



**REPUBLIC OF KENYA**

**High Court at Embu**

**Miscellaneous Application 49 of 2011**

TOWN COUNCIL OF SAGANA.....1<sup>ST</sup> INTENDED APPELLANT/APPLICANT

CYRUS KIIGE KANGANGI  
(Suing on behalf of AJIRU-MUGO CLAN)..... 2<sup>ND</sup> INTENDED APPELLANT/APPLICANT

HARUN WANDUNGO (Suing on  
behalf of AGACIIKU NGURUU CLAN .....3<sup>RD</sup> INTENDED APPELLANT/APPLICANT

MICHAEL MUNENE MBATHI (Suing  
on behalf of ACEERA GATHURA CLAN) ..... 4<sup>TH</sup> INTENDED APPELLANT/APPLICANT

VERSUS

MARGARET WAMBUI MWANGI..... RESPONDENT.

**RULING**

This is the Notice of Motion dated 8/6/2011 brought under Order 53, Order 42 and section 3A Civil Procedure Rules seeking an order for leave to file appeal out of time. The grounds are set out on the face of the application and supported by the affidavit of one Anthony Gatimu the clerk to the 1<sup>st</sup> Applicant in which he explains the history of this matter. He states that by Gazette Notice Legal Notice No.411 of 14<sup>th</sup> October 1997 the land KIINE/THIGIRICHI/527 fell within the jurisdiction of the Town Council of Sagana. And therefore the 1<sup>st</sup> Applicant ought to have been made the Defendant in Kerugoya Senior Principal Magistrate's Civil Case No.245/00. They were not aware of the said suit until 2006 when they instructed their Counsel to take up the matter. A suit Embu HCC NO.35/06 was filed. The same was heard as *NAIROBI MISC. CIVIL APPLICATION NO.178/07* by the Constitutional Court which dismissed it on 8<sup>th</sup> December 2009. A Notice of Appeal against the Judgment was filed on 24<sup>th</sup> December 2009.

At paragraph 19 of the supporting affidavit the deponent states that the said appeal has never been filed because typed proceedings have never been obtained.

The Respondent in her replying affidavit opposed the application on the grounds that the Defendant in the lower Court case never appealed against the Judgment. Secondly the Applicants were not parties to the said suit.

When the application came for hearing both Counsels appearing submitted orally.

Mr. Githinji Kiong'o for the Applicants stated that the affidavits of Anthony and Silas showed that the Applicants tried to remedy the situation but through wrong procedures. He cited Article 159 (i)(d) of the Constitution which urges the Courts not to dwell on technicalities. He admits that the Applicants were not parties to the suit in the lower Court. He cited Articles 10(2) (b) 19 and 20 of the Constitution urging the Court to consider age of the Applicants. And that they were an opposed people. He cited the case of **ROYAL MEDIA SERVICES -VS- ATTORNEY GENERAL** where the issue of social justice was addressed by the Court sitting on a Sunday. And in the case of **CITY COUNCIL OF NAIROBI -VS- SATO PROPERTIES LTD & 2 OTHERS CIVIL APPEAL NO.72 OF 2008** an aggrieved party was granted leave to appeal, though not a party to the proceedings.

Mr. Mwaniki for the Respondent referred the Court to its Ruling in **HIGH COURT MISC. APPLICATION NO.26/2012** where the 2<sup>nd</sup> Applicant was the 3<sup>rd</sup> Applicant and similar orders were being sought. He suggested that the Applicants apply for review of the lower Court Judgment. He also submitted that the delays had not been explained.

Mr. Githinji in reply submitted that the wrong party was sued in the Court below and the Applicants require to be assisted. He referred to Legal Notice NO.411 of 14<sup>th</sup> October 1997. There is no dispute that there is a Judgment **KERUGOYA PMCC NO.245/00** dated 29/5/2002 which has not been set aside. It is also true that none of the Applicants herein was a party in the suit before the lower Court. It is also true that the Applicants herein have never filed for Review of the lower Court Judgment. Instead they have spent a lot of energy trying to overturn that Judgment through wrong procedures. This has even contributed to unnecessary delays. There is even a Notice of Appeal filed before the Court of Appeal filed on the 24/12/2009. The status of that appeal is unknown. The facts of this case are quite disheartening and can't be adequately addressed through this application or an appeal. It is true an injustice has been committed to the Applicants. But the same cannot just be addressed at any forum. There is a clear process which must be followed. For example if this land falls within Sagana Town Council by virtue of Legal Notice NO.411 of 14/10/1997 why did the Respondent's husband sue Kirinyaga County Council in the year 2000 while title was not with them? Secondly if title was not with Kirinyaga County Council who then transferred title to the Respondent in compliance with the decree of the Court?

The acreage of the land in issue is about 200 acres. Would this be said to be valued at 25 pounds under the repealed Registered Land Act giving jurisdiction to the Senior Resident Magistrate to deal with the matter?

I quite agree with Mr. Mwaniki that the Applicants herein should file for Review of the lower Court Judgment before the said Court because as long as that Judgment remains in place the Applicants may not go far. The matter in the lower Court was heard *ex parte* and a Judgment affecting so many innocent parties was made. The innocent parties were not parties of the said suit. It is now before the Review Court that Mr. Githinji can bring in his arguments under Articles 10, 19, 20 and 159 of the Constitution respectively.

Order 45(1) is very clear on who may file an application under the said order. I have dwelt quite abit on this particular application unlike the one in Misc. No.26/12 because of the presence of the 1<sup>st</sup> Applicant herein. Legal Notice NO. 411 of 14<sup>th</sup> October 1997 is very important and clearly touches on the creation of the 1<sup>st</sup> Applicant, and the area under it.

Had the Applicants been parties to the suit in the Court below I would not have hesitated to grant them leave to appeal inspite of the inordinate delay. The fact of their not being parties therein works against them but they should find solace in Order 45 of the Civil Procedure Rules and make the necessary

application without further delay. Thereafter the parties may see the way forward.

Otherwise the application for leave to file appeal out of time is disallowed. Each party to bear his/her own costs.

**DATED AND SIGNED DELIVERED AT EMBU THIS 18<sup>TH</sup> DAY**

**OF APRIL 2013**

**H.I. ONG'UDI  
J U D G E**

In the presence of;

Mr. Mwaniki for Respondent

Njue – C/c