



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 13 OF 2011

STEPHEN WANG'ANG'A NJOROGEAPPELLANT

V E R S U S

**1. STANLEY NGUGI NJOROGE
2. JOHN GITHARA NJOROGERESPONDENTS**

R U L I N G

1. The three parties in this appeal are brothers. The appeal is the latest battle in a long-standing family dispute over land. To give a background and proper perspective of the dispute I can do no more than quote extensively from the **ruling dated and delivered on 23rd July 2009 in Nairobi HC Petition No. 476 of 2006** (Mbogholi Msagha J,) between the same parties over the same subject matter –

“... The dispute relating to this parcel of land was first of all presented before the panel of elders at Kiambu which filed its award dated 9th April, 1984 with the court, with an order that the parcel of land be divided equally between the father of the applicant, one Njoroge Njuguna and himself. The court adopted this award as its judgment. Subsequently, the Chief Magistrate’s court at Kiambu noted that having there been no appeal from the ruling of the court that adopted the award, the said piece of land formed part of the estate of the father of the applicant herein and that evidence should be taken to justify the entitlement of the applicant.

The applicant herein did not file any appeal against the judgment of the magistrate who adopted the award or the estate. Instead, he filed another case, i.e., Civil Case No. 882 of 1993. That case went to the High Court and in Civil Appeal NO. 207 of 1996 at Nairobi, Khamoni J, dismissed the same with costs to the Respondent.

It would appear that the appellant herein, having found no avenue to address the award and subsequent orders, decided to file this constitutional petition. I note however, that this petition comes 25 years after the award of the elders was confirmed as judgment of the court.

Having lost his opportunity to challenge the said award through the normal appellate system, I consider it an abuse of the court process for the applicant to use a constitutional reference to address a matter he would have addressed

by filing the relevant appeals. A judgment of the court can only be challenged through the appellate system as set out in the relevant statutes. This the applicant did not do.

Above all, for him to wake up 25 years after the original orders to justify his right upon the said property, if any, he is guilty of laches which he cannot justify by any state of reasoning. This litigation must come to an end. The award does not exist because the same has been subjected to proceedings that clearly show that it is not a court judgment. The time allowed to challenge such judgment has also expired. It would be a great injustice to the Respondents to be brought to court over and over again over the same issues which ought to have been settled a long time ago if the applicant had followed the right procedures....”

2. Following the above ruling the Appellant instituted fresh proceedings vide **Kiambu CMCC No. 255 of 2009** against his two brothers (the Respondents herein) seeking the same reliefs that he had been unable to obtain that far. After taking evidence the Kiambu court in a **judgment dated and delivered on 24th November 2010** dismissed the suit with no order to costs. In the judgment the lower court reviewed the history of the litigation and held that the suit was *res judicata* and an abuse of the process of the court. The Appellant then appealed in the present appeal against that judgment of the lower court.

3. When the appeal came up for directions under **Order 42, rule 13** of the **Civil Procedure Rules** on the 22nd of January 2014, the Respondents stated that they intended to object to the jurisdiction of the court to hear the appeal upon the ground that there was a previous appeal vide **Nairobi HC Civil Appeal No. 476 of 2006** which was dismissed. That preliminary objection was canvassed on 3rd of March 2014, and this ruling is on the same.

4. The Respondents relied fully on the **replying affidavit sworn by the 1st Respondent and filed in court on 24th February 2014**. That replying affidavit is in essence the Respondents’ submissions in support of their preliminary objection to the appeal. The Respondents were unrepresented and acted in person.

5. Learned counsel for the Appellant in opposing the preliminary objection submitted that the appeal herein is against the judgment of the lower court in Kiambu CMCC No. 255 of 2009, which judgment was in favour of the Respondents; that the Appellant had an automatic right of appeal to this court against that judgment; and that therefore the appeal is properly before the court.

6. I have considered the submissions of the Respondents as contained in their aforesaid replying affidavit as well as the submissions of the Appellant’s learned counsel.

7. It turns out that what the Respondents on 22nd January 2014 referred to as Nairobi HC Civil Appeal No. 476 of 2006 was in fact Nairobi HC Petition No. 476 of 2006 that was dealt with by Mbogholi Msagah, J as already seen. The fact of the matter is that Kiambu CMCC No. 255 of 2009 was heard by that court and judgment delivered. That judgment was in favour of the Respondents. The Appellant had an automatic right of appeal against the judgment which he exercised by filing the present appeal. No matter how unmeritorious the Appellant’s suit before the Kiambu Court, and no matter how unmeritorious the appeal herein might be, the fact is that the appeal must be heard in the normal way and either dismissed or allowed.

8. I may point out that even if the suit before the Kiambu court had been struck out, as it should have been, rather than being heard on its merits and a judgment rendered, the Appellant would still have been entitled as of right to appeal against such order of striking out.

9. In the circumstances, the appeal here in court is not incompetent and is properly before the court. It must be heard and determined on its own merits. I must therefore overrule the preliminary objection with

costs in the cause.

10. Given the history of this dispute it is in the best interest of the parties that this appeal be heard and determined as soon as possible. At delivery of this ruling I shall give directions towards early disposal of the appeal.

11. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MARCH 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 28TH DAY OF MARCH 2014