



IN THE COURT OF APPEAL
AT NYERI

(CORAM: TUNOI, WAKI & AGANYANYA, J.J.A.)

CIVIL APPEAL NO. 156 OF 2005

BETWEEN

1. ITHAGI KAHIHIA

2. CATHERINE WACHU ITHAGIAPPELLANTS

AND

1. EDWARD GIKONYO KAHIHIA

2. GEORGE MWANGI KANYARIRESPONDENTS

(Being an appeal from the ruling and order of the High Court of Kenya at Nyeri (Juma, J.) dated 11th February, 2003

in

H.C.Succession Cause No. 365 of 1999)

JUDGMENT OF THE COURT

The dispute herein related to land reference No. *Othaya/Thuti/ 521* registered in the name of **Mathenge Kahihia**, deceased. **Ithagi Kahihia**, 1st appellant, was his brother. He too died after the filing of this appeal. He has not been substituted. However **Catherine Wachu Ithagi**, 2nd appellant wife to the 1st appellant's brother still survives. She proceeded with this appeal on her own behalf. **Edward Gikonyo Kahihia**, the 1st respondent is also the brother of the deceased Mathenge Kahihia. He also died after this appeal was filed. However, **George Mwangi Kanyari**, 2nd respondent still survives and he proceeded with this appeal on his own behalf. The dispute commenced as **Succession Cause No. 110 of 1993** at the Senior Principal Magistrate's Court Nyeri and on 31st May, 1994 it was by consent of the parties referred to the District Officer Othaya for arbitration by elders. The District Officer was appointed Chairman of the panel. The dispute was deliberated upon and an award filed in court but it is not clear if the same was registered as a judgment of the court. There was an application dated 20th November, 1997 filed in the court for an order to set the award aside. In the meantime the case was transferred to the High Court as **High Court Succession Cause No. 365 of 1999**. It was not fixed for hearing by the appellant for over three (3) years and on 30th April, 2001 an application by the respondents dated 25th April, 2001 was filed under **Order XV Rule 3** Civil Procedure Rules for its dismissal for want of prosecution. This is the application which was heard on 5th November, 2002 by the superior court (*J.V.O. Juma, J. - as he then was*) who delivered his ruling on 11th February, 2003 and dismissed the suit for want of prosecution. As a

result of that ruling the appellants lodged this appeal on 9th June, 2005 through a memorandum of appeal dated 7th June, 2005 listing 4 grounds of appeal as follows:

“1. The learned Judge erred in law and fact in dismissing the appellants’ application without giving a chance to be heard.

2. The learned Judge erred in law and fact in failing to direct his mind to the fact that the dispute was about inheritance of a piece of land registered in the name of Mathenge Kahihia (deceased) who in fact died intestate.

3. The learned Judge erred in law and fact in failing to take into consideration, the close family relationship between the applicants and the deceased in deciding the merits of the application.

4. The learned Judge erred in law and fact in holding that the delay in prosecuting the application was solely attributable to the appellants.

When the appeal was heard before this Court on 18th May, 2011 **Mr. Wamahiu**, learned counsel for the appellants largely repeated the grounds set out on the memorandum of appeal and concluded that the appellants ought to have been given a chance to be heard on the merits of the application dated 20th November, 1997. **Mr. Ndirangu**, learned counsel for the respondents opposed the appeal and submitted that the learned Judge exercised his discretion properly as the appellants failed to pursue their application after filing it.

When the learned Judge delivered his ruling on 11th February, 2003 he stated in part:

“It is gross negligence for counsel to file an application and take no action on same for over 5 years. The respondents have failed to explain their inaction. This court will not condone the laxity of advocates in pursuing their matters.”

This ruling arose from the submissions of counsel for the parties on 5th November, 2002, on the application by the applicant to the application dated 20th November, 1997. When **Mr. Kaburu**, learned counsel for the appellant responded to it, he submitted *inter alia*:

“Substantial Justice demands inter-parties hearing. Both parties reside on the land. Suit was referred to arbitration by the lower court. Award was filed late out of time. Application to set the award filed in the lower court. File was transferred to the High Court. It was High Court to give directions as to the next step. The respondent was unrepresented then.”

In an application of that nature the court only exercises judicial discretion whether or not to grant the order sought. But it is the duty of the applicant to lay the basis for the exercise of that discretion. We do not agree with the submission of Mr. Kaburu before the superior court that it was the court’s duty to give directions as to the next step to be taken. It was the appellants’ who filed the application dated 20th November, 1997 and it was upon them to prosecute it. They did not do so within a reasonable time and did not explain to the learned Judge the reason why they did not do so. We are of the view that the learned Judge exercised his discretion properly and we cannot interfere with his decision. We dismiss this appeal with costs.

Dated and delivered at Nyeri this 8th day of July, 2011

P. K. TUNOI

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR