



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 17 OF 2013**

**FRANCIS NYAGA NGINYINYI.....PLAINTIFF**

**VERSUS**

**KABABI KANGANGI.....1<sup>ST</sup> DEFENDANT**

**KABARE FARMERS CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

The Applicant has moved this Court through a Notice of Motion dated 20<sup>th</sup> February, 2020 pursuant to the provisions of *Sections 1A, 1B and 3A of the Civil Procedure Act, Order, 18. Order 43 and Order 51 Rules 1 to 3 of the Civil Procedure Rules*, seeking the following orders:

- 1. That the 2<sup>nd</sup> Defendant/Applicant do have the leave of this Honourable Court to appeal against the two rulings delivered herein on 10<sup>th</sup> February, 2020.**
- 2. That the costs be provided for.**

The application is founded upon the following grounds:

1. The 2<sup>nd</sup> Defendant/Applicant is aggrieved by the ruling delivered herein on 10<sup>th</sup> February, 2020 and intends to appeal against them having filed a Notice of Appeal.
2. An appeal from the ruling of this Honourable Court, under *Order 18 of the Civil Procedure Rules*, lies with the leave of the court as mandated by *Order 43 Rule (2) of the CPR*.
  - a. The intended appeal raises grounds that merit judicial consideration within the meaning of the rule in **Sango Bay Estate & Another v Dresner Bank [1971] EA 17** namely;
    - a) Whether the court was right in ordering the 2<sup>nd</sup> Defendant's witness to step out as one of the plaintiff's witness was testifying.
    - b) Whether the court was right in allowing the 1<sup>st</sup> Defendant to give evidence despite the fact that neither made nor filed a witness statement.
    - c) Whether the orders made that day i.e. 10<sup>th</sup> February, 2020, contravened the 2<sup>nd</sup> Defendant's right to a fair hearing.
    - d) The exercise of discretion by this honorable court was plainly wrong and against the law as set out by the Court of Appeal in **Kenindia Insurance Company Limited v East African Underwriters Kenya Limited & Others, 1982-1988) KLR, 639**.

3. In **Re Estate of Mbiyu Koinange (deceased) [2015] e KRL**, this Honourable Court held that an applicant seeking leave to appeal need not demonstrate that its proposed appeal has overwhelming chances or probability of success, rather it merely requires that it has an arguable and reasonable appeal.

4. The applicant's right to appeal is provided for by *Article 48 of the Constitution* which guarantees the right to access to justice for all persons; in **James Wangalwa and another v Agnes Naliaka Cheseto [2012] e KLR**.
5. The applicant has met the requirements for granting the application for leave to appeal.
6. The applicant's right to a fair hearing under article 50 of the Constitution has been contravened.
7. The Court of Appeal may take a different view of the matter from the one taken by this Honourable Court.
8. It is in the interest of justice if the prayers sought are granted.

In addition to the grounds, the applicant through **SAMUEL MAINA** has deposed to a 9 paragraphs supporting affidavit, of which the following are the major averments:-

1. That he is the Secretary Manager of the 2<sup>nd</sup> Defendant herein and has authority to swear the affidavit.
  2. He seeks the court's leave to refer to the two rulings which were delivered here on 10<sup>th</sup> February, 2020.
  3. The 2<sup>nd</sup> Defendant/Applicant is aggrieved by the ruling delivered herein on 10<sup>th</sup> February, 2020 and intends to appeal against them having filed a notice of appeal.
4. That he has been advised by his advocate on the grounds for lodging an appeal to the Court of Appeal.

The Plaintiff/Respondent opposed the application vide his 15 paragraphs replying affidavit dated 25<sup>th</sup> May 2021, of which the following are the major averments:

1. That the said application lacks, merit, frivolous and discloses no reasonable cause of action and is meant to waste time as the suit was filed in 2010.
  2. That the court should concern itself with conclusion of the main suit in order to determine the parties' rights and not mere technicalities.
  3. The filed notice of appeal is a non-starter, incompetent and improperly filed without leave of the court.
  4. That the applicant has not stated what specific prejudice it has suffered as a result of the two orders.
  5. That if the two witnesses were present and heard the testimony of the witnesses they were likely to skew the testimony of the other witnesses.
  6. That the two witnesses cannot purport to be KABARE FARMERS CO-OPERATIVE SOCIETY which is a legal entity and the mere fact that they are employees of the said entity does not equate them to it.
  7. That the 1<sup>st</sup> defendant being very elderly litigant and who was appearing in person cannot have been barred from testifying for not filing a witness statement.
  8. That the applicant has not demonstrated what prejudice it suffered when the first defendant testified without a statement.
  9. That the 2<sup>nd</sup> defendant's defence is against the plaintiff and not against the 1<sup>st</sup> defendant.
10. That the leave sought cannot be granted in vain especially where the applicant has not demonstrated that he has an arguable appeal.

### **ANALYSIS**

The applicant has brought this application for leave to appeal the ruling of this Honourable Court issued on 10<sup>th</sup> February, 2020 under **Order 18 of the Civil Procedure Rules**. In that application, the Applicant is seeking leave of the court pursuant to **Order 43 Rule (2) of the Civil Procedure Rules**.

An application for leave to appeal an order or decision under **Order 43 rule 2 CPR** is a discretionary power to be exercised judicially. It is an undoubted right of every litigant who is aggrieved by any order/decision issued/given by a court or tribunal to appeal against such order/decision within the stipulated period. The order/decision which the Applicant is seeking to overturn was issued by this Court on 10/03/2021. It is not a condition for an applicant to show that the proposed appeal is arguable or likely to succeed as that is a preserve of the appellate Court. The only condition this court must satisfy itself is that the application has been made within the prescribed period which, in this case, is 14 days from the date of issue. Since this application was filed on 20/02/2020, which was less than 14 days from the date of issue, I am satisfied that the application meets the threshold for the grant of the orders sought. The upshot of my analysis is that the Notice of Motion dated 20/02/2020 is merited and the same is allowed as follows;

1) *The 2<sup>nd</sup> Defendant/Applicant be and is hereby granted leave to appeal against the two rulings of this Court delivered on 10<sup>th</sup> February, 2020 within 14 days from the date of this Ruling.*

2) *The costs of the application to abide the intended Appeal.*

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 21<sup>ST</sup> DAY OF JANUARY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. *Mr. Munyiri for the 2<sup>nd</sup> Defendant*
2. *Plaintiff/Advocate – absent*
3. *Kabuta, Court clerk.*