REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 78 of 2000

ELIZABETH WAMBUI GITHUKU

ROSE GATHIGIA WACHIRA……. APPELLANT

VERSUS

ALICE WANJIKU NGATIA……...….. RESPONDENTS

RULING

The application before court is by Notice of Motion dated 13th October 2006. The application seeks the review or setting aside of the dismissal of this appeal made on 17th May 2006. Further the application seeks that the appeal be reinstated and be heard on merit. The affidavit in support is sworn by the advocate for the appellant namely Maina Karingithi advocate. He stated that on 17th May 2006 he noticed in the Court's Notice Board that this suit had been listed for dismissal for want of prosecution. That he had to attend to another matter before court 2 namely HCCC NO. 35 and 180 of 2001 on the same date. He therefore instructed a counsel by the name of Mr. Gori to hold his brief in respect of this matter. That the application made by Mr. Gori on that day for the matter to be stood over generally was refused by the court and the court proceeded to dismiss the appeal for want of prosecution. That the notice for the dismissal of the appeal had not been served on Mr. Karingithi and it only came to his notice on 7th March 2006 when he noted that there was no affidavit of service to his firm. He also noted that even the letter returning the lower court file although indicated to have been served on his firm had not indeed been served thereof. In his affidavit he deponed that for reasons unknown to him letters on this matter had not been served to his office which has been detrimental to the appellant. He therefore sought that the court would set aside or review that order.

The application was opposed. The respondent to the appeal filed a replying affidavit. In her affidavit she stated that the appeal was filed in the year 2000. That the appellant had for seven years not taken any action to prosecute the appeal. The respondent stated that she attended court in person when the notice to show cause was due to be heard why the appeal should not be dismissed for want of prosecution. She stated that the explanation given by the appellant why the dismissal should not have been granted was not convincing. She further stated that the present application was filed five months after the order of dismissal.

The record of this court file of 17th May 2006 shows that when the notice to show cause came up before court the appellant was represented by Mr. Gori. Mr. Gori indicated to the court that he was holding brief for Mr. Karingithi who was seeking an adjournment because he had not been served with the notice for dismissal and had only noted the case on the notice board. The Judge requested the respondent to the appeal to respond to that application and the respondent opposed the adjournment. The court ruled on the application and in so doing that the respondent was advanced in age. He also noted that she was from rural area in Karatina and if she had been able to attend court there was no excuse for Maina Karingithi for fail to attend. It is that ruling that the appellant seeks the setting aside or review. On whether the court should consider to set aside that order the court should be satisfied that the applicant approached the court within reasonable time of the dismissal. The applicant did not file the present application until five months after the dismissal. There was no explanation given by the applicant on the delay in making the application. I am of the view that the delay was inordinate and sufficiently so to defeat the prayer to set aside the dismissal. The court is also of the view that what the applicant is seeking

from this court is an appeal against the decision of this court for dismissal of the appeal. The court cannot entertain such an application which is disguised as review or setting aside but is in fact an appeal since that will be inviting this court to sit as an appellant court to a ruling of a Judge of the High Court. Hon. R.S.C. Omolo J.A. had something to say on that matter in *Civil Appeal No. 272 of 2003 NTOITHA M'MITHIARU =AND= RICHARD MAOKE MAORE & 3 others (unreported)*. He stated,

"***The "unlawful and unacceptable mode of service" had been ordered by Onyancha J and in all respects, the two judges had the same and equal jurisdiction. Mulwa, J was here declaring as unlawful and unacceptable orders which had been made by Onyancha, J. In our jurisprudence and with the greatest respect to Mulwa, J he himself had absolutely no jurisdiction to declare unlawful and unacceptable the orders made by a brother judge of equal and concurrent jurisdiction. If this kind of thing was to be allowed to take root, there will, in my view, be total chaos and confusion in the High Court and there would even be no need for the appeal process."***

I am of view that the application is not merited and the same is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 22nd day of April 2008.

MARY KASANGO

JUDGE