



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

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

Civil Appeal 292 of 2002

BETWEEN

JOHN NJATHI MWANGI APPELLANT

AND

**NJATHI NJOROGE
RUTHI WAITHIRA**

NJOKI KARIUKI RESPONDENTS

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Aganyanya J) dated 11th June, 2002 wherein the learned Judge dismissed the appellant's application for the reinstatement of the *High Court Civil Appeal No. 270 of 1994* which appeal was dismissed by the superior court on 6th August, 2002 for want of prosecution under *Order XLI Rule 31 (2) Civil Procedure Rules*.

The appeal which was dismissed by the superior court was against the order of the Resident Magistrate, Thika, referring the dispute on the distribution of the estate of Rachel Muthoni Njathi to the District Officer (DO) and elders for determination and the subsequent order dismissing the application to set aside the decision of the D.O. and the elders.

The appellant is the son of Miriam Wairimu who was the daughter of Rachel Muthoni Njathi who died intestate. She was survived by Wanjiru Njoroge (deceased) – mother of Njathi Njoroge (1st respondent); Ruth Waithera (2nd respondent) and Njoki Kariuki (3rd respondent). The appellant claimed to be the sole beneficiary of the estate of his grandmother Rachel Muthoni Njathi comprising of land – Land Title No. Loc. 3/Kariua/483. It appears however, that the D.O. and the elders awarded the appellant 1/3 share of the land and two – thirds share to the three respondents equally. The dismissed appeal was essentially against that distribution.

The dismissed appeal was filed on 14th September, 1994. It was dismissed on 6th August, 2002 eight years later for want of prosecution. The application for the reinstatement of the dismissed appeal was filed on 17th May, 2002.

The appellant did not show under what law the application for reinstatement of the appeal was made. This appeal is against the order of the superior court dated 11th June, 2002 dismissing the application for the reinstatement of the appeal.

By Order XLII 1(1) (z) Civil Procedure Rules, an appeal lies as of right against the dismissal of an appeal

under **Order XLI Rule 31**. However, Order **XLI** does not provide for an application for the reinstatement of an appeal dismissed for want of prosecution under Order XLI Rule 31. The rules only provide for re – admission of an appeal dismissed in of default attendance on the hearing date (see Order XLI Rule 16).

The appellant did not therefore have a legal right to apply for re – instatement of the dismissed appeal.

It follows that the application for reinstatement which was dismissed by the superior court was incompetent and that the order appealed from was made without jurisdiction. The order is therefore null and void. As no legal right of the appellant was infringed by dismissal of the appeal, this appeal is incompetent and is struck out with costs to the respondents.

Dated and delivered at Nairobi this 1st day of July, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR