

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 38 of 1995

JACKSON KANYONI KABURUNGO.....APPELLANT

Versus

WAICHINGA KABURUNGO.....RESPONDENT

***(Being an appeal from the Ruling of the Senior Resident Magistrate W. Gitari in Nyeri
Succession Cause No. 181 of 1991 delivered on 12th May 1993)***

RULING

The appeal herein was filed on 25th November 2005. The appeal is against the Ruling of the SPM Succession Cause No. 181 of 1991 delivered on 12th May 1993. The Respondent has filed a Notice of Motion dated 28th February 2007 brought under *Sections 78(2) and 3A* of the Civil Procedure Act and Rule 73 of the Probate and Administration Rules. The order sought by that application is:-

“That, the appeal herein be dismissed and/or struck out with costs as the subject matter therein is no longer subject to succession.”

The appeal relates to a ruling over a succession cause. In his supporting affidavit the Respondent stated that following that ruling and since there was no stay granted to the Appellant, the Respondent effected that ruling by registering in his name Land parcel No. **IRIAINI/KIAGUTHU/569**. That the said parcel of land was the subject of the succession cause. Accordingly the Respondent stated that the said parcel of land cannot be subject of the succession cause which is the order sought by the present appeal. The Appellant opposed the application. The Appellant argued that there were no grounds to warrant striking out of the appeal that the fact that there has been change of status does not defeat the appeal. That the appeal has merit.

I confirm that I have considered the application, the arguments in its favour and in opposition. Does the Respondent’s application have merit? On the basis of the grounds offered in its support, I find that it has no merit. The property, the subject of the succession Cause has not been transferred to a third party without notice and the Court can, on hearing the appeal make appropriate orders in regard to that. The ground therefore presented by the Respondent in seeking the dismissal of this appeal is misconceived. The order of the court therefore is that the Notice of Motion dated 28th February 2007 is dismissed with costs to the Appellant.

Dated and delivered at Nyeri this 20th day of July 2007.

MARY KASANGO

JUDGE