



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 165 OF 2000

GRACE MWIHAKI GIKUNI APPELLANT/APPLICANT
ORIGINAL RESPONDENT

VERSUS

WALTER MUCHERU KABERERE 1ST RESPONDENT

CECILIA WAITHIRA KABERERE 2ND RESPONDENT

ORIGINAL CLAIMANTS

(Being an appeal from the Award dated 10th February 2000 delivered by the Provincial Land Tribunal at Nyeri)

RULING

***Setting Aside Orders of Court dismissing Appeal
Application dated 14th October 2010***

I. BACKGROUND

1.This is a land matter. A boundary dispute arose between the parties concerning land parcels LR Githunguri/Githiga 212. The matter was first heard at the Lands Dispute Tribunal Kiambu LDT 16/20/93 of 1998. The respondent not being satisfied with the award appealed to the Provincial Lands Dispute Tribunal

Case No. Kiambu 67/99. They found in favour of the respondent basing their findings on the decision of the District Lands Registrar of 7th November 1994.

2.A right of appeal to the High Court from their decision of 10th February 2000 was given to be so made within 60 days. The appellant filed appeal to this High Court on 7th April 2000.

3.The respondent appointed advocates to represent him on

5th June 2000 who opposed the appeal on grounds that no pure law was raised.

4.The appellant was represented by M/s P S Gatimu & Co Advocates.

5.By a letter of 14th July 2008 and – eight years later, the deputy registrar notified the appellant, that the appeal had been admitted to hearing and whether the records be filed. I see no proof on the record of appeal that such admission had been made under Section 79B. Be that it may, two years later on 1st July 2010, a notice was issued under Order 41 r 31(2) Civil Procedure Rules addressed to the appellant in person seeking to have the appeal dismissed for lack of prosecution.

“If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

6.On the day called out for the hearing of the notice to show cause, the appellant was absent. The appeal was dismissed for lack of prosecution on 23rd July 2010.

7.On becoming aware of the dismissal orders, the appellant filed an application dated 14th October 2010 through her new advocate seeking to set aside the said orders. The application sought leave for the new advocate to come on record for the appellant.

II APPLICATION 14TH OCTOBER 2010

8.The first prayer sought is for leave for the appellant’s new advocate to come on record. It is an issue that was never addressed by the advocate for the applicant/appellant before any Hon. Judge nor did the respondent comment on this.

9.It had been notified to this court that the former advocate had passed away. Any new advocate who wishes to take over a matter from the former advocate who has passed away is required to file an application for leave to have the name of the deceased advocate removed and replaced with their name as new advocates.

10. The present advocate has appeared before four to five different judges between October 2010 and April 2011 who had all along treated the present advocate as being on record.

11. The application to come on record should at all times be separate from other application and it is hoped in future that this would be adhered to.

12. This court would otherwise formally grant the application for the advocate to come on record on behalf of the appellant.

13. The main prayer sought in the application of 14th October 2010 is to reinstate the dismissed appeal.

14. The appellant had left the conduct of her case in the hands of her late advocate. She came to know of her case being dismissed very late. She prayed through her advocate that the appeal be reinstated for hearing.

15. This application was opposed by the respondents on grounds that since the appeal had been filed in the year 2000 no action had been taken at all for the last 10 years. The delay in prosecuting the appeal was excessive.

III OPINION

16. I have perused this file and noted the following:

16.1 The appellant was represented by M/s P.S. Gatimu Advocate who filed the appeal on the 7th April 2000.

16.2 The lower court file from the tribunal was called for by the deputy registrar and copied to the advocate.

16.3 That this file had not been brought up. Unless this is done, the matter cannot be placed before Hon. Judge under Section 79B Civil Procedure Act for admission on summary rejection of the appeal.

16.4 The deputy registrar notified the appellant in person on 14th July 2008 that the appeal had been admitted. (There is no proof to this effect on the appeal file, that any Hon. Judge admitted the appeal for hearing.)

16.5 On 1st July 2010, a notice under Order 41 r 31(2) Civil Procedure Rules was issued to show cause to the appellant why the appeal should not be dismissed for lack of prosecution.

16.6 This notice of 1st July 2010 was mailed to the appellant's last known box number instead of personal service upon her advocate.

16.7 On 23rd July 2010, the appeal was dismissed in the absence of the appellant who had failed to attend court.

17. In my opinion, the former order III of the Civil Procedure Rules is very clear on the issue of representation as long there is an advocate on record, all service is made upon the said advocate and not the litigant in person. All service upon a party must be personal service. Any other form of service must be by leave of the court and by way of substituted service.

18. In this appeal case, the said appellant was allegedly served by the registrar and the courts. This mode of service was provided for. Even if per chance it was, service should have been to the advocate on record.

19. It is only through the application before court that it transpired the advocate for the appellant had passed away. The procedure for the court to adopt is to write to the Law Society of Kenya to know which advocate had been assigned to deal with the late advocate's firm. That advocate, if known would contact the client to notify her that her advocate had passed away and to appoint a new advocate.

20. Where no action is taken by the client, the advocate for the respondent would file an application under the white book as outlined in the former order III rule 11. It provides to have the advocate removed from record and be given leave to serve the litigant personally.

21. This matter had become intricate due to the appellant not being notified according to law that her matter would be dismissed.

22. The appellant to my mind should have filed a review application to the orders issued on 23rd July 2010 not an application for setting aside.

23. This is because once an appeal has been dismissed, the law does not provide for its reinstatement. The only exception is when on the day called out for hearing the appeal is dismissed, the party who was absent, for good cause, may ask for the dismissal orders to be set aside or *ex parte* judgment be set aside.

24. Under Order 41 r 32(1) now order 42 r 35 (2) Civil Procedure Rules, there is otherwise no such provision. The authorities relied on by the appellant concerned suits and not appeals.

25. My conclusion in this whole matter is that there has been a breach of justice. The orders given by the Hon. Judge on 23rd July 2010 would not have been given if she was aware of the new fact that the

appellant's advocate had passed away.

26. I would in the circumstances, allow the application. The appellant had relied on authorities, which as stated earlier, concerned the dismissal of suits and not appeals under the former Order XVI Civil Procedure Rules.

27. The appeal be and is hereby reinstated for hearing. There will be costs in the appeal.

DATED THIS 13TH DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates:

- i) R M Munyaro instructed by the firm of M./S Amolo Gachoka & Co Advocates for the appellant*
- ii) P Chege instructed by the firm of M/s Wachira, Mburu, Mwangi & Co Advocates for the respondent*