



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 30 OF 1995**

KIHUYU NDIRANGU .....APPLICANT

VERSUS

REUBEN KINYANJUI .....RESPONDENT

**RULING**

This application is for the reinstatement of appeal dated and filed in this court on 3rd February 1995 which was dismissed on 26th February 2002 for want of prosecution.

It is dated 27th and filed in this court on 28th June 2002. The appeal was dismissed under order XLI Rule 31(2) of the Civil Procedure Rules which allows the Registrar of the High Court to place an appeal file before a judge for dismissal if within one (1) year of the filing and service thereof the same has not been set down for hearing.

According to the last order on this file dated 5th June 2000, there was an application dated 17th March 1999 (not 2000 as indicated) which sought various orders including one that James Kihuyu Ndirangu be granted leave to apply for letters of administration ad colligenda bona, that a prohibitory order registered against the suit land L.R. No. Kiamba/Ruaka/T.304 on 12th September, 1995 be reinstated, that the appeal hereof which had abated be reinstated and the said James Kihuyu Ndirangu be deemed as the appellant.

Prayers 1, 2 and 3 of that application were granted on 5th June 2000. These related to the appointment of Kihuyu as the appellant, reinstatement of the prohibitory order registered against the suit land Kiamba/Ruaka/T.304 and the reinstatement of the appeal which was declared to have abated by the order of court dated 15.3.1999.

After this order nothing happened until 26th February, 2002 when the file was placed before the court for dismissal of the suit for want of prosecution. This is the subject of the application of 27.6.2002 subject to this ruling.

The application is supported by the grounds set out on the body thereof and the supporting affidavit.

The grounds on the body of the application are that the appeal was dismissed for want of prosecution on the ground (i) that no step had been taken by either party for 3 years (ii) that various steps have been undertaken by the appellant in the prosecution of the appeal;

- (a) This appeal abated after the death of the original appellant Mr. Kihuyu Ndirangu on 15th October 1997
- (b) That his son Mr. James Kihuyu Ndirangu made application for letters of administration ad colligenda bona under section 67(1) of the Succession Act Cap 160 Laws of Kenya for purposes of taking over this suit.
- (c) The same was granted on 28th July 1999 by this court.
- (d) That earlier on the same James Kihuyu had made an application 17th March 1999 which was heard by his Lordship Justice Shaikh Amin.
- (e) That on 17th March 2000 the said James Kihuyu Ndirangu moved the court again for the appeal to be reinstated.
- (f) That on 25th July 2000 the Honourable Court issued order for the reinstatement of the prohibitory orders.
- (g) That the said orders were served on the Land Registrar Kiambu.
- (iii) That it is apparent from the face of the record that within a period of three (3) years the appellant has taken various steps to prosecute this suit,
- (iv) That it has also been difficult to fix this matter for hearing as the officers on the civil appeal's registry state that they do not have the lower court record and that the same cannot be traced in Kiambu Senior Principal Magistrates Court Registry.
- (v) The Honourable court dismissed the appeal without notice to the appellant on record.

The supporting affidavit, deponed to by James Kihuyu Ndirangu was nearly in similar terms as the grounds stipulated on the body of the application.

A replying affidavit was deponed to by the respondent on 19th August and filed in court on 20th August, 2002. It denied matters deponed to in paras 3 to 8 of the supporting affidavit as he had never been served with an application for substitution or notice of hearing of such application; neither was his advocate on record. That as far as he was concerned the appeal filed by Kihuyu Ndirangu abated in 1999 and that all the prayers sought by the applicant in the application and the whole appeal had been overtaken by events as

- (a) an eviction order had been issued against Kihuyu Ndirangu on 29/6/94 during his life time without any objection by him – that the order was executed by the bailiff on 14.6.1995.
- (b) That the court confirmed the abatement of the appeal on 15.3.99.

That the respondent had transferred the suit premises to a third party on 18th July 2000 through a sale and that the third party had taken possession thereof since with knowledge of the applicant. That in the circumstances there was nothing left for the litigation between the applicant and the respondent and that the applicant cannot persist in pursuing this appeal when he is aware the original appellant had already been evicted from the suit premises during his life time.

Counsel for the parties appeared in this court on 5th November 2002 and 26th February 2003 to urge and/or oppose the application basing their submissions on the grounds on the body of the application and the supporting affidavit and the replying affidavit. The application is for the reinstatement of the appeal which had been declared abated by this court order of 15th March 1999. There was also a prayer that James Kihuyu Ndirangu be issued with letters of administration ad colligenda bona. These orders were granted on 5th June 2000 by Honourable Judge Amin. This is one reason which the applicant

attributed the delay in prosecuting this appeal to.

But inspite of the orders having been obtained as above stated, this application for reinstatement was not made until 27th June 2002 – Nearly 2 years after. No explanation was given for the delay of the nearly 2 years otherwise this is the only way his application could have been considered favourably. And even before making this application for reinstatement of the appeal, the applicant ought to have ensured the record of appeal is ready.

Instead he says this court should give directions as to the record of appeal because officers in the civil appeals registry state that they do not have the lower courts record and that the same cannot be traced in Kiambu Senior Principal Magistrate's court. I am not convinced the applicant does not know how to go about this particular complaint – or that he does not annex correspondence to show his inquiries at that court over this matter or an affidavit by an authorized official at that court to support this aspect of the application!

On the other hand, it is true under order LXI Rule 31(2) of the Civil Procedure Rules the Registrar should list appeals over which a date for the hearing thereof has not be set down for hearing within one year of the filing of the memorandum of appeal before a judge for dismissal on notice to the parties. There is no indication that copies of the notice signed by this court on 26th February 2002 were served on the parties herein, leave alone the applicant.

This is a serious lapse on the part of the Registrar and though this application does not fall under order XLIV of the Civil Procedure Rules, this court can apply the provisions of Section 3A of the Civil Procedure Act to intervene.

It is not convincing to say that reinstating this appeal will serve no purpose because the appeal and application have been overtaken by events. After all if the appeal succeeded, the appellant could still be compensated inform of damages.

I allow the application and reinstate the appeal which was dismissed on 26th February 2002 with an order that thrown away costs of the appeal and those of the application either agreed or taxed shall be paid to the respondent. These shall be the orders of this court.

Delivered this 5th day of March, 2003.

**D.K.S. AGANYANYA**

**JUDGE**