



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO. 166 OF 2001

MARY MUTHONI.....APPELLANT

VERSUS

SAMUEL KAMAU.....RESPONDENT

(Being an appeal from judgment of the Karatina Magistrates Court (A.B.L Musiega SRM) dated 4th December, 2001)

RULING

1. The applicant has filed in this court an application dated **8th December, 2014** seeking the following orders;-

- i. **THAT the application herein be certified as urgent and the applicant be allowed to appoint Wahinya & Associates Advocates as her advocates in this matter.**
- ii. **THAT the firm of Wahinya & Associates Advocates be allowed to come on record in this matter.**
- iii. **THAT the order dismissing the appeal herein on the 7th August, 2013 be set aside and the appeal be reinstated.**
- iv. **THAT the costs be provided for.**

2. The application is brought under **Sections 1B and 78B** of the Civil Procedure Act, **Order 42 Rule 35(2)** and **Order 9 Rule 9** of Civil Procedure Rules, 2010. The Appeal here in was filed on **31st December, 2001** against the judgment of the Magistrate's court which had adopted the finding of the land disputes tribunal in relation to **LR. No Konyu/Gachuku/594**.

3. The Applicant on **15th March, 2005** filed an application to be appointed Guardian ad Litem for the original Appellant (Kariuki Nguje Muthuki). The respondent filed a preliminary objection to the application for guardianship stating it was based on points of law on the **5th May, 2005**. However the court gave the orders of guardianship on **2nd April, 2006**.

4. On **15th March, 2005** the respondent filed an application seeking to dismiss the appeal for want of prosecution, on the grounds that no step had been taken to prosecute it since its filing. In a replying affidavit dated **10th May, 2005** Mbao Gitahi deponed that there had not been unwillingness on the part of

the applicants to prosecute the matter; that the original appellant had been unwell and Mary Muthoni was pursuing orders of substitution.

5. From the pleadings and affidavit filed by **Mary Muthoni** on **17th July, 2008** the original appellant is said to have died on **13th July, 2005**. Seeking to represent the family in the matter, she filed an application dated **8th July, 2008** seeking to be substituted as the Administrator of the estate of the deceased limited to this appeal as per grant of letters dated **2nd April, 2008**. Substitution was done on **30th October, 2008**.

6. On **19th August, 2009** the applicant through her counsel filed a letter to the court requesting for typed proceedings. It is indicated that the registry advised the applicant to pay up requisite court fees to facilitate preparation of the proceedings. No action was taken in this matter until **5th July, 2013** when the respondent fixed his earlier application dated **15th March, 2005** for dismissal of the appeal for want of prosecution.

7. The court heard the application on **25th July, 2013** in the presence of the applicant's Counsel. From the court record, the said counsel had not filed a reply to the application and is said not to have responded though physically present in court. The respondent's application was allowed and the suit was dismissed.

8. The applicant has filed the instant application seeking to reinstate the appeal on grounds of lack of communication from her former advocate stating that he did not inform her of the progress of the matter, and that her attempts to reach him had borne no fruit. It is her contention that the dismissal was due to negligence by her advocate and urged the court to allow a new counsel to come on record and hear her appeal on merit.

9. When the application came for hearing on **22nd January, 2015** the respondent was being represented by a new counsel who had filed a consent signed by one of the former firms of advocates representing him. The applicant opposed that consent stating that the new firm ought to have obtained consent from both Counsels who had previously represented the respondent. The counsel, **Mr Misati** thus withdrew the notice of appointment and the applicant's counsel proceeded with the application ex-parte.

10. I have perused the court records and the pleadings and considered the law applicable. I find the issue for determination to be whether the applicant has met the threshold for the grant of the orders sought.

11. The grounds for review are provided for under **Order 45** of the Civil Procedure Rules. For an application for review to succeed there must be new and important matter or evidence discovered which after due diligence was not within his knowledge, error or mistake on the face of the record or any sufficient reasons. In the instant case, the first two conditions have not been proved.

12. On the ground of '**sufficient reasons**' the applicant has argued that her former counsel was not informing her of the progress of the suit. Upon perusal of the court record, I have noted that other than the notice of appeal filed in 2001, the record of appeal is yet to be filed. In the absence of a record of appeal, there is no appeal to be reinstated.

13. Further the applicant has not given any details on what caused the communication breakdown between her and her counsel. She has also not demonstrated what personal steps she took to follow up this appeal or her advocate. The application for dismissal of the suit was filed in 2005 to which the appellant did not respond and no explanation is given for not doing so. To my mind, the appellant has been indolent and this court should not exercise its discretion in his favour.

14. In light of the foregoing, I find that the application lacks merit and is hereby dismissed.

Dated, signed and delivered in open court at Nyeri this 13th day of February, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Warutere holding brief for Mr. Waihenya for the applicant.

Court Clerk - Lydia