



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Appeal 39 of 1997

KILWAKE KIMINGICH ::::::::::::::: APPELLANT.

VERSUS

SCHOLASTICA MARUTI ::::::::::::::: RESPONDENT.

RULING.

By a Notice of Motion dated 8th May, 2009, pursuant to the provisions of sections 3 and 3A of the Civil Procedure Act, and Order L Rule 1 of the Civil Procedure Rules the applicant seeks orders:-

1. **THAT**, the orders made on 20th June, 2003 dismissing the appeal be set aside.
2. **THAT**, the appeal be set down for hearing.
3. **THAT**, costs be provided for.

The application is based on the grounds:-

- (a) **THAT**, the appellant/applicant's counsel had passed away.
- (b) **THAT**, the appellant has been ailing.
- (c) **THAT**, the appeal involves a land matter and which in the interest of justice ought to be reinstated.

The application is predicated upon the affidavit of Kilwake Kimingich sworn on the 8th day of May, 2009.

On behalf of the applicant, it was urged that he was previously represented by the firm of Kapten & Co. Advocates who filed the appeal on his behalf. Mr. Kapten passed on in December, 1999. That since the said advocates demise he has not received any communication from the court. That the notice of dismissal dated 11th November, 2009 never reached him. He became aware of the dismissal of this matter in early April, 2009 when the suit land was being sold to a third party. In addition thereto he has been unwell since the year 2000. In this regard he relied on exhibits "RK (a), (b), (c) and (d)". For those reasons he prayed that the dismissal order be set aside.

The respondent opposed the application. In doing so, she relied on her own replying affidavit sworn on 11th November, 2009.

The respondent conceded that the appeal herein was filed by the firm of Kapten & Co. Advocates. That Mr. Kapten died in 1999. The applicant was aware of the demise of his advocate. It was his duty to appoint another advocate to conduct the appeal personally. That the issue of his sickness is a red herring. It is an afterthought since he did not appeal in person and he has not filed this application in person. Just as he was represented by an advocate so is he as at present. When Mr. Kapten passed on he should have instructed another counsel to prosecute his appeal.

Last but not least, that the appeal was filed on 9th July, 1996 and was admitted on 14th March, 1997. Subsequently on 15th September, 1997 the appellants counsel was asked to compile his records of appeal which he has never done till the time of dismissal. That eviction of the appellant from the suit land was done in November, 1999 even before Mr. Kapten for the appellant died. Accordingly the appeal would be academic.

I have analysed the relevant available evidence as best as I can. It is not in dispute that the firm of Kapten & Co. Advocate was initially on record.

Order III Rule 8 of the Civil Procedure Rules provides as follows:-

“ Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating of an advocate with the necessary modifications. ”

When Mr. Kapten died in 1999, it was thus incumbent upon the appellant to file an application or notice to act in person or for the firm of Risper Arunga & Co. Advocates to obtain leave to file Notice of Change of Advocates. Thus the appeal could have proceeded to its final conclusion.

As it is, the firm of Risper Arunga & Co. Advocates have come on record in place of M/s. Kapten & Co. Advocates without obtaining leave of the court.

Accordingly this application by Risper Arunga & Co. Advocates, on behalf of the appellant, is bad in law. It is consequently dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Kitale this 30th day of June, 2010.

N.R.O. OMBIJA.

JUDGE.