



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CIVIL APPEAL NO. 717 OF 2013

MARGARET KANINI 1ST APPELLANT
SIMON KIVUTI KIURA 2ND APPELLANT
JUSTA WAWIRA KIURA 3RD APPELLANT
JOHN MURIITHI KIURA 4TH APPELLANT
PETER NJERU KIURA 5TH APPELLANT
IRENE MUTHONI KIURA 6TH APPELLANT
ERNEST MWANGI NJOROGE 7TH APPELLANT

VERSUS

ALICE MUTHONI MURICHI RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED BY THE

**HONOURABLE MRS. WACHIRA, CHIEF MAGISTRATE EMBU ON 26TH AUGUST 2013 IN
THE CHIEF MAGISTRATE'S COURT EMBU CIVIL SUIT NO. 242 OF 2012)**

RULING

On 26th August 2013, the Chief Magistrate Embu Court (Mrs. Wachira) delivered a ruling in Chief Magistrate's Court Embu Civil Case No. 242 of 2012 following a Preliminary Objection raised by the appellant herein on the following grounds:-

1. *That the application dated 31st October 2012 was incurably defective*
2. *That the applicant lacked locus standi to file the suit as she had no grant to enable her file the suit on behalf of the Estate of the deceased*
3. *That the Court lacked jurisdiction as the matter involved land and should be heard by the Environment and Land Court by virtue of Section 13 and 14 of the Environment and Land Court Act and*
4. *That the Environment and Land Court lacks jurisdiction to transfer this suit to the Chief Magistrate's Court at Embu*

The trial magistrate dismissed the Preliminary Objection but went on to add that the plaintiff and

defendant did not have letters of administration and advised them to sort out that issue.

Being aggrieved by the learned trial magistrate's ruling dismissing the said Preliminary Objection, the appellant has sought to appeal against the same and I need not go into the grounds of appeal for purposes of this ruling. The appellant/applicant has also filed a Notice of Motion dated 5th September 2013 under certificate of urgency seeking a stay of the proceedings in the Chief Magistrate's Court pending the hearing and determination of the intended appeal.

The application is opposed and grounds of opposition have been filed.

The application was canvassed by way of written submissions which I have considered together with the application and other supporting documents including the ruling sought to be appealed against.

The application is brought under **Section 3, 3A and 75 of the Civil Procedure Act** and **Orders 42, 43 and 51 of the Civil Procedure Rules**. The ruling sought to be appealed against was made following a Preliminary Objection in which the issues of jurisdiction and locus standi were raised. From the record of the proceedings before Mrs. Wachira on 26th August 2013 when she delivered the ruling subject of the intended appeal, there is nothing to indicate that leave to appeal was sought for and granted. An appeal does not lie as a matter of right from a ruling on a Preliminary Objection as provided for under **Order 43 of the Civil Procedure Rules** unless, as provided for under **Sub-rule 3**, the order sought to be appealed against

“----- Conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit”.

In the case of **G.R MANDAVIA VS RATTAN SING 1965 E.A 118**, the Court of Appeal stated that where a Preliminary Objection alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and the suit is permitted to proceed, no Preliminary decree arises but only an order and the unsuccessful party has a right of appeal but with leave. As no leave was sought or granted by the learned Chief Magistrate, it follows that no appeal can properly lie against her ruling dated 26th August 2013. Therefore, there can be no arguable appeal to warrant granting the orders sought in the Notice of Motion dated and filed herein on 5th September 2013.

That being my view of the matter, it follows that the said Notice of Motion must be dismissed with costs.

It is so ordered.

B.N. OLAO

JUDGE

31ST MARCH, 2014

31/3/2014

Coram

B.N. Olao - Judge

Mwangi – Court clerk

Ms Kwamboka for Kinyanjui for Applicant – present

Mr. Abubakar for Njeru for Respondent – present

COURT: Ruling delivered this 31st day of March 2014 in open Court.

Ms Kwamboka for Mr. Kinyanjui for applicant present

Mr. Abubakar for Mr. Njeru for respondent present.

B.N. OLAO

JUDGE

31ST MARCH, 2014