft Memorandum of Appeal dated 10 December 1999. It however appears that the appeal was actually lodged on 27 November 2008 as Appeal No. 71 of 2008. That appeal had not been heard by the time the Land Disputes Tribunal Act was repealed in 2011. I have seen that an application was filed before the Magistrate's Court in Kaloleni to set aside that judgment. Through a ruling delivered on 21 April 2016, the Hon. R.K. Ondieki, held that the Magistrate's Court is *functus officio*.
3. On 23 December 2016, this Miscellaneous Cause was filed. The main prayer is to transfer to this court Appeal No. 71 of 2008 pending before the defunct Provincial Appeals Committee, and for the appeal to be heard. From what I can see, this application for transfer has never been listed for hearing.
4. Due to inactivity, on 21 August 2020, a notice was issued to the applicant to show cause why the application should not be dismissed for want of prosecution. The notice was placed before Njoroge Mwangi J, for hearing on 7 September 2020. An affidavit had been filed to beseech the court not to dismiss the matter. Inter alia, it was deposed by the applicant that the area where the disputed land is located was declared an adjudication section in the year 2017, and due to that, he was advised by his counsel, that his application could not be pursued until the adjudication process was finalised. He continued to depose that the Adjudication Committee made a decision on the dispute on 8 September 2017. He was dissatisfied and appealed to the Arbitration Board under the Land Adjudication Act. He avers that his complaint is still pending hearing and determination. He deposed that if the matter herein is dismissed his appeal before the defunct Provincial Appeals Committee will be rendered nugatory. He believes that the Adjudication Committee erred by finding that the dispute had been determined through an exhaustive legal process. That is why he pleaded with the court not to dismiss his application for failure to prosecute.
5. Having gone through the affidavit, Njoroge J, was persuaded not to dismiss the application for failure to prosecute. This was on 7 September 2020.
6. The matter came before me on 20 January 2021. The applicant was not present. I thought the applicant was no longer keen and I directed that he yet again show cause why it should not be dismissed for failure to prosecute. The show cause came up on 27 September 2021. Yet again, the applicant was absent.
7. I regret my inability to continue keeping this file in our shelves. The application was filed in the year 2016. Not a single step has been taken to prosecute it. Even after lapse of one year, after the order of 7 September 2020 was made, still the applicant has not moved the court to prosecute his application. It is not even clear what the applicant wants. On one hand, he appears to be pursuing an appeal before the Land Adjudication Arbitration Board. On the other hand, he also wants to keep this application pending in court so that he can pursue another appeal before this court. He is probably hoping that he will get a favourable ruling before the Land Adjudication Arbitration Board while this application remains unprosecuted. I am afraid that I cannot allow the applicant to play lottery with the dispute settlement mechanisms. He is certainly trying to be like the proverbial hyena, who tried to follow two paths at the same time, since there was roast meat at the end of both roads. The result is that owing to his greed, he split into two, and that was the end of him. This will also be the end for the applicant. Not having moved the court since 2016, and this now being about 5 years later, I have to terminate this path for the applicant. I proceed to dismiss the Miscellaneous Application dated 22 December 2016. I make no orders as to costs as the respondent himself has also not bothered with the matter.
8. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF OCTOBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA