



**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO.160 OF 2007**

**JOSEPH CHERUIYOT.....1ST APPELLANT**

**PETER NGETICH.....2ND APPELLANT**

**KIMORONG MIBEL.....3RD APPELLANT**

**VERSUS**

**WILSON BUSIENEI & 19 OTHERS.....RESPONDENTS**

**RULING**

The application is brought by way of Notice of Motion under the provisions of **Order 50 Rules 1** and **42 Rules 1** and **2** of the **Civil Procedure Rules** and **Section 3A** and **75** of the **Civil Procedure Act Cap.21**.

The Applicants seek the following orders:

1. That the appeal be struck out
2. That costs of the application and the appeal be borne by the appellant.

At the hearing of the application, the parties chose to argue the application by way of written submissions.

This application was filed by the respondents in the appeal and they submit that the appeal arose out of an application in the subordinate court by the appellants under the provisions of **Section 34** of the **Civil Procedure Act**.

The applicants contend that the appellants never sought and/or obtained leave to file the appeal herein as required by the provisions of **Section 75** of the **Civil Procedure Act** and **Order 42** of the **Civil Procedure Rules**. The appeal as it stood was therefore incompetent and ought to be struck out with costs.

The appellants in response submit that the trial court's jurisdiction was limited to reading and adopting the award. That it overstepped its mandate by proceeding to make a determination on substantive issues on the proprietary rights to land.

The appellants contend that the trial court in making its determination gave the appellants an automatic right of appeal. The appellants prayed that the application be dismissed with costs.

After due consideration of the submissions made by the parties herein, this court finds two issues for

determination:

- i. whether leave of the court was a pre-requisite before the filing of the appeal;
- ii. whether the appeal is incompetent.

This court has had occasion to peruse the application dated 29/01/2007 and the orders made by the subordinate court on the 15<sup>th</sup> November, 2007.

The application in the subordinate court was grounded on the fact that the decree and award were ambiguous. The applicants therein sought the trial court’s intervention for the interpretation of the decree to enable proper and lawful enforcement of the decree, therein. The trial court proceeded to grant the orders and in making the determination, corrected the award.

This court makes reference to Section 75(1)(c) of the Civil Procedure Act which reads as follows:

**“Section 75(1) An appeal shall lie as of right from the following orders and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-**

**(a)** .....

**(b)** .....

**(c) an order modifying or correcting an  
award.”**

Notwithstanding the fact that the application in the subordinate court was made under the provisions of **Section 34** of the **Civil Procedure Act**, this court finds that the trial magistrate indeed made a determination that fell under the provisions of Section75(1)(c) aforesaid. Whether the trial magistrate acted *ultra vires*, beyond his mandate or that the court had become *functious officio* is a non-issue at this juncture.

The only relevant factor is that the moment the trial court proceeded to make a determination upon substantive issues leading to the correction of the award, the right of appeal was born.

In this instance, therefore, the right of appeal is automatic as is clearly stated in the aforementioned provisions of **Section 75(1)(c)**.

**FINDINGS:**

This court finds that leave to file the appeal is as of right. This court also finds that the appeal is properly before this court and that it should proceed to be heard and be finally determined on merit.

**CONCLUSION:**

The application is lacking in merit and is hereby dismissed. The appellants shall have costs.

It is so ordered.

**Dated and Signed at Eldoret this ..... day of ....., 2013.**

**A. MSHIL**

**JUDGE**

**Dated and Signed and Delivered at Eldoret this 7th day of August, 2013.**

**by Hon. Justice G. W. NGENYE MACHARIA**

**G. W. NGENYE MACHARIA**

**JUDGE**

In the presence of

Paul, Court clerk

Mr. Wanyonyi, Advocate for appellant

Miss Mfutu, Advocate for respondent