



Waweru (Suing in His Capacity as The Legal Representative of The Late Ephantus Waweru Mubia - Deceased) v Wandeto (Environment and Land Appeal E007 of 2022) [2022] KEELC 3955 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

**LN GACHERU, J
JULY 28, 2022**

BETWEEN

**SAMUEL MWANGI WAWERU (SUING IN HIS CAPACITY AS THE
LEGAL REPRESENTATIVE OF THE LATE EPHANTUS WAWERU MUBIA -
DECEASED) APPLICANT**

AND

JOSEPH MUBIA WANDETO RESPONDENT

RULING

1. Vide a Notice of Motion Application dated May 12, 2022, the Appellant/Applicant sought for Orders against the Respondent as follows;
 - a. That the Respondent be restrained from proceeding with the execution and subdivision and/or transfer of land parcel NoLoc 11/muchungucha/25, on the strength of the orders of the Lower Court (per EM Muriuki Nyaga Srm) dated May 12, 2022, in Murang'a LDT Case No 131 of 2006, pending hearing of this application inter parties or until the hearing and determination of this Appeal or until further orders of this Court whichever is the last.
 - b. That the execution of the lower court orders in Murang'a LDT Case No 131 of 2006, issued on May 12, 2022, bestayed perpetually as they are in serious violation of law and the established tenets of legal jurisprudence pending hearing of this Appeal.
 - c. The costs of this application be borne by the Respondent
2. The Application is premised on the grounds set out on the face of the said Application and the Supporting Affidavit of Samuel Mwangi Waweru sworn on May 12, 2022.



It is the Applicant's contention that the Respondent's father filed a case at the Land Disputes Tribunal being Case No 131 of 2006, against his father (now deceased). That the Elders sitting at the Tribunal who are not well versed in law made some obnoxious orders relating to land parcel No Loc 11/Muchungucha/25, which is the subject of these proceedings. That the said Elders had no power under the defunct Land Disputes Tribunal Act, to adjudicate on matters relating to title to land. That the Award was therefore void abinitio to the extent of making LDT Case No 131 of 2016, a nullity.

3. That the lower court proceeded to substitute the Respondent herein with his deceased father erroneously. Further that the lower court went ahead on May 12, 2022, to Order that land parcel No Loc 11/Muchungucha/25, be subdivided and transferred, despite the existence of a High Court Order in Murang'a Succession Cause No 100 of 2014. Further, that the Applicant will suffer grave injustice if the land for which he is an administrator was to be shared and transferred pursuant to the Lower Court Order and therefore the lower Court Order should be stayed permanently.

The Application is opposed by the Respondent via his Replying Affidavit sworn on May 23, 2022. It is the Respondent's averment that the Appeal filed on May 13, 2022, is incompetent and bad in law as no leave was sought and granted by the trial court. That he is advised by his advocate that the orders sought are unsustainable as there is No Appeal against the Decree of the Court, but only against execution. That the lower Court is just exercising its mandate of executing the Decree arising from the Land Disputes Tribunal's Award that stand unchallenged to date.

4. That he is further advised by his advocate that the Applicant neither appealed nor sought Judicial Review of the Award and Judgment of the Court and hence his lamentations are late in the day. That an appeal cannot be based on a strong feeling against a court decision. That it must be shown in what way the Award and Decree have been successfully challenged.
5. That the instant appeal is incompetent for want of leave, and there is no reason to grant a stay of execution. That the orders sought in the application are untenable in that they seek stay in perpetuity, which is alien to our law. That the applicant has failed to comply with the requirements of Order 42 Rule 6 of the *Civil Procedure Rules*.

In addition to filing the Replying Affidavit, the Respondent filed a Notice of Preliminary Objection dated May 23, 2022.

In the said Notice of Preliminary Objection, the Respondent opposed the Appeal on grounds that;

1. This appeal is not competent as it was filed without prior leave to do so. Whereas what was sought was execution of the Decree and an appeal is not filed as of right under Order 43 Rule 1(i) (k) of the *Civil Procedure Rules*.
2. The Appellant did not seek for leave of the Court under Order 43 rule (2) and (3) of the *Civil Procedure Rules*.
3. The Notice of Motion dated May 12, 2022, being based on the said incompetent appeal is similarly bad in law and does not lie and should be struck off with costs.
6. The Notice of Motion Application dated May 12, 2022, and the Notice of Preliminary Objection dated May 23, 2022, were canvassed together by way written submissions.
7. The Appellant/Applicant filed his written submissions dated June 28, 2022, through the Law Firm of T. M. Njoroge Advocates. The Applicant in his submissions reiterated his averments in the Application and opposed the Preliminary Objection. That the Orders, sought in the application dated May 3, 2021, filed in the lower court were substantive Orders, which did not require leave to Appeal.



8. The Respondent on the other hand filed his written submissions dated June 9, 2022, through the Law Firm of J.N. Mbuthia & Co Advocates.

The Court has carefully read and considered the pleadings filed, the rival written submissions, authorities cited and the relevant provisions of the law and finds that the issues for determination are;

1. Whether the Notice of Preliminary Objection dated May 23, 2022 is merited.
2. Whether the Notice of Motion application dated May 12, 2022 is merited

i. Whether the Preliminary Objection dated May 23, 2022 is merited.

9. The Respondent contends that the instant appeal is a non-starter as no leave was sought to file the Appeal and hence, it should be struck out. On his part, the Appellant/Applicant asserts that the Respondent's assertions on lack of leave to file the Appeal are mere technicalities, meant to defeat substantive justice and that since the Respondent has not filed an Application to strike out the Appeal, and therefore the objection is not merited.

The legal position on Preliminary Objection was well established in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the Court held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The Court further held:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop”

10. For a Preliminary Objection to succeed, the same must raise pure points of law that it would not be difficult to ascertain and there must be no proper contests of facts.

The Purpose of Preliminary Objection, was well stated by the Supreme Court in Civil Application No 36 of 2014;- *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, where the Court held;

The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

11. Having been well guided as above, this Court shall move to determine whether the Notice of Preliminary Objection herein is merited or not.



Section 75(1) of the *Civil Procedure Act* provides for the Orders against which an Appeal would lie as of right and/or with the leave of the Court. It provides that:

“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) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - b) An order on an award stated in the form of a special case;
 - c) An order modifying or correcting an award;
 - d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
 - f) An order under section 64;
 - g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - h) Any order made under rules from which an appeal is expressly allowed by rules.
12. Section 75 of the *Civil Procedure Act* must be read together with the provisions of Order 43 Rule 1 of the *Civil Procedure Rules* which sets out the Orders and rules in respect of which appeals would lie as of right. Order 43 Rule 1(2) provides that an appeal shall lie with the leave of the Court from any other Orders made under the Rules.
13. In the present Appeal, the Appellant/Applicant seeks to appeal against an Order of the trial Court allowing the subdivision of Loc 11/Muchungucha/25, into 2 equal portions between Samuel Mwangi Waweru and Joseph Mubia Wandeto.
- The Order was as a result of an application dated 3rd May 2021, that was made under the provisions of Section 98 of the *Civil Procedure Act*, Cap 21 and which does not fall under the Orders which are appealable as of right, as per the provisions of Order 43 Rule 1 of the *Civil Procedure Rules, 2010*.
14. As such, the Appellant did not have an automatic right to appeal against the Order delivered on 12th May 2022. He was required to obtain leave of the Court as stated under Section 75(1) of the *Civil Procedure Act* and Order 43 Rule 1 (3) of the *Civil Procedure Rules*, before an Appeal could be preferred.

Order 43 Rule 1(3) of the Civil Procedure Rules states as follows-

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”



15. The above requirement is couched in mandatory terms. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR, Mutungi J stated as follows in regard to the necessity for parties to seek leave of the Court before filing appeals-

“where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order.”

16. Further, the Court of Appeal in *Lucy Wanjiku Nyaga v James Mwaniki Munyi & another* [2018] eKLR, while dealing with Article 159(2) (d) of the *Constitution*, cited the case of Peter Nyaga Murake v Joseph Mutunga (2015) eKLR, where the Court of Appeal stated:

“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules. The procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.

17. The same position was taken in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, where the Court stated as follows;-

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a hand maiden of just determination of cases.”

18. Based on the above, it is evident that the Appeal herein is not guaranteed as a matter of right under Order 43 Rule 1 of the *Civil Procedure Rules*, and the Appellant/Applicant was required to seek leave before filing the said Appeal. This Court has perused the Court record and the pleadings herein and has seen no such application for leave made either orally and/or formally by the Appellant. This Court is of the considered view that the said leave goes to the heart or the root of this appeal and the Jurisdiction of this Court to hear the instant appeal.

19. In the case of *Nyutu Agrovet Ltd v Airtel Networks Ltd* [2015] eKLR, the Court of Appeal held that where there was no automatic right of Appeal stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, then the Appellate Court has no jurisdiction to hear and determine an Appeal, unless leave of the court from which the order was made is sought and obtained.

Further, in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR, the Court of Appeal observed:

“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.



20. This Court is bound by the aforementioned decisions of the Court of Appeal and it finds and holds that lack of the leave to Appeal, where such leave is required by law, renders the entire Appeal void *ab initio*.

Therefore, this Court finds and holds that the Notice of Preliminary Objection dated May 23, 2022, raises a pure point of law and the said Preliminary Objection is found merited and the same is upheld.

(ii) Whether the Notice of Motion application dated May 12, 2022 is merited

21. Having found above that the Jurisdiction of this Court to deal with the instant appeal is disabled for want of leave to file an appeal, this Court will not engage in an academic exercise, by determining the Notice of Motion Application dated May 12, 2022, on merit.

22. Having analysed the available evidence, the Court finds and holds that the Preliminary Objection dated May 23, 2022, is meritorious and proceeds to uphold the same entirely. Having found that this Court has no jurisdiction to entertain the instant suit, it follows that the Court cannot therefore entertain any application and/or any other proceedings in this matter. Thereafter, the Court will resist itself from determining the suit herein and proceeds to strike it out entirely with costs to the Respondent.

In a nutshell, the Court upholds the Notice of Preliminary Objection dated May 23, 2022, entirely and further finds and holds that it has no jurisdiction to deal with the instant Application and the entire suit.

23. Consequently, the suit herein is struck out entirely with costs to the Respondent. The Court makes no order in regard to the Notice of Motion Application dated May 12, 2022, as the entire suit has been struck out.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of;

Joel Njonjo - Court Assistant

T M Njoroge for the Appellant/Applicant

Mr Mbuthia for the Respondent/Objector

L. GACHERU

JUDGE

28/7/2022

