

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 8 OF 2011

JOHN GITAU WAINAINAAPPELLANT

V E R S U S

JOSEPH GITAIGA WAINAINARESPONDENT

ANTHONY MACHARIA KARIOKI GATHATAINTERESTED PARTY

RULING

1. The appeal herein emanates from the decision (Judgement) delivered on 16th February 2011 by the Thika Chief Magistrate's Court. A memorandum of Appeal against the whole decision was filed on 5th February 2020 and thereafter the appeal fixed for hearing. Consequently, parties agreed to dispose of the matter by way of written submissions. The court then directed for the Deputy Registrar to call for the original file from Thika Law Courts. On 8th October 2019, both counsel confirmed filing written submissions and without highlighting on the same asked the court to deliver Judgment based on the written submissions.

2. The court then fixed the case for Judgment on 3rd December 2019. Due to pressure of work, Judgment could not be delivered. It was then rescheduled to 19th December 2019. On that day, the court realised that the original file from Thika Law Courts was not available although indicated from the file record that it was forwarded to the Deputy Registrar Family Division. The court could not proceed to write its Judgment without the original file. I therefore directed for the file to be traced. Since December Vacation had started, the matter was fixed for mention on 4th February 2020.

3. Unfortunately, on 4th February 2020 I was on leave and for that reason, the original court file was not available for extension of the orders. After resuming duty from leave on 24th February 2020, I enquired whether the file was available. I was informed that it was misplaced and the registry staff needed more time to look for it. Unfortunately, I fell sick from 27th February 2020, got admitted in hospital on 1st March 2020 up to 8th March 2020 and after discharge, courts were suspended from normal operations due to Corona Virus.

4. While on duty during the week of 23rd to 27th March 2020, I tried to get the original file but in vain. Upon perusing the record of appeal, I realised that the same is incomplete as it only contains the typed lower court proceedings, court Judgment and Certificate of Confirmed Grant.

5. Ideally, the record of appeal does not have lower court pleadings like the Petition for grant of representation and its supporting documents, application for confirmation, protest and the reply thereof plus other supporting documents etc.

6. In the absence of the original lower court record and considering that the record of appeal is incomplete, I will not write a Judgment without the necessary pleadings before the lower court being on record. For those reasons, I will defer writing the pending Judgement until the original file is availed and on the extreme circumstances have the Advocate for the appellant file a supplementary record of appeal so as to file the necessary and relevant pleadings filed and relied on before the lower court within 30 days from the date of delivery of this Ruling.

7. Mention on 19th May, 2020 for further directions.

DATED, DELIVERED and SIGNED in at NAIROBI this 29th day of April 2020.

J. N. ONYIEGO

JUDGE