



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 3 OF 2017

FREDRICK MUCHIRI MBURUTO..... APPELLANT/RESPONDENT

VERSUS

GRACE WANJIKU.....1ST RESPONDENT/APPLICANT

JOSEPH KINYUA KARUMBE..... 2ND RESPONDENT

RULING

1. The 1st Respondent herein filed a Notice of Motion dated 17th July, 2020 whereby she's seeking the following orders:

a. That this Honourable Court be pleased to strike out this appeal with costs.

b. The costs of this application and of the appeal be awarded to the 1st Respondent/applicant.

2. The application is premised on the following grounds on the face of the application: -

a. The order of the subordinate court dated the 31st March, 2017, the subject of this appeal does not qualify for automatic right of appeal under the provisions of *Section 75 of the civil procedure Act; and Order 22 of the Civil Procedure Rules*.

b. The order dated the 31st March, 2017 arises out of the adoption of the award and entry of judgment for the purposes of execution of the awards of Land Disputes Tribunal established under the then Land Disputes Tribunals Act, No. 18 of 1990, (Now repealed).

c. The proceedings giving rise to the order of the subordinate court dated the 31st March, 2017 were initiated by the parties under the procedures and powers granted to the courts under the referred Land Disputes Tribunals Act.

d. The proceedings began with the award of the Central Land Disputes Tribunal which was appealed to the Provincial Land Disputes Appeals Committee, and finally on points of law to the High Court.

e. The role of the Resident Magistrate's court in the LDT No. 10 of 1999 was purely ministerial. It was to adopt the award of the Tribunal as a judgment of the court and execute it.

f. This was done by the resident magistrate by his ruling dated 31st March, 2017, the subject matter of this appeal.

g. No appeal lies.

h. The appeal before court is ill conceived, frivolous and vexatious.

3. The application was supported by the Affidavit of the 1st Respondent/applicant which was sworn on 17th July, 2020.

4. The respondent deponed that the impugned ruling arose from her application dated 10th September, 2010 in LDT No. 10 of 1999 in the PM's Court at Kerugoya for execution of the award of the Provincial Land Disputes Appeals Committee Central Province which is the subject of this appeal.

5. She further deponed that she had been advised by her advocates on record that the appeal was filed without leave. Further she had been advised that the memorandum of appeal has never been served, the appeal had never been listed for direction and that it was a ploy to keep

this litigation in court until she was too old to enjoy the fruits of her judgment.

6. She also deponed that as the trial magistrate had observed in his ruling, this was an old matter and litigation must be brought to an end.
7. The Appellant/Respondent on the other hand opposed the application by a Replying Affidavit sworn on 5th February, 2020 and filed on 8th February, 2021.
8. The Appellant stated that she had been advised by her advocates on record that the appeal by virtue of *Section 75 (h) of the Civil Procedure Act* is competent and properly before court and should be heard and determined on merit.
9. He stated that one of her complaints in the appeal was that the Learned Resident Magistrate did not have jurisdiction to entertain the 1st Respondents application which is a matter of law appealable as of right.
10. He stated that the legality of the award was never determined by the High Court as contended by the Applicant and that the role of the Resident Magistrates Court was not purely ministerial as it had to first satisfy that it had jurisdiction to deal with the matter and that the award was lawful.
11. He stated that the impugned orders were appealable under Order 43 1 (l) (k) and that his appeal raises a fundamental point of law on whether it was lawful for the Learned Magistrate to authorize the Executive Officer to sign necessary documents to facilitate the transfer yet the suit land was registered in the name of one Purity Wahito Kinyua who was not a party to the suit and application.
12. He stated that the Memorandum of Appeal was an annexure to his affidavit in support of his application for stay of execution in the lower court and that the appeal could not be listed for directions before admission.

PARTIES SUBMISSIONS

13. When the application came up for hearing on 10th May, 2021, the parties through their advocates on record agreed that it be disposed of by way of written submissions.
14. The Applicant filed hers on 3rd August, 2021 while the Appellant filed his on 16th August, 2021.

APPLICANT'S SUBMISSIONS

15. The applicant submitted that the ruling dated 31st March 2017 does not give rise to a decree or part of a decree within the meaning of *Section 65 (1)(b) of the Civil Procedure Act, Cap 21* and thus there's no right of appeal conferred and that the memorandum of appeal is therefore misconceived and ought to be struck out.
16. The applicant further submitted that the impugned ruling does not give rise to any orders prescribed under *Section 75 or 76 of the Civil Procedure Act, Cap 21* and thus, there is no right of appeal under those Sections or under *Order 43 Rule (1)(k), order 22 rules (25) (57) (61) (3) and 73 of the Civil Procedure Rules*.
17. He submitted that the Land Disputes Tribunal Act No. 18 of 1990 was a complete act by itself with its own rules and regulations which was the position until it was repealed by the replacing legislation in the name of Environment and Land Court Act No. 19 of 2011 which was operationalized on the 30.08.2011.
18. He concluded that litigation had been going on since 1998, that is 23 years and thus, litigation must be brought to an end as observed by the trial magistrate.
19. He prayed that the Memorandum of Appeal be struck out with costs as the same is untenable, frivolous and vexatious.

APPELLANT'S SUBMISSIONS

20. The Appellant submitted the applicant's application has no merit and relied on his replying affidavit sworn on 5th February, 2021 and filed on 8th February, 2021.
21. He also submitted that the appeal is properly before court and raises substantial points of law and ought to be heard so that it can be determined on merit.
22. He outlined the grounds set out in his memorandum of appeal and urged that the instant application be dismissed with costs as the issues raised in his replying affidavit were not challenged, controverted or denied by the applicant.

ANALYSIS

23. I have considered the application, Affidavit evidence, grounds of opposition, annexures to the Affidavits, written submissions and the applicable law.

24. The applicant's case is that the appeal ought to be struck out as leave was not sought prior to filing the same. Further, the Applicants contend that no appeal lies against the order adopting the Provincial Land Disputes Appeals Committee Central Province.

25. The appellant on the other hand contend that he had automatic right to lodge this Appeal under the provisions of order 43 Rule 1 sub-rule (1) (k).

26. I have perused the Memorandum of appeal dated and filed on 26th April, 2017 which reads as follows: -

“Being an appeal from the Ruling/Orders Y. M. Barasa, Resident Magistrate delivered on 31st day of March, 2017 in Kerugoya Principal Magistrate’s Court Land Disputes Tribunal Case No. 10 of 1999 (L.D.T No. 10 of 1999) – Grace Wanjiku (Claimant) vs Joseph Kinyua Karumba 1st Objector & Fredrick Muchiri Mburuto 2nd Objector”

27. It is thus evident that the appellant is seeking to appeal the Ruling and order that was delivered on 31st March 2017.

28. I have perused the said ruling which is at page 122 of the Record of appeal dated and filed in this court on 3rd March, 2021. The same was delivered with respect to a Preliminary Objection dated 25/10/10 and two applications dated 25/10/10 and 5/11/10 respectively.

29. In the application dated 25th October, 2010 which is at page 9 of the Record of Appeal, the applicant had sought the following orders: -

“That this Honourable Court be pleased to review its order entering judgment in terms of the Kirinyaga Land Disputes Tribunal’s award, the award of the Central Province Appeals Committee and all consequential orders and all decrees and set them aside....”

30. In the application dated 5th November, 2010 which is at page 13 of the record of appeal, the applicant therein sought the following orders: -

“That the executive officer be authorized to sign the necessary documents to facilitate the transfer of L.R NO. Inoi/Kariko/752 as per the judgment entered on 16th October, 2001 in this case.....”

31. The Preliminary objection dated 25th October, 2010 was made in opposition to an application dated 10th September, 2010 whereby the applicant therein sought similar orders to those sought in the above mentioned application dated 5th November, 2010.

32. As observed earlier on, the said applications were dealt with together in the impugned ruling.

33. Pertaining the application dated 25th October, 2010 abovementioned, the same sought for review. Orders emanating from an application for review are appealable as of right under *Order 43 Rule (1) (x)*.

34. The application dated 5th November, 2010 sought orders to Execute an order of the court under *Section 98 of the Civil Procedure Act* which provides that: -

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

35. The Appellant contend that the same is appealable as of right under *Order 43 Rule 1 (k)*. The said provision of the law specifies that orders emanating from *Order 22, rules 25, 57, 61(3) and 73* (orders in execution) are the ones appealable without leave.

36. It therefore follows that an order for execution of instruments by an order of a court emanating from *Section 98 of the Civil Procedure Act* can only be appealed against with leave of the court.

37. I have perused the proceedings of the trial magistrate and I note that the appellant did not seek leave to appeal against the order made by the trial magistrate with regards to the application dated 5th November, 2010 and Preliminary Objection in response to the application dated 10th September, 2010. Failure to seek leave goes to the root of the appeal and the fate of the same is striking it out.

38. This being the case, the appellant ought to have appealed against part of the ruling dealing with the findings and determination of the application for review dated 25th October, 2010 since it is not mandatory for an appellant to appeal against the entire ruling/order.

39. In the case of *Phillip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103 AT 1040, Apaloo J* (as he then was) held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party

should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

40. Further **Article 159 (2) (d) of the Constitution** of Kenya provides that: -

“..... Justice shall be administered without undue regard to procedural technicalities.”

41. From the foregoing and in view of the fact that the applications were dealt with in an omnibus single ruling, striking out the entire appeal would be a draconian step for this Honourable Court to take.

42. Since this Honourable Court has discretionary powers to grant leave to amend pleadings, I am of the view that the Memorandum of Appeal can be amended to inject life to this Appeal.

CONCLUSION

43. In the circumstances I find that the Notice of Motion dated 17th July, 2020 succeeds partly and the same is hereby allowed in the following terms:-

a. No appeal lies with regards to the order and findings of the application dated 5th November, 2010 in Kerugoya Principal Magistrate’s Court Land Disputes Tribunal Case No. 10 of 1999 (L.D.T NO. 10 OF 1999).

b. An appeal lies as of right with regards to the application dated 25th October, 2010 in Kerugoya Principal Magistrate’s Court Land Disputes Tribunal Case No. 10 of 1999 (L.D.T NO. 10 OF 1999).

c. The appellant be and is hereby granted leave to amend his Memorandum of Appeal to reflect it as an Appeal in respect of the ruling delivered on 5th March, 2017 in Kerugoya Principal Magistrate’s Court Land Disputes Tribunal Case No. 10 of 1999 (L.D.T NO. 10 OF 1999).

d. The Appellant to comply with order (c) above within 21 days failure to which the appeal shall automatically stand as struck out with costs to the Respondent.

e. Costs of the application to be in the cause.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Maina Kagio holding brief for Mr. Muchiri for Appellant
2. Ms Wambui Mwai holding brief for Njagi for the Respondent
3. Kabuta – Court clerk.