



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 86 OF 1999

RICHARD MWENDA & CATHERINE KAILU KIUNGA

(suing as legal representative of

M'MIRONGO M'THARI – DECEASED).....APPLICANT

VERSUS

THE LIQIDATOR IGEMBE FARMERS COOP. LIMITED.....RESPONDENT

R U L I N G

This application is dated 2nd May, 2013 and seeks orders:

1. **THAT** this application be certified as urgent and be heard exparte in the first instance
2. **THAT** the dismissal order of 20.8.2010 be set aside.
3. **THAT** Richard Mwenda and Catherine Kailu Kiunga be appointed as the legal representatives of the late M'MIRONGA M'ITHAKI for the purposes of this appeal.
4. **THAT** an order of temporary injunction be issued to restrain the respondent, his servants, agents and employees from trespassing, utilizing and fencing the appellant's land parcel No. ITHIMA/NTUNENE/1171 until the hearing and final disposal of this application inter partes and until the the appeal herein is heard and disposed.
5. **THAT** this order be served upon the O.C.S Laare Police Station for enforcement and compliance
6. **THAT** a penalty clause be inserted in the order to forestall non-compliance.

It is supported by the affidavit of Richard Mwenda and the following grounds, among others:

1. **THAT** *The proposed legal representatives hold limited letters of grant in respect of the estate of the deceased.*
2. **THAT** *the respondent in the appeal will not be prejudiced in any way if the application herein is granted*
3. **THAT** *the fencing utilizing and trespassing of the respondents in the suit land is prejudicial to the estate of the deceased as the respondent is likely to develop the suit land adversely to the interests of the estate.*

THE APPLICANT'S WRITTEN SUBMISSIONS

The applicant has given the background of this application. He says that M'Mirongo M'Thaki (deceased) was the plaintiff in Meru PMCC 538 of 1998. He lost the suit and filed Meru HCA 86 of 1999 through M/s B. G. Kariuki & Company, Advocates. He states that the appeal did not see the light of the day as the

Deputy Registrar of this court did not process and activate the appeal as mandatorily required by Section 79 B of the Civil Procedure Act and under Order 42 rules 12 and 13 of the Procedure Rules. The applicant's advocate says that the applicant only noticed in the year 2013 that there was interference in the subject matter and that is when he discovered from his father's documents that there was a suit pending in court. It is said that the applicant's father died in the year 2010.

The applicant's advocate proffers that the suit was dismissed on 20.8.2010 under Order XVI Rule 6 of the Civil Procedure Rules and claims that no notice was served upon the firm of M/s B.G. Kariuki & Company, Advocates. He, therefore, submits that the dismissal of the appeal was unlawful and unprocedural and prays that the dismissal be set aside. He also argues that the court can invoke Article 59 of the Constitution of Kenya and the inherent jurisdiction of the court under sections 3 and 3A of the Civil Procedure Act to set aside the dismissal order. The applicant argues that Order OXVI Rule 6 did not apply to appeals but to proceedings which had not been prosecuted for 3 years.

RESPONDENT'S WRITTEN SUBMISSIONS

The respondent opposes the appeal vehemently. He points out that the Appeal was filed on 25th November, 1999 and was dismissed on 20th August, 2010, ten years later. He submits that the advocate who represented the appellant/applicant Mr. Kariuki, knew or ought to have known that he was required to take the necessary steps to prosecute the appeal which he and his client did not do for a period of over 10 years.

The respondent submits that the procedure provided under section 79 B of the Civil Procedure Act is not mandatory and that the appellant's advocates could not have waited for a period of over ten years to be notified whether the appeal had been admitted or rejected summarily but should have exercised due diligence to check the status of the appeal with the court. The respondent argues that the fact that the appellant had taken over 10 years before he took any interest in the case shows that he had lost interest in the case.

The respondent argues that section 1A, 1B and 3A of the Civil Procedure Act gives the Court special powers to make orders that it deems fit to prevent the abuse of the court process and asks the Court to hold that the suit was properly dismissed after the appellant had abused the court process by not prosecuting his appeal for over 10 years.

The respondent also argues that the provisions of Article 159 (2) of the Constitution are not meant to assist the indolent litigants and persons who are out to obstruct the course of justice and conclude that the appellant is not entitled to the orders sought in this application. It is urged that the application be dismissed with costs.

DETERMINATION

This suit was dismissed for want of prosecution by virtue of the provisions of Order XVI rule 6 on 20.8.2010. This order gave power to a court handling a suit to dismiss a suit where no application was made or step taken for a period of three years by either party. This order unlike order 17 of the Civil Procedure Rules, 2010 did not require that notice in writing be given to the parties. In this case no application had been made or any step taken by the parties for a period of over 10 years. This to me was an inordinate period of inactivity by the appellant amounting to abuse of the court process. It is now 15 years since the appeal was filed in 1999.

I agree with the respondent that the applicant can not successfully continue to lay blame upon this court's Deputy Registrar for supposedly failing to have the appeal admitted or dismissed in terms of section 79 B of the Civil Procedure Act. In all the circumstances, the duty to have a suit heard expeditiously lies upon the plaintiff or the appellant, as the case may be.

The Civil Procedure Rules 2010 became operational on 10th September, 2010. This has the effect that any submissions regarding these rules are not relevant as the suit was dismissed on 20.8.2010. I do

note that the applicants have submitted that their father, the appellant, died in 2010. This was over 10 years after he had filed the apposite suit.

Having considered all issues in this matter, I find that the application lacks merit. It is, therefore, dismissed. I award costs to the respondent.

It is so ordered.

Delivered in Open Court at Meru this 11th day of December, 2014 in the presence of:

Cc

Harun Gitonga for Respondent

Lekoona for the Applicant

P. M. NJOROGE

JUDGE