



REPUBLIC OF KENYA

High Court at Meru

Environmental & Land Case 25 of 2012

MOSES KIRIIRI

MUTHIRU.....APPELLANT

VERSUS

KIMATHI MUTHIRU.....1ST RESPONDENT

KAIRIRA MUTHIRU.....2ND RESPONDENT

KARANI MUTHIRU.....3RD RESPONDENT

RULING

The preliminary objection in this matter is dated 30th April, 2012. Mr. Mutuma for the respondents argued that the Preliminary Objection was incompetent for want of leave. He prayed that Civil Appeal No. 25 of 2012 and any applications made thereunder be dismissed with Costs. He pointed out that in Meru CMCC 129 of 2011, a Preliminary Objection raised by the appellant was dismissed. When the appellant sought leave to file an appeal against the ruling that dismissed the Preliminary Objection, the lower Court declined to give leave. That notwithstanding, the appellant went ahead to file an appeal without seeking leave of this Court.

He argued that the right of appeal was guided by statute and no law allowed an appeal as of right. He prayed that since no leave was sought and granted, the appeal should be dismissed with costs.

In support of the Preliminary Objection Mr. Mutuma relied on the case of **Kenya Commercial Bank Ltd versus Tony Monase Esipeya (Civil Appeal No. 105 of 1998)** which was a Court of Appeal Decision.

Mr. Rimita for the appellant opposed the Preliminary objection saying that the lower court had no jurisdiction to hear the matter in question as the plaintiffs (now the respondents) had not obtained leave of the Land Adjudication Officer as required by law. According to him the lower Court had no jurisdiction ab initio even to allow the matter to be filed in its registry. As such all proceedings in the lower court were a nullity. The lower court, his argument moved further, did not even have Jurisdiction to grant leave which it had denied the appellant.

Mr. Rimita also sought to rely on Section 1A and 1B of the Civil Procedure Act and Section 159 of the Constitution arguing that the preliminary objection merely raised technical issues.

According to Mr. Rimita the authority relied upon by the respondents was distinguishable from this case because it was, according to him, based on the Limitation of Actions Act whereas the issue

in his appeal was one of jurisdiction.

Mr. Mutuma for the appellant sought to dismiss Mr. Rimita's effort to distinguish the Kenya Commercial Bank versus Esipeya Case with the present appeal. He argued that in both cases the issue was lack of leave.

I have examined Order 43 which the respondents are relying upon in support of their preliminary objection. I have also examined Sections 1A and 1B of the civil Procedure Act.

I will start with Section 1A of the Civil Procedure Act. It says at 1A (1):

“The overriding objective of this Act and rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.”

Order 43 of the Civil Procedure Rules decrees that an appeal in a matter as in the nature of the present appeal shall only lie with the leave of the Court.

It is my inclination that the overriding objective contained in Section 1A(1) of the Civil Procedure Act cannot be intended to legitimize what is clearly illegitimate. I also find that lack of leave is a legal issue and not a mere technicality as would have been envisioned by Article 159 of the Constitution.

I now turn to the case of Kenya Commercial Bank -V- Esipeya which the respondents have relied upon in support of their preliminary objection. I find that in this case as well as in the petition herein, the overriding issue is absence or lack of leave to appeal. The case which is a Court of Appeal decision held that where the unsuccessful party had no right of appeal except with leave, and leave was not obtained, the consequence was that the appeal was incompetent and had to be struck out. The case of Kenya Commercial Bank-V-Esipeya referred to the case of **GR. Mandavia-v-Rattan Singh [1965] EA 118** and said in the following quotation:

'It was held, inter alia, that where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.'

The case of Kenya Commercial Bank Limited versus Tony Manase Esipeya is a Court of Appeal Decision. It binds this Court.

In the present case leave to appeal was not obtained. The consequence is that the appeal herein is incompetent and it is hereby struck out with costs. It is therefore **ORDERED:**

1. That the appeal herein and the application made thereunder are dismissed.
2. Costs to the Respondents.

Written and Signed in Meru this 14th day of December 2012.

P. M. NJOROGE
JUDGE

Coram: P. M. Njoroge, J.

Mutuma for Respondent (present)
Rimita for appellant (Absent)
Cc Mwonjaru/Mutinda

Delivered in open court and signed this 20th day of February, 2013.

P. M. NJOROGÉ
JUDGE