



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 1089 OF 2005**

**GRACE WANJIRU MBURU.....PLAINTIFF**

**VERSUS**

**JOSEPH MBURU KIMUKU.....DEFENDANT**

**RULING**

The applicant by way of this Chamber Summons seeks orders that her eviction in execution of the decree of this court in Nairobi HCCC NO.2115 OF 1999 and issued on 26<sup>th</sup> February 2001 be stayed pending the intended appeal against the judgment delivered by Aganyanya J on 26<sup>th</sup> February 2001.

The intended appeal has not been filed because the file went missing, being file HCCC NO.2115 OF 1999. The application was drawn and filed by the applicant who is a lowly peasant who speaks only Kikuyu and she has even requested to be provided with a Kikuyu interpreter. The application does not show the grounds upon which the same is based but it is supported by an affidavit sworn by herself. It is a very length affidavit comprising about 47 paragraphs.

The application is opposed on the ground that the same is incompetent and fatally defective. Mr. Kaburu for the respondent submitted that the application offends all the known legal provisions. It offends the provisions of Section 43 and Section 44 of the Advocates Act Cap 16 in that it does not show the person who drew the affidavit. Secondly it offends the provisions of Order L Rule 15 (2) of the Civil Procedure Rules. Thirdly the jurant appears on a separate page from the body of the affidavit.

The application does not also state the grounds upon which the same is based nor is the application dated. In conclusion counsel submits that even if there will be any appeal, the same has no chances of success and the applicant did not annex the draft of the intended appeal to assist the court.

The applicant has deponed in her affidavit that she was the wife of the step mother of the respondent having been married under Kikuyu Customary Law which allows women to women marriage.

Her husband was called Wamaitha who was the step mother of the respondent. The suit Land LR NO. KOMOTHAI/KIAMBURURU/332 was initially registered in the name of the respondent during land demarcation and he was to hold the same in trust for himself and his step mother. In 1978 Wamaitha sued the respondent to have the land subdivided so that each could have his or her portion. The respondent was awarded 8 acres while Wamaitha was awarded 4 acres.

But because Wamaitha had no child, the register indicated that she was registered for life interest during her life time. But later she got married to the applicant and when she died, the applicant inherited the suit land through succession and she got title which was later cancelled by the court through an application by the respondent who claimed that Wamaitha the woman husband of the applicant had only life interest over the suit land. The applicant has deponed that she had been married and

had lived on the suit land with her woman husband for over 30 years. She further deponed that she was not made aware of all the court proceedings until the time when her eviction had been contemplated. All the decisions against her, first by Aganyanya, J then Waweru J and the Court of Appeal were ex parte though there are returns of service filed in court showing that she was served.

But she states that land matters are very sensitive and had she been served, she could not fail to attend court as the outcome of those proceedings could result in the eviction from her land. I agree with counsel for the respondent that the applicant does not quote the legal provisions under which she has brought her application and other legal technicalities. But talking into account her states in society, a lowly peasant farmer who speaks only Kikuyu that is the best she could have done. The courts now tend to move away from legal technicalities and should decide the real issues in dispute between the litigants.

On the issue of delay in lodging the appeal she has stated that this was caused due to the disappearance of the court file HCCC NO.2115 OF 1999 and in fact to date it has not been traced. She was forced to file another fresh suit to enable her to file her papers.

For the reasons above stated, the applicants application is allowed in terms of prayers 1, 2 and 3 of the Chamber Summons undated but filed in court on 15<sup>th</sup> July 2005.

The applicant is advised to approach KITUO CHA SHERIA for legal assistant. Costs of this application be costs in the appeal.

Dated and delivered at Nairobi this 26<sup>th</sup> day of October 2005.

**J.L.A. OSIEMO**

**JUDGE**