REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCA 82 OF 2008

SCOLA KARUTHU MURIIRA.....PLAINTIFFF

VERSUS

NAOMI KITHIRA M'MUNGANIA.....DEFENDANT

R U L I N G

1. This Application is dated 12th June, 2015. The Application is stated as being brought to Court under Order 45, CPR, rules 1 and 2 Sections 1 and 1 A, 3 and 3A of the Civil Procedure Act. The Application seeks Orders that:-

a. ***The Honourable Court do certify this Application as extremely urgent and hear it exparte in the 1st instance.***

b. ***The Honourable Court do review the Ruling dated 18th May, 2015, set the same aside, and reinstate the appeal dated 12th August, 2008 for hearing on merit.***

c. ***The Hononourable Court do stay execution of the said Ruling pending the hearing of this Application or until further Orders of this Court.***

d. ***The Court do make such further Orders as may meet the ends of Justice in this case.***
e. ***Costs of this Application be in the Course(sic).***

2. The Application has the following grounds:-

i. ***The Applicant has been condemned unheard Contrary to Laws and Rules of Natural Justice.***

ii. ***The mistakes of Counsel should not be visited upon a Litigant.***

iii. ***The Applicant stands to lose her land unless the appeal is reinstated and heard on merit.***

iv. ***It is only just and fair that the appeal is heard.***

v. ***There is an error on the face of the record.***

vi. ***There are sufficient reasons to warrant review.***

3. Mrs E.G. Mwangi, the Advocate for the Appellant, told the Court that one of the grounds upon which this Court dismissed this suit was that there was no Certification by a Judge that an issue of Law was involved. She submitted that it was never the responsibility of Counsel for a litigant to certify the

suit as involving a point of law. She said that, that was the responsibility of the Deputy Registrar.

4. Mrs Mwangi submitted that though Mr. Nahashon Karuti, the Appellant's Advocate did not have a practicing certificate in 2014, he did have one in 2008 when he filed the appeal.

5. Mrs. Mwangi submitted that since the Respondent had not opposed the Application, it should be allowed.

6. Mrs Mwangi asked the Court to note that a record of appeal had been filed by Mr. Nahashon Karuti, the Appellant's Advocate in 2008.

7. I do note that in her Supporting Affidavit sworn on 12th June, 2015, the Appellant /Applicant was lacononic that this appeal was admitted by the Court on 10th May, 2012.

8. The Respondent did not say much in the form of submissions. She told the Court that her dead husband did not allow her to be involved in this suit. If she did so, his curse would decimate her family. She said that she was a poor widow who could not afford the services of an Advocate. She also complained that she had for many years found it difficult to meet the costs of coming to Court.

She concluded by saying: "***I am in the hands of God***".

9. I have considered the pleadings of the Applicant and her submissions. I have also noted the Respondent's concerns.

10. I may harbour very strong feelings and veritable pathos regarding whether or not a litigant should be punished for the infractions and deficiencies perpetrated by his or her Advocate. But as a Judge, I am bound by the decisions made by more Superior Courts. The Court of Appeal in Civil Appeal No 192 of 2002, National Bank of Kenya Versus Wilson Ndolo Ayah, e KLR in a Judgement delivered on 4th December, 2009, opined as follows:

"It is public policy that Courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such Advocates we come to the conclusion that will discourge excuses being given for justifying the illegality.

" A failure to invalidate the act by an unqualified Advocate is likely to provide an incentive to repeat the illegal act. For that reason the charge and instrument of guarantee in this matter are invalid, and we so hold".

Even assuming that the superior Court has in subsequent years changed its mind, I wish to make it clear that the issue of lack of a practising Certificate was not the only reason for my dismissal of this suit. There was, to me, the more substantial reason that contrary to the Mandatory Provision of Section 8(9) of the Land Disputes Tribunal Act (now defunct), no appeal should be admitted to hearing unless a Judge had certified that an issue of law was involved.

11. I will deal with the submission by the Applicant's Advocate that this application should be allowed, as it is not opposed. I do not agree that all unopposed applications should be allowed for that reason only. This approach would create confusion in the administration of Justice. It would embrace, in some cases, strange and even illegal Orders. Courts of law can not allow themselves to be conduits for such nefarious activities, I opine that all applications, opposed or unopposed, must be considered and, allowed or not allowed on their merits alone.

12. Mrs. Mwangi has submitted that this appeal was admitted on 10th May, 2012. The Applicant in her Supporting Affidavit at paragraph 6 has deponed to the fact.

The Court record shows otherwise. On that day, 10th May,2012, the Hon Justice J.A. Makau, Judge, directed as follows: " The Appellant do prepare record of Appeal within the next thirty days and

serve the same upon the Respondent".

The Hon. Judge did not admit the appeal. The Hon. Judge never said that he had admitted the appeal.

13. Although, it was clear that there was no record of appeal when I made my Ruling and on 10 May, 2012 when Justice Makau directed that a record of appeal be filed within 30 days, there is now in the Court file a record of appeal allegedly filed on 6th June, 2012. To me its cover and the 1st two pages, which look new, suggests that the documents have been sneaked in to the court file for purposes of this application.

14. On 16th April, 2015, Mr. Nahashon Karuti, the Advocate for the Appellant admitted that indeed the Court file did not have a record of appeal on that day. He sought to file a replacement, seven years after this matter had been brought to Court.

15. He who alleges is required to prove, the degree of proof notwithstanding. Mrs. Mwangi has alleged that Mr. Nahashon Karuti had a Practising Certificate in 2008 when he filed the Memorandum of Appeal. No documentary evidence has been adduced. In any case, Mrs Mwangi admits that in the year 2014, when Mr. Karuti filed a supplementary record of Appeal, filed on 23rd June, 2014, he did not have a Practising Certificate.

16. Mrs Mwangi has submitted that it is not the responsibility of Counsel for the litigant to obtain a certification from a Judge. She contends that that is the duty of the Deputy Registrar. I disagree.

Section 8 of the Land Disputes Tribunals Act (now repealed) deals with appeals to the Appeals Committee and the High Court. Section 8 (9) has a proviso which states:

"Provided that no appeal shall be admitted to hearing by the High Court, unless a Judge of that Court has certified that an issue of law (other than customary law) is involved".

17. I do not agree that it is the responsibility of the Deputy Registrar to have a Judge certify that an issue of law is involved. It is, Contrary to what the Advocate submits, the responsibility of the High Court not to admit to hearing any appeal that does not have a certificate from a Judge certifying an issue of law is involved. It is the duty of a litigant or his/her Counsel to move the Court appropriately.

18 I note that the Applicant does not dispute that in this suit no certificate was issued by a Judge certifying that the apposite issue or issues involved an issue or issues of law.

19. In the Circumstances, after taking into account all the issues raised in this application, I find that there is not or there are not sufficient grounds for review. Therefore, I dismiss the application.

Delivered in open Court at Meru this **30th day of July, 2015** in the presence of:-

CC:

Lilian/Daniel

Muthomi holding brief for E.G Mwangi for Appellant/Applicant

Naomi Kathira M'Mungania -Respondent

P.M.NJOROGE

JUDGE