



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 622 OF 2007

CECILIA WANJIRU KIMWERE.....APPLICANT

V E R S U S

- 1. THE HON ATTORNEY-GENERAL**
- 2. JOHN GATHARA WACHUKA.....RESPONDENTS**

R U L I N G

1. On 11th June 2010 the appeal herein was allowed by consent in the following terms.
 - “(i) By consent the appeal is allowed with no orders as to costs.**
 - (ii) The Government surveyor shall conduct a resurvey in relation to the suit property to resolve the dispute.**
 - (iii) The Government shall not be held responsible for any costs that may be lodged by any third parties.”**
2. Subsequently the Appellant applied by **notice of motion dated 8th February 2011** seeking two main orders as follows –
 - (a) That the re-survey be carried out in the presence of all interested parties to determine the boundary between L R Nos. Dagorreti/Riruta/2437 and 2438.
 - (b) That the survey be done vertically and not horizontally as was earlier done by the Land Registrar.
3. That application was heard *inter partes* before Onyancha, J. In a ruling dated and delivered on 8th March 2013 the learned Judge directed that there be a re-survey of the boundary between the two parcels of land and that the resurveyed boundary **“be vertical in order to give both parcels of land equal frontage (access) both to the main road on the upper side and to the river on the lower side”**.

4. The Appellant then filed **notice of motion dated 29th May 2013** which is the subject of this ruling. She seeks the main order that she be granted leave to file a notice of appeal out of time. The application is brought under **section 7** of the **Appellate Jurisdiction Act, Cap 9**. The grounds for the application include -

- (i) That the Appellant's advocates failed to attend the ruling delivered on 8th March 2013 by an oversight.
- (ii) That the Appellant therefore did not become immediately aware of the ruling until after time to lodge notice of appeal had lapsed. She had also been taken ill shortly after 8th March 2013.
- (iii) That if the order of 8th March 2013 is effected the Appellant will be adversely affected by it.

5. There is a supporting affidavit sworn by the Appellant in which she gives the factual background to the application. She has deponed, *inter alia*, that if the boundary between the two parcels of land is re-surveyed vertically as directed by the order of 8th March 2013, she stands to lose part of her land. She has not demonstrated how that would come about.

6. It appears that the 1st Respondent, the Attorney-General, has not filed any papers in response to the application. But the 2nd Respondent has opposed the application by grounds of opposition dated 5th June 2013. Those grounds include -

- i. That the application is misconceived, incompetent and bad in law in that the High Court has no jurisdiction to grant the leave sought.
- ii. That the appeal herein having been from a decision of the Chief Land Registrar, the appeal to the High Court is final and there is no right of appeal from the decision of the High Court.
- iii. That the delay in applying is inordinate and has not been explained.
- iv. That the order of the High Court of 8th March 2013 does not prejudice the Appellant in any way.

There is no replying affidavit filed.

7. I have considered the submissions of the learned counsels for the Appellant and the 2nd Respondent, including the cases cited.

8. I may mention right away that this court has jurisdiction under section 7 of the Appellate Jurisdiction Act to grant leave to lodge notice of appeal out of time. The issue to consider is whether or not the Appellant has a right, automatic or otherwise, to appeal to the **Court of Appeal** against the order of 8th March 2013.

9. Contrary to the view of the learned counsel for the 2nd Respondent, the intended appeal will not be a second appeal against the judgment of this court in this appeal. As already seen the appeal was allowed by consent entered on 11th of June 2010. The Appellant is not seeking to appeal against that consent judgment. Even if she were I am not certain that there would be no right of second appeal from an appeal against an order of the Chief Land Registrar. See **section 150** of the **Registered Land Act Cap 300** (since repealed).

10. What the Appellant seeks to appeal against is the **order of 8th March 2013**. That order was made pursuant to the application by notice of motion dated 8th February 2011. The said application was made under the inherent power of the court (**section 3A** of the **Civil Procedure Act, Cap 21**). There is no

automatic right of appeal against orders made under the inherent power of the court. See **Order 43, rule 1 (1) & (2)** of the **Civil Procedure Rules, 2010**.

11. The submission by the Appellant's learned counsel that there is an automatic right of appeal against the order of 8th March 2013 is thus erroneous.

12. In the present application no leave to appeal against the order of 8th March 2011 has been sought or obtained. The Appellant has argued that she does not require such leave. What has been sought in the present application is leave to lodge notice of appeal out of time under section 7 of the Appellate Jurisdiction Act.

13. As there is no automatic right of appeal, and as there is no leave to appeal against the order of 8th March 2013 sought and obtained, the present application is indeed misconceived and incompetent. It is hereby struck out with costs to the 2nd Respondent. It is so ordered.

14. In the event I need not consider the merits of the application.

DATED AND SIGNED AT NAIROBI THIS 17th DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 21ST DAY OF FEBRUARY 2014