

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.172 OF 2000

MUCHIRI MUIGAI.....
APPELLANT

VERSUS

MILKA NJERI.....
RESPONDENT

R U L I N G

On 14th August 2006, the respondent filed an application seeking orders from this court to enforce the judgment that had been rendered in her favour in respect of the parcel of land known as LR.No.Kiganjo/Handege/1021 (*the suit land*). In particular, the respondent sought an order of the court to the effect that the Deputy Registrar of this court do execute all the transfer forms in relation to the suit land to enable the same to be transferred to the respondent. The application was supported by the affidavit of the respondent. The application was opposed. A replying affidavit opposing the application was duly filed. The application was listed for hearing on 9th June 2010. On that day, the respondent did not attend court. The advocate of the appellant urged the court to dismiss the application for want of prosecution. This court duly obliged. It dismissed the said application with costs for want of prosecution.

On 9th September 2010, the respondent filed an application pursuant to the provisions of **Rules 49 & 73** of the **Probate and Administration Rules** craving for orders from this court to set aside the order of dismissal of the application dated 14th August 2006 that was made on 9th June 2010. The respondent further prayed that the said application be reinstated to hearing. The grounds in support of the application are stated on the face of the application. The respondent's counsel contends that she failed to attend court due to inadvertence. She explained that the date that the application was listed for hearing was mistakenly not diarised by her clerk, thus her failure to attend the court. She urged the court not to punish her client on account of the mistake of counsel. The appellant objected to the application. He filed grounds of objection to the application. It was the appellant's case that the respondent's application lacked merit and had been filed after an inordinate delay. The appellant further stated that the advocate of the respondent did not have *locus standi* to prosecute the application since she had not been properly appointed to act on behalf of the respondent. He therefore urged the court to dismiss the application on costs.

At the hearing of the application, this court heard oral rival submissions made by Miss. Chelagat for the respondent and Mrs. Njuguna for the appellant. This court has carefully considered the facts of this case. It was clear to the court that the advocate of the respondent failed to attend court to prosecute the said application on account on the fact that the scheduled hearing date had not been listed in her diary. The mistake was inadvertent. The objection to the application did not raise any issues that would make this court refuse to exercise its discretion in favour of the respondent. The respondent's counsel is properly on record. I think it is now an accepted principle of the law, that in so far as it is possible, the court should lean towards deciding cases on their merits and not on procedural technicalities. This court is of the view that this is one of the cases where the court is required to exercise its discretion in favour of the respondent and set aside the order of dismissal of the application that it had made on 9th June 2010. The appellant will be adequately compensated by an award of costs.

In the premises therefore, the order of this court made on 9th June 2010 dismissing the respondent's application dated 14th August 2006 is hereby set aside. The said application is reinstated to hearing. The appellant shall be paid costs of this application. The respondent shall be at liberty to list the said application for hearing at the registry.

DATED AT NAIROBI THIS 15TH DAY OF MARCH, 2010

**L. KIMARU
JUDGE**