REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 36 OF 2008

PETER NTHENGE NGEWA ……..……....…APPELLANT

VERSUS

SAMUEL WAMBUA KAMAMI…….....…RESPONDENT

(Being an appeal from the original Ruling in Machakos Chief Magistrate's Court Civil Miscellaneous No. 1 of 2003 by Hon. J.M. Munguti, SRM on 19/2/08)

RULING

1. The award in the **Land Disputes Tribunal Case No. 102** of 2002 was adopted and confirmed as the judgment of the court on the 14/1/2003. Thereafter, a decree was issued. On the 29th January, the Defendant/Respondent appointed the firm of **Rachier & Company Advocates** to act for him in the matter. An application to set aside, vary or vacate the judgment and decree was filed on the 14th February, 2003 by the aforestated firm. The plaintiff on the other hand appointed the firms of **Ms Makau & Company** to act for him.

2. A Notice of Motion seeking execution/compliance of the decree was filed by the Plaintiff/Decree holder on the 30th June, 2003. Grounds of opposition were filed on the 8th December, 2003.

3. On the 6th June, 2007, the firm of **Ngolya & Company Advocates** filed a Notice of Appointment purporting to have been appointed to act for the Respondent/Judgment Holder. On the 10th July, 2007, the Applicant filed a Preliminary Objection on the point of law on the ground that **L.N. Ngolya & Company Advocates** were not properly on record and the action offended the provisions of the **Civil Procedure Rules.** A Notice of Preliminary Objection on a point of law was consequently filed to the effect that the applicant/ decree holder's purported execution for costs was illegal and an abuse of the court process.

4. In his submissions **Mr. Mutua Makau,** learned counsel for the Applicant stated that counsel representing the respondent was not properly on record. Alluding to **Order III rule 9** of the Civil **Procedure Rules**, he stated that there was a judgment on record therefore a new advocate needed leave to be allowed to be on record. Further, he argued that even the filing of the Preliminary Objection by the firm of **Ngolya & Company Advocates** was null and void.

5. In response thereto, **Mr Ngolya** stated that **Order III rule 9** of the **Civil Procedure Rules** did not apply to the proceedings having emanated from the **Land Disputes Tribunal Act.**

6. The court in dismissing the Preliminary Objection made a finding that **Order III rule 9A** was only applicable where there is change of advocates after entry of judgment or when a party decides to act in

person.

7. It is upon this background that the appellant was aggrieved. In his appeal against the ruling he stated that:-

i. The learned trial magistrate erred in law and fact in dismissing the appellant's Preliminary Objection dated 10th July, 2007 when the appellant had proved that judgment had already been entered against the respondent on 14th February, 2003 and that the advocate for the respondent had not obtained leave to come on record as laid down in **Order III rule 9A of the Civil Procedure Rules**;
ii. The learned trial magistrate erred in law and fact in allowing the respondent's Preliminary Objection dated 11th July, 2007 yet it had been filed and argued by an advocate who was not properly on record;
iii. The learned trial magistrate erred in law and fact in ruling that the applicant/appellant was not entitled to any costs in the Machakos Lower Court Miscellaneous Application No. 1 of 2003 while the same costs had been granted by the Court after conclusion of two different formal applications;
iv. The learned trial Magistrate erred in law and fact in acting as an appellate court and on its own motion reviewing and dismissing the costs awarded on the two applications to the appellant yet the same costs were awarded by a different magistrate and no application to set the costs aside or review was ever filed or made by the respondent;
v. The learned trial magistrate erred in law and fact in dismissing a valid decree which was issued by a valid court yet there was no application to vary, stay or dismiss the said decree.
vi. The learned trial magistrate erred in law and in fact and misdirected itself in giving a ruling concerning costs arising from the Tribunal yet the applicant/appellant had not sought for such costs; and
vii. The learned trial magistrate erred in law and in fact in awarding costs to the respondent in his preliminary objection yet the said preliminary objection had no merits at all.

8. The appeal was canvassed by way of written submissions. Counsel for the respondent argued that the appeal filed was incompetent as the appellant did not seek leave of the court prior to filing it. He stated that under **Order XLII of the Civil Procedure Rules**(now repealed) an order made by the court touching on a preliminary objection on a point of law is not included as one of the orders in pursuance of which an appeal lies as of right.

9. In response thereto counsel for the appellant submitted that leave was not a requirement in the instant case as the preliminary objection made in the Lower Court was pursuant to Orders of the Civil Procedure Rules, therefore the provisions of **Order XLII** do not apply. The Appeal therefore lies of right under **Order XLII 1(1) (c)** of the **Civil Procedure Rules** as points of law are found in **Order VI** rule 7.

10. **Section 75** provides for appeals from orders. Orders from which appeals lie of right are provided for by **Section 75(1)** and in particular paragraph (h) which specifies that an appeal lies of right from any order made under the rules from which an appeal is expressly allowed by the rules. Orders from which the appeal lies of right are provided by **Order XLII (1).** In particular paragraph(c) alluded to by the appellant's counsel in respect of pleadings generally, Order **XLII (2)** is emphatic. It provides:-

> "***Any appeal shall lie with leave of the court from any other order made under these Rules***"

11. The appeal in the instant case is against a Preliminary Objection raised in the Lower Court. The question that must be answered is whether the ruling being appealed is an order as envisaged by the rules?

12. A Preliminary Objection was clearly delineated in the case of ***Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributor Ltd [1969} E.A. 696*** where **Law J.A** stated the following:-

> "***So far I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if***

argued as a preliminary point may dispose off the suit".

13. **J.B. Ojwang ,J**(*as he then was*) clarified the issue in the case of **Oraro versus Mbaja[2005) eKLR** where he stated that:-

> ***"I think the principle is abundantly clear. A "preliminary Objection' correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence . Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof , or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement...that 'where a court needs to investigate facts. A matter cannot be raised as a preliminary point"***

14. In another case of ***G.R. Mandavia versus Ralton Singh [1965] E.A. 118*** the court of Appeal held:-

> ***"Where a preliminary issue… fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave".***

15. This is a case where a Preliminary Objection was raised. In my opinion it was an arguable case considering the intention of **Order III Rule 9** of the **Civil Procedure Rules.** However, the learned trial magistrate exercised his discretion, applied the law and came up with a ruling which was an order that does not fall within the ambit of rules provided by **Section 75(1) (h)** of the **Civil Procedure Rules.** Leave was required.

16. In the case of **Makhangu -versus- Kibwana [1995 – 1998] 1 E.A. 175** - it was emphasized that where leave is required to file an appeal and such leave is not obtained, the appeal filed is incompetent and cannot even be withdrawn as an appeal.

17. From the foregoing it is apparent that the appellant required leave of the court to appeal from the ruling of the Lower Court. Leave having not been sought as required by the law, the appeal is incompetent. Consequently, it is struck out with no orders as to costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **27TH** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE