



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 26 OF 2014**

STEPHEN MUTHAMIA MARETE.....1<sup>ST</sup> APPELLANT

DAVID GATOBU MARETE.....2<sup>ND</sup> APPELLANT

JULIUS MURITHI MARETE.....3<sup>RD</sup> APPELLANT

**VERSUS**

MARY NAITORE KINYUA (*Enjoined as the legal representative of the estate of*

PATRICK KINYUA IRINGO (Deceased).....RESPONDENT

*(Being an appeal from the judgment/decree of Hon. D.O. Onyango Ag. SPM delivered on 6/2/2014 in Meru CMCC No. 358 of 1998)*

PATRICK KINYUA IRINGO.....PLAINTIFF

**BETWEEN**

STEPHEN MUTHAMIA MARETE.....1<sup>ST</sup> DEFENDANT

DAVID GATOBU MARETE.....2<sup>ND</sup> DEFENDANT

JULIUS MURITHI MARETE.....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

**The Appellant's Case**

1. The respondent filed a plaint dated 24/4/1998 and an amended plaint dated 4/2/2003 in the *Chief Magistrate Court in Meru in Civil Suit No. 358 of 1998* in which he sought the following orders against the defendants therein (who are now named as the appellants herein) :-

**(a) An order of rectification of register of Nkuene/L-Mikumbune 856, 857, 858, 859, 860, 861, 862, 863 and 864 and defendant names be replaced by plaintiffs names and general damages for fraud;**

**(b) An order of rectification of register of Nkuene/L-Mikumbune/856, 857, 858, 859, 860, 861, 862, 863 and 864 and the same be replaced and/or transferred back to the plaintiff's names;**

**(c) Costs and interests.**

2. The defendants filed a defence dated 8/5/1998 and denied the plaintiff's claim. Judgment was issued on 6/2/2014. It is this judgment that the appellants are aggrieved by.

3. The appellants filed a Memorandum of Appeal on 7/8/2014 and an amended Memorandum of Appeal filed on 7/5/2018 in which they set out the following grounds:-

**(1) That the Learned Trial Magistrate erred in law and fact by failing to properly evaluate the evidence on record.**

**(2) That the Learned Trial Magistrate erred in law and fact when he purported to treat allegations of the respondent as if the same were undisputed or proved facts.**

**(3) That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof on the appellants contrary to the law.**

**(4) That the Learned Trial Magistrate failed to properly analyze and evaluate the points of law raised by the appellants which caused a miscarriage of justice on the part of the appellants.**

**(5) That the Learned Trial Magistrate erred in law and fact in failing to consider that it would be unconscionable to allow the respondent to keep the appellants money and get back all his land when the respondent had admitted the receipt of the purchase price.**

**(6) That the Learned Trial Magistrate misdirected himself when he failed to properly consider and dispassionately evaluate the admissions of the respondents and instead relied on a few discrepancies to find the respondent had proved his case.**

**(7) That the Learned Trial Magistrate did not properly analyze the doctrine of “non est factum”.**

**(8) That the Learned Trial Magistrate erred in law and fact in failing to find that the cancellation of all titles in the suit land would affect parties that were not sued in the primary suit.**

4. The appellants pray that his appeal be allowed and the costs of this appeal and those in the Lower Court be awarded to the appellants.

5. The respondent filed her submissions on this appeal on the **3/9/2018**. I have perused the court record and found that no submissions have been filed on behalf of the appellants.

6. In an appeal, an appellant is required to convince the court that the grounds that he relies on in the memorandum of appeal have merit. This is normally done through oral submissions or through written submissions.

7. This appeal was filed in the year **2014**. On the **28<sup>th</sup> June 2018** this court ordered the appellant to file and serve submissions in respect of the appeal within **21 days**. That period ended on **19<sup>th</sup> July 2018**.

8. This matter was specifically brought up for hearing during the service week to ensure expedition in the hearing and determination of the appeal. The submissions were meant for that very purpose. The written submissions were meant to take the place of oral submissions in this matter. I now have nothing before me to persuade me on the merits of this appeal.

9. These are adversarial proceedings. The grounds of appeal in the memorandum of appeal are not self-explanatory. This is not an open and shut case or appeal for that matter. In our justice system, the court cannot be seen to be stepping into the arena of conflict by trying to decipher what the appellants meant in their grounds of appeal while they have demonstrated by defying a court order that they are not interested in the appeal any longer.

10. An appeal is not like an interlocutory application normally supported by sworn affidavit evidence, which at times can be determined purely on the basis of the affidavit evidence.

11. The genesis of this appeal was the case filed in the Magistrate's court. A decision has already been issued by that court on the merits of the case before it. In the judgment dated **6/2/2014** in the matter, the court ordered that the Land Registrar Meru do rectify the registers in respect to **Nkuene/Lower Mikumbune 856, 857, 858, 859, 860, 861, 862, 863 and 864** and the names appearing therein be replaced with that of the respondent. The court also condemned the defendants to pay the costs of the suit.

12. Active prosecution of this appeal would have necessitated submissions by the appellant. Though the respondent's submissions are on the record they are of not much help in debating the main points raised in the memorandum of appeal as they just seek to confirm that the magistrate's court's decision was right.

13. In my view, when an appellant has been ordered to file written submissions and he fails to do so as the appellants have done in this case, the court should find, as it does in this case, that the appellant has failed to prosecute his appeal, or is no longer interested in pursuing it.

14. There is a valid judgment of the court below to be implemented. If the appeal is dismissed, the decision of that court will stand. No void will be left. It will not be as if a suit has been dismissed for want of prosecution unheard.

15. I find that the appellants have failed to prosecute their appeal. I hereby dismiss the appeal with costs for want of prosecution.

**Dated signed and delivered at Meru on this 20<sup>TH</sup> day of DECEMBER, 2018.**

**MWANGI NJOROGE**

**JUDGE**

