

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 149 of 1996

FREDRICK WACHIRA NDEGWA

(SUBSTITUTED NDEGWA WACHIRA-DECEASED).....APPELLANT

AND

RICHARDA WANJIKU NDANJERU.....RESPONDENT

**(Appeal from the judgment and/or order of the High Court of Kenya at Nyeri (Osiero, J.) dated
10th June, 1996**

IN

H.C.C. APPEAL NO. 2 OF 1994)

JUDGMENT OF THE COURT

He subject matter of this appeal is a parcel of land No.Tetu/Unjiru/172 which has since been subdivided into 2 titles namely No. Tetu/Unjiru/891 and No. Tetu/Unjiru/892. This is the second time round the dispute over the suit land has reached this Court.

The dispute was referred to arbitration under Order 45 of the Civil Procedure Rules by the Senior Magistrate's Court at Nyeri and an award was duly filed and read. The present respondent was the plaintiff in those proceedings and the defendant was one Ndegwa Wachira (now deceased) and since substituted by Fredrick Wachira Ndegwa now the appellant. Ndegwa Wachira was aggrieved by the award and applied to set it aside alleging misconduct on the part of the arbitrator. By his ruling dated 22nd September, 1993, the Senior Resident Magistrate dismissed the application to set aside the award and gave Ndegwa Wachira leave to appeal to the superior court. That appeal was duly filed on 7th January, 1994 being Civil Appeal No. 2 of 1994. While that appeal was still pending Wachira Ndegwa died on 2nd August, 1994.

Before any application was made for Wachira Ndegwa's substitution his appeal was summarily dismissed by Ang'awa, J. on 4th October, 1994 under section 79B of the Civil Procedure Act.

The appellant having been substituted for his late father then made two applications to the superior court. The first dated 19th February, 1996 sought the revocation of the subdivision of the suit land into Nos. 891 and 892 and the restoration of the original title to his name. The second application was filed on 26th March, 1996 by which the appellant sought the review of the summary dismissal or his appeal. Osiero, J. dismissed the first application by his ruling delivered on 21st March, 1996. And he dismissed the second application by his brief ruling dated 10th June, 1996. It is against the latter ruling that the appellant now appeals to this Court.

We agree entirely that Ang'awa J. erred in dismissing summarily the appeal brought by Wachira Ndegwa

for the simple reason that while she had the power to dismiss the appeal summarily under section 79B of the Civil Procedure Act, she did so when the appellant was already dead. But the determination of that issue alone in favour of the appellant is not sufficient to dispose of this appeal. The suit land has been subdivided and the portion which had been given to the respondent has since been transferred to one Kanyora Muthoi, who is now the registered proprietor. Kanyora Muthoi is not a party to this appeal and it would not be just to make an order which may radically affect his interest in his absence. The subject matter has moved on and is no longer in the control of the respondent.

In these circumstances, this appeal fails and is dismissed with costs.

Dated and delivered at Nyeri this 18th day of October, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL