



REPUBLIC OF KENYA



Njuguna & 31 others v Karanja & another (Environment & Land Case E009 of 2021) [2023] KEELC 17601 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E009 OF 2021**

FM NJOROGE, J

MAY 31, 2023

BETWEEN

ZACKARIA KIMANI NJUGUNA & 31 OTHERS PLAINTIFF

AND

MARGARET NJOKI KARANJA 1ST DEFENDANT

AGATHA NJAMBI KARIUKI 2ND DEFENDANT

RULING

1. This ruling is in respect of the defendants Notice of Motion application dated 21/03/2023 expressed to be brought under Order 43(1)(3), Order 51 Rule 1 of the *Civil Procedure Rules* 2010, sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* which seeks the following orders:
 - a. Spent
 - b. This honorable court grant leave to the defendant/applicant herein to appeal against the ruling and order made on March 16, 2023.
 - c. The costs of this application be provided for.
2. The application is supported by the affidavit of Margaret Njoki Karanja sworn on 21/03/2023. The grounds on the face of the application and the supporting affidavit are that the court made a ruling and order on 16/03/2023 dismissing their application to set aside the ex parte judgement; that their advocates on record did not get a chance to make an oral application for leave to appeal since the ruling was delivered electronically; that they are dissatisfied with the ruling and order of the court made on 16/03/2023 and wish to appeal against it; that the defendants have an arguable appeal with high chances of success; that the court in its ruling did not consider the affidavits sworn by the 2nd defendant and Jonah Goodwin Kariuki Kaniu whose averments were uncontroverted by the plaintiffs; that had the court considered the said affidavits, it would have arrived at a different conclusion and that the court



contradicted itself by concluding that her draft replying affidavit did not disclose any triable issues and at the same time stated that the only issue that was raised is the payment of Kshs. 112,000/= which can be discussed.

3. In response to the application, the plaintiffs filed a replying affidavit sworn on 28/03/2023 and filed on 30/03/2023 by Zackariah Kimani Njuguna, the 1st plaintiff. He deposed that the defendants application is an after thought and is a delaying tactic; that the said application is only meant to frustrate the conclusion of the dispute and is a wastage of the court's resources and time; that the plaintiffs being the successful parties are entitled to the fruits of their judgement; that no prejudice would be occasioned to the defendants if their application is disallowed and so they sought that it is in the interest of justice that the application be disallowed.
4. The application was canvassed by way of written submissions. The plaintiffs filed their submissions dated 12/05/2023 on 15/05/2023 while the defendants filed their submissions dated 17/05/2023 on 19/05/2023.
5. The defendants in their submissions identified the following issues for determination:
 - a. Whether the defendants/applicants have a right to appeal.
 - b. Whether the filing and service of the notice of appeal is a fetter to the right of appeal.
 - c. Who should bear the costs.
6. The defendants submit that the right of appeal exists to allow a party that has lost a chance for the decision to be reviewed to appeal to the appellate court. The defendants relied on section 75 of the *Civil Procedure Act* and Order 43(2) of the *Civil Procedure Rules* in support of their arguments. The defendants also submit that they have an arguable appeal as per the memorandum of appeal that had been annexed to their supporting affidavit. The defendants further submit that they are only seeking for justice to be done through a review of the ruling as allowed by law. They concluded their submissions by seeking that their application be allowed.
7. The plaintiffs submitted on whether the defendants are entitled to the orders sought and whether costs should issue. On the first issue, the plaintiffs submitted that the defendants filed the present application together with a Notice of Appeal on the same day without obtaining leave. The plaintiffs relied on the case of *Inderjit Singh Saimbhi v Mohinder Singh Saimbhi & another* [2020] eKLR and submitted that since they had already filed the Notice of Appeal, this application is superfluous. They also submitted that the defendants were served repeatedly but they opted not to attend court and they have only come to court after the ex parte judgement had been entered. The plaintiffs relied on the case of *Muguga Investment Company Limited & 2 others v Nicholas Kabucho Murimi & 7 others* [2015] and submitted that the defendants' application lacks merit and should therefore be dismissed. On the issue of costs, the plaintiffs relied on section 27 of the *Civil Procedure Act* and sought that the costs of the application be borne by the defendants.

Analysis and Determination

8. After considering the application, the replying affidavit and the submissions, the only issue that arises for determination is whether the defendants should be granted leave to appeal against the ruling delivered on 16/03/2023. The defendants argue that they were aggrieved by the ruling delivered by this court on 16/03/2023 and since it was delivered by electronic means, their advocates could not seek leave to appeal against the said ruling. This then necessitated the filing of the application under consideration. The plaintiffs on the other hand argue that the defendants' application is an abuse of



the court process and is only meant to delay the course of justice. The plaintiffs also point out that the defendants have already filed a Notice of Appeal and therefore the present application is misconceived.

9. Judgement in this matter was delivered on 24/10/2022. The defendants filed the application dated 21/11/2022 seeking to set aside the said judgement under Order 12 Rule 7 of the Civil Procedure Rules which application was dismissed by this court in its ruling delivered on 16/03/2023. It is this ruling that the defendants are seeking leave to appeal from.
10. Order 43 Rule 1(h) provides as follows:

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“(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
...(h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);...”

11. It is my view that an appeal from a ruling on an application brought under Order 12 Rule 7 of the Civil Procedure Rules lies as of right and there is no need for a party to seek leave. The defendants therefore did not need to seek leave to appeal as they have an automatic right of appeal. A perusal of the court record indicates that the defendants had already filed a Notice of Appeal dated 21/03/2023 and lodged on 22/03/2023 against the ruling delivered on 16/03/2023. It is my view therefore that the defendants' application dated 21/03/2023 lacks merit and it is hereby dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

