

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.134 OF 2009

IN THE MATTER OF APPEAL AGAINST LAND DISPUTE APPEALS COMMITTEE (RIFT VALLEY PROVINCE)

APPEAL NO.92 OF 2007

MUTHI MATHU APPELLANT

VERUS

PHYLLIS WAIGWA RESPONDENT

RULING

The Notice of Motion dated **24th November 2011** is made under **Order L Rule 1** and **15 Civil Procedure Rules** and **Section 1A, 3** and **3A Civil Procedure Act**. It seeks that this court do set aside the order dated **29th May 2011**, and costs be provided for. The application is premised on grounds that on **18th May 2011**, the applicant received a notice of dismissal of the appeal for want of prosecution – which notice was received nine (9) days after the dismissal. Upon hearing of the dismissal, the applicant moved to court expeditiously and without delay.

In an affidavit supporting the prayers, applicant depones that he lodged his appeal on **28th June 2009** and a memo of appeal was served upon the Respondent.

On **9th June 2009**, the Deputy Registrar wrote a letter to the Rift Valley Province Land Disputes Appeal Committee to furnish them with records in regard to the appeal which had been deferred by the committee. The Respondent was never notified as to whether the record was forwarded to court. He has been eager to prosecute his appeal and urges this court to allow his application.

The issue here as to when the applicant received his notice regarding the dismissal of the appeal can easily be addressed by taking into account the date when the Notice was issue – that was on **26th April 2011** – he does not dispute that the address used is his regular postal address.

A letter or notice is deemed to have been received within reasonable period of that service unless it is sent back on a Return to Sender Basis. The letter was sent on **26th April**, and applicant wants this court to believe that it took 3 weeks to reach him, that is rather far fetched. Legally the document is deemed to be received once it has been posted and there is nothing to suggest there may have been some delay at the Post Office. Indeed even the claims about purported interest in pursuing his appeal does not arise because after filing his appeal and serving the Respondent, he took no steps to move the court or even make inquiries about this matter. The alleged letter written by the Deputy registrar on **9th June 2009** (which would mean it was written before appeal was filed) has not even been annexed to the affidavit. I find no merit in the application and the same is dismissed with costs to Respondent.

Delivered and dated this 2nd day of March, 2012 at Nakuru.

H.A. OMONDI

JUDGE