

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL 43 OF 1996

MUTHOKA NGUMI 1ST APPELLANT

JOHN NDUNDA MUSYIM..... 2ND APPELLANT

VERSUS

SAMMY K. MUTUNGARESPONDENT

R U L I N G

The parties who appear before this court are not the original parties. Those who started the case had died after the lower court appeal was filed but before it was heard. Mr. Kisongoa who is now appearing for the respondent appeared for the appellant in the Resident Magistrate's Court from where this appeal arises. The Appellant for whom he appeared in that court, I understand the facts, was the defendant in the court of origin which was the Kilungu District Court, being presided by a 3rd class Magistrate. This before me therefore, is a second appeal. The appellant/Defendant lost the appeal at the lower court. Mr. Kisongoa did not appeal for him as the loser. Mr. Makau Senior appealed for the appellant whom he represents here. What this court does not understand is how Mr. Kisongoa happens to represent the respondent here who was also the unrepresented respondent whom Mr. Kisongoa unsuccessfully opposed in the Resident Magistrate's Court.

A second issue is about who should be parties in this appeal. The matter was partly brought before my sister Wendoh J, particularly as concerns the 2nd Appellant, John Ndunda Musyimi. Wendoh J. ruled in the ruling delivered on 8.6.2004 that John Ndunda Musyimi had never been joined as a party and was therefore not a party in this appeal. She also established that by a consent given by the Land Adjudication Officer, Makueni, Muthoka Ngumi, the 1st Appellant and Sammy Kiiio (Mutunga), the Respondent were joined as parties replacing the original parties – Ngumi Kisomo and Mutunga Konza respectively – who had died. If Mr. Makau thought they were wrongly substituted into the case by the lower court, he failed to challenge the same by including a relevant ground of appeal. Infact the issue of the same consent by the Land Adjudication Officer covering all the proceedings in the lower court were also challenged before Mwera, J. in his ruling dated 27.7.2001. Mr. Makau is shown to have fully agreed with Mwera, J. that the consent bringing aboard the parties now before the court,

“is still operative until the machinery is exhausted and final orders issued for the land adjudication officer to take and therefore complete the relevant adjudication register”

In fact in the same ruling, the honourable Judge stated –

“Anyway Mr. Makau said that with the right of appeal from the lower court rulings and judgements, the consent of 4.4.1995 was meant to extend and cover all stages in the proceedings in respect of appeal No. 17 of 1996.”

Both sides, for many years having accepted the present parties, except John Ndunda Musyimi, as the right parties, are at this late hour estopped from again delving back into the issue which had been clearly settled with their consent.

For the above reasons, this court is of the opinion that this very old and unnecessarily delayed appeal, should proceed to a hearing which the court suggests, should be within the next 30 days. Orders accordingly.

Dated and delivered at Machakos this 17th day of February 2006.

D. A. ONYANCHA
JUDGE