



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO 225 OF 2013**

**ISAAC NJUGUNA KAMAU .....APPELLANT**

**IRENE MUGURE WAWERU..... APPELLANT**

**VERSUS**

**RAHAB WANGUI KAMAU.....RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants/ applicants hereinafter referred to as the applicants are seeking an order of stay of proceedings in Limuru Land case No. 10 of 2011 and the execution of the decree pending the hearing and determination of the appeal. The application is brought under Order 42 rule 6 of the Civil Procedure Rule and section 1A, 1B and 3A of the Civil Procedure Act.

2. The background of this application is that the parties had a land dispute. The said dispute was adjudicated upon by the Limuru Land Dispute Tribunal and an award was made which was adopted by the Principal Magistrate Court Limuru on 26/7/11. Thereafter the Respondent through the District Surveyor Kiambu wrote to the applicants indicating that he intend to visit the Parcel of land and carry out the subdivision on the 30/4/13. The applicants then moved to this court seeking the orders of stay.

3. The applicants' states that they stand to lose the parcels of land if the exercise continues; that his only brother has already passed away and that he is still the registered owner of Ndeiya/Makutano/843. He also states that the issue involving the parcels of land is ownership and that issues of title do not fall within the mandate of the Land Dispute Tribunal which forms the basis of the appeal; that the Land Dispute Tribunal and the Subordinates Court's decree has been challenged and if the orders are not granted the appeal shall be rendered nugatory.

4. The application was opposed. In a replying affidavit dated 24/5/2013 the Respondent states that the appeal lacks merit and is hopeless and that it is just an orchestrated scheme to deny her the fruits judgment. That she is 75 years and it is the intention of the appellants that she dies before the implementation of the court orders; that the appellants do not stand to lose anything as her only interest is to curve out the portion of land the Tribunal awarded and that she has no intentions to dispose off the said land; that she is agreeable to have the interest of the appellants secured by an inhibition order by the court of the resultant parcel of land that shall emerge in her name.

5. Parties filed written submissions. The Respondent submitted the award of the Tribunal was read to the parties on 26/7/11 and thereafter adopted as the judgment of the court at Limuru Courts in the Land Case No. 10 of 2011 on the 27<sup>th</sup> September 2011; that in accordance with the law the appellants had 30 days from the date when the award was read to file the appeal to the Provincial Appeals Committee and the

appellants being aggrieved by the said award and eventual decree, preferred this appeal which was filed on the 15/12/11. It is further submitted that the appeal must fail as it is in the wrong forum for want of jurisdiction and that the matter was filed hopelessly out of time. Counsel referred to the provisions of Section 8 of the Land Dispute Tribunal Act no. 18 of 1990, now repealed and submitted that the appellants' avenue of appeal was to the Provincial Land Disputes Tribunal sitting in Nyeri and not the High Court sitting in Nairobi and that there was no direct recourse to an appeal before this court, that therefore this court lacks the jurisdiction to determine the appeal which has been un procedurally brought; that the other alternative or option available to the applicants was to file a Judicial Review proceedings seeking orders of Certiorari.

6. The Respondent relied on section 79 (G) for their submission that the appeal was filed out of time. It was submitted that the subordinate court's judgment was read on the 27/9/11, the applicants had until the 27/10/11 to lodge the appeal, but they did so on the 15/12/11 one and half months later. The Respondent argued that Section 79 (G) provides that an appeal may be filed out of time if the appellants satisfy the court that he had good and sufficient cause for not filing the appeal out of time; that the applicants ought to have sought leave to file the appeal out of time but they did not. The Respondent relied on 2 authorities namely *Margaret Wairimu Waweru vs Livingstone Ngugi Gikuri Nrb. C.A. 380 of 2000* and the case of *Modern Distributors Ltd T/A Keroka Executive Bus Service vs Mary Wanjiru Gichuhi & another C. A. 269A of 2005*.

7. The appellants submitted that the award that the court adopted was re-amended vide a second award dated the 16<sup>th</sup> of November 2011 and that it is this second award that without the court inviting the parties to participate in its reading and adoption proceeded to issue an amended decree dated the 22<sup>nd</sup> of November 2011 and thereafter the appellants filed the present appeal. It was argued that the court has wide powers to determine issues and that the court ought to make a finding that the issue before it is a sensitive and emotive issue relating to land; that the appellants have raised concerns on how the matter was conducted, the legality of the acts and the omissions of the subordinate court and that had being immovable no prejudice will be visited on the Respondent if the proceedings in the subordinate court are stayed pending the hearing and determination of the appeal.

8. On the issue that the appeal was filed out of time it was submitted that given the chronology of events the amended award of 16<sup>th</sup> November 2011 culminated the issuance of the amended decree of 22<sup>nd</sup> of November 2011 and the same was appealed within time by the appellants through this appeal which was filed within the 30 days period as provided under Section 79 of the Civil Procedure Act. On the Court jurisdiction it was submitted that the court has unfettered powers and is best suited to deal with the question raised in the appeal as to whether the subordinate court could possibly amend the decree upon receiving a second award without the participation of the appellants and following the procedure laid down in the Land Dispute Tribunal Act. No. 18 of 1990 (now repealed). The applicants submitted that the court needs to look at substantive justice and that the stay should be granted.

9. Having considered all the above these are my findings. From the court record and the annexures it is event that the judgment in the subordinate court was read on the 27<sup>th</sup> of September 2011. The applicants in their submissions have mentioned that there was an amendment done on the award on the 16<sup>th</sup> November 2011 and an amended decree issued on the 22/11/11. Parties should desist from adducing evidence through submissions, however when I look at what is attached the tribunal merely stated the omissions of the numbers of the two parcels of land in dispute and an amended decree was issued on the 22/11/11. In my view the date the decree was amended does not in any extend the time of filing the appeal. The judgment was read on the 27/9/11 in the presence of both the claimant and the objectors. Under section 79 (G) of the Civil Procedure Act the appellants were to file their appeal within 30 days which should have been on or before the 27/10/11. The Memorandum of Appeal was filed on the 15<sup>th</sup> of December 2011 about one and half months later. The proviso in Section 79 (G) of the Civil Procedure Act provides that;

***“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal on time”.***

10. It was upon the appellants to file an application to have their appeal admitted out of time. This they did not do. Substantive justice is of necessity in any matter; however where the provisions of law are clear any party coming to court must comply. No leave was sought or obtained before the appeal was filed; therefore the appeal is not competent. The appeal is therefore struck out, having struck out the appeal ,I need not go into the merits of the application for stay of the judgment and decree. The parties are related therefore each party shall bear its own costs.

Orders accordingly.

Dated , signed and delivered this **23rd Day** of **OCTOBER 2014**.

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Appellants/Applicants**

.....**For the Respondent**

.....**Court Clerk**