



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 209 of 2012**

**ROBERT WAGACHA.....APPELLANT**

**VERSUS**

**NELLIE WAIRIMU MUNYUA.....RESPONDENT**

**RULING**

The application before the court is dated 26<sup>th</sup> July, 2012. It is brought by the former appellant seeking a reinstatement of the appeal which was dismissed on 18<sup>th</sup> September, 2009, for want of prosecution.

The record shows that the appeal was filed by a Memorandum of Appeal dated 28<sup>th</sup> April, 2000. By a Notice dated 6<sup>th</sup> May, 2008 the Deputy Registrar issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution. Other similar notices dated 23<sup>rd</sup> June, 2008, 21<sup>st</sup> October, 2008 and 17<sup>th</sup> July, 2009 were also issued to be served upon the Appellant and Respondent or their advocates.

On 28<sup>th</sup> May, 2008 the appeal was as a result of the Deputy Registrar's Notices to Show Cause above, mentioned in court. Since both parties had not appeared, the court ordered for fresh Notices to issue. The matter came up again on 17<sup>th</sup> October 2008 and both parties were again absent. The same process was repeated on 15<sup>th</sup> May, 2009. The Registry appears to have refixed the appeal on 18<sup>th</sup> September, 2009 and this time both the Appellant and Respondent were served to appear on 18<sup>th</sup> September, 2009.

However, the parties once more failed to appear. Okwengu, J dismissed the appeal for want of prosecution under the then Order XLI, Rule 31(2) of the Civil Procedure Rules. That is the dismissal which the Applicant/former appellant, now wishes to set aside to re-open the appeal.

The Applicants main ground for wishing to reinstate the appeal is that he did not know that the appeal had been so dismissed. That his former advocate (now deceased) had informed him that he had won the appeal and that if the counsel misled him, the court should not allow a party to suffer because of the mistake of the Advocate.

The Respondent on the other hand avers that the Appellant, who is her own son, knew well that the appeal had been dismissed since they lived together on the same piece of land, the subject of the suit.

I have carefully perused the records. I observe that the dispute between mother and her son concern a piece of land – L.R. No. Kiambaa/Ruaka/683 – which the Nyeri Provincial Land Appeal Committee, ordered shared by the Appellant and his mother, the Respondent in the shares of 0.5 to 0.5 acres. The committee's decision was delivered on 2<sup>nd</sup> March, 2000 and it announced the statutory period of appeal of 60 days.

After analyzing the facts on the record, I am persuaded that the correct and credible version is that the Appellant knew or must have been informed by his advocate, of the dismissal of the appeal. The court does not accept the view that a professional advocate, who lost a case, would choose to tell his client lies as claimed the applicant herein. It could be different if the advocate lost the suit and chose not to communicate to his client at all. However, in this case the applicant clearly claims that he was in touch with his advocate. This court accepts the Respondent's version, that the Appellant knew that the appeal had been dismissed.

Having come to the above conclusion and noting that this is a 2000 appeal, this court finds no good reason in the Applicant's arguments, to merit a re-opening of the dispute between these peculiar parties in these circumstances. Furthermore, the clear impression created on perusal of the record, is that the Applicant/Appellant, filed the appeal and decided to do nothing more to bring it to a hearing. He had entered a caution against the title at the land Registry which he continually used to frustrate court process of execution in accordance with the terms of the decree. The caution or caveat still persists.

In the circumstances, it would be unfair and unjustifiable to interfere with the orders made on 18<sup>th</sup> September, 2009, while taking into account also, the fact that the Respondent's age is now very advanced.

Finally, I have also noticed that the Committee's decision appealed from was delivered on the 2<sup>nd</sup> March, 2000. The Memorandum of Appeal was filed in this court on 2<sup>nd</sup> May, 2000. My calculations confirm to me that the appeal was filed one day out of the prescribed period. So as asserted by the Respondent in her affidavit, the appeal itself in its present form was fatally incompetent.

For the above reasons, the application to reinstate the dismissed appeal is hereby dismissed with no order as to costs. Furthermore the caution or restriction on Title L.R. No. Kiambaa/Ruaka/683, is hereby ordered lifted to enable the Nyeri Land Appeal Committee's Order dated 2<sup>nd</sup> March 2000 to be executed by the Executive Officer, Chief Magistrate's Law Court, Kiambu. Orders accordingly.

Dated and delivered at Nairobi this day 27<sup>th</sup> of November, 2012.

**D A ONYANCHA**

**JUDGE**