



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 24 OF 2014**

**PENINNAH WANJIRU NJOROGE & 3 OTHERS ...APPELLANTS**

**=VERSUS=**

**JANE NYANGUTHI NDIRANGU.. .....RESPONDENT**

**RULING**

1. This is a Ruling in respect of a Notice of Motion dated 9<sup>th</sup> June 2016, brought by the Respondent/Applicant. The application is expressed to be brought under the provisions of Order 2 of the Civil Procedure Rules and Section 79 B of the Civil Procedure Act. The applicant seeks the following reliefs:-

*i. That this Honourable Court be pleased to dismiss the memorandum of Appeal lodged before this Court on 9<sup>th</sup> July 2014.*

*ii. That costs of the application be provided for.*

2. The applicant had filed a suit against the Respondents at the Chief Magistrates Court in Thika over the ownership of **LR No. Ruiru/Ruiru East Block 1/3561**. In a Judgement delivered on **18<sup>th</sup> June 2014**, Hon J.N.Onchuru, Principal Magistrate granted all the applicants reliefs in the Plaint. The Respondents were dissatisfied with the Judgement and they preferred an appeal to this court. A Memorandum of Appeal was lodged in this court on **9<sup>th</sup> July 2014**.

3. The applicant now contends that since the lodging of the Memorandum of Appeal by the Respondents, they have not taken any step towards the prosecution of the appeal and that this has prevented the applicant from enjoying the fruits of her Judgement. That the Respondents are enjoying stay orders which were granted by this court without bothering to prosecute their appeal hence this application.

4. The applicant contends that she has on several occasions invited the Respondents Counsel to come to Court with a view to taking directions to expedite the appeal but that the Respondents counsel has always not turned up in Court. That the Respondents intention in not prosecuting the appeal is to frustrate the applicant. That the Respondents have clearly abandoned their appeal.

5. The Respondents have opposed the applicants application which they contend is intent on misleading the Court and that it is based on misinterpretation of the Law. That Order 42 Rule 11 cannot be read in isolation. That the appeal filed herein has gone beyond Section 79B and that directions should be given so that the appeal should go on.

6. The Respondents accuse the applicant of dwelling on technicalities. That after the lodging of the Memorandum of Appeal, the applicant moved the court for stay orders which stay orders were granted on **18<sup>th</sup> September 2015**, wherein the Judge directed that the prosecution of the appeal should be expedited.

7. I have carefully gone through the applicant's application as well as the submissions filed by counsel for the parties herein. I must point out at the outset that the applicant's motion is not clear on which provisions of the law the application is being brought. The applicant has simply stated that the application is brought under Order 2. There is no Rule cited. The only clear provision is Section 79 B which has been cited. The applicant has also come under the amorphous clause "**and all other enabling provisions of the law**" which is commonly cited by Advocates to act as a safeguard in case no proper provisions have been cited. However be that as it may, even if no provisions under which the application was brought were not to be cited, still the court has to decide the application on its merits.

8. Order 42 of the Civil Procedure Rules 2010, gives an elaborate procedure on prosecution of appeals. The process begins from the lodging of memorandum of Appeal all through to dismissal of an appeal which has not been prosecuted within the timelines given. The other relevant provisions which guide appeals from subordinate Courts are Sections of the Civil Procedure Act.

9. In the instant cases, the applicant is citing Section 79B of the Civil Procedure Act. That section provides as follows:-

***"Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily".***

10. The summary reflection of an appeal under Section 79 B cannot be done unless there is filed a certified copy of the decree appealed against. In the instant case, a perusal of the court file shows that no such decree has been filed. The documents required to be available under Order 42 Rule 13(4) are not in the file. There is no compliance with Order 42 Rule 11 of the Civil Procedure Rules and as such no directions can be given under Section 79B of the Civil Procedure Act.

11. The applicant would have only brought an application for dismissal of the appeal if within three months after the giving of directions under Orders 42 Rule 13, the appeal would not have been set down for hearing. That provision is not open to the applicant as no directions have been given. I have looked at the decisions in **Haron E. Ogechi Nyaberi Vs British American Insurance Company Ltd ( 2012) eKLR**. In this case, Justice Onyancha dismissed the applicant's appeal in a case where the court had been moved under section 3A of the Civil Procedure Act. The Judge appreciated the fact that Order 42 Rule 35 (1) was not applicable because directions had not been given. He did this because he considered the fact that the appeal had been pending in Court for 11 years. The Deputy Registrar had written to the appellant to prepare documents necessary to enable directions to be taken but this notwithstanding, the appellant never took steps to have the appeal listed for directions. These are the circumstances which made the Judge to invoke the inherent powers of the Court to dismiss the appeal. This is unlike in the present case where the appeal was filed in 2014. The application for stay was granted on 18<sup>th</sup> September 2015.

12. I do not think that is an appropriate case where the memorandum of appeal can be dismissed. I therefore disallow the application. To fast-track the appeal herein, the Respondents are directed to prepare all necessary documents to enable the appeal move ahead. The Respondents are given 30 days to ensure that the appeal is ready for hearing failing which the appeal herein will stand dismissed without any further re-course to court.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 7<sup>th</sup> day of March 2017**

**E.O .OBAGA**

**JUDGE**

**Court:**

At 2.50 P M . No appearance by advocates who were aware of the time and date of delivery of Ruling.  
Parties to read Ruling at the Registry.

Court Assistant: Hilda

**E.O .OBAGA**

**JUDGE**