



**Oxli r 1 CPR setting aside summary rejection of appeal under section 79B of the Civil Procedure Act.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**H.C.C.A. NO. 90 OF 2007**

**LESIT J.**

**M'MUGUNA M'MUKANGU.....APPELLANT**

**VERSUS**

**M'IMATHIU M'RINGO.....RESPONDENT.**

**R U L I N G**

The application is a Notice of Motion brought under Order XLI rule 1 of the CPR. It is seeking an order as follows:

1. That the order for summary rejection of this appeal be reviewed and set aside and the appeal be admitted for hearing.
2. Costs be provided for.

The grounds on the face of the application are that there is an apparent error on the face of the record that the appeal raises substantial points of law; that it is only fair and just that the appellant be heard on merit, and that the appellant stands to suffer irreparable loss.

The application is supported by the affidavit sworn by the appellant. That affidavit repeats the same grounds cited on the face of the Notice of Motion Application, which are strictly points of law and not of facts.

The respondent was served with the application but he did not appear on the date of hearing. I noted however that he has filed a preliminary objection on points of law in which he states that he will raise the P.O. during the hearing of appeal or on any other appropriate time. I think it is important for me to consider those points. The points raised are as follows:-

1. **The appellant herein failed, neglected and/or refused to file appeal within thirty (30) days from the date of findings or Ruling of the District Land Registrar – Meru dated 23<sup>rd</sup> day of June, 1998. Photocopy of the same is hereby attached marked “MMI”**
2. **The appellant herein failed, neglected and/or refused to appeal to the Provincial Land Dispute Tribunal Committee at Embu as directed by the court on 30<sup>th</sup> July, 2007 in Meru CM LDT No. 37 of 2007 and as it is provided under section 8(1) of the Land Disputes Tribunals Act 1990 (No. 18 of 1990) which section states inter-alia “any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within Thirty days of the decision, appeal to the Appeal Committee constituted for the province in which the land which is the subject matter of the dispute is situated.”**
3. **Under the circumstances this appeal is incompetent, an abuse of the court process. Non suited, frivolous and vexatious and the same should be struck out and dismissed with costs to the Respondent.**

The applicant was represented by Mr. Kirima Advocate. In his submissions, the learned counsel for the applicant stated that it was an error apparent on the face of the record for the court to rule that there is no ground of appeal as the appeal raises substantial points of law which pertain to ownership under the Registered Land Act Cap 300. Counsel submitted that the appellant was a first registered owner of the suit property and that that was a point of law which needed to be adjudicated upon and that it was therefore a mistake for the judge to lock out the appellant summarily as he did. Counsel relied on the authority of Kalayu Kiamba v Jacob Gichunge HCCA No. 38 of 2007

The appeal in this case is against an award of the elders that was read to the parties on 30<sup>th</sup> July 2007 in Land Disputes Tribunal No.37 of 2007. Five grounds of appeal are cited on the face of memorandum of appeal.

As follows:-

1. The honourable Tribunal erred in law and fact by upholding that the boundary (sic) to stay as per the ruling of 23<sup>rd</sup> June 1998 because the boundary was never determined despite a dispute having been registered to the Land Registrar.
2. The Honourable Tribunal misapprehended the facts of the case since the boundary on the ground does not correspond with the map.
3. The Honourable Tribunal erred in law and facts in failing to consider the evidence of the appellant since the Surveyor who was to determine the boundary did not take any measurement on the ground because the respondent was not agreeable.
4. The Honourable tribunal erred in law and fact by upholding the entire evidence of the respondent which evidence was baseless.
5. The Honourable tribunal erred in law and facts in adjudicating a dispute on a land registered under cap 300 laws of Kenya.

The file was placed before Hon. Lenaola J. for directions as to the admission of the appeal. In the learned judges remarks he wrote there is no right of appeal to the High Court see order of Hon. Mwicigi dated 30 July 2007. The application was brought under OXLr1,2 and 3 these rules deal with forms of appeal, grounds which may be taken on appeal and power for parties to obtain reversal of whole decree. The order and rules invoked do not deal with applications for either review or setting aside of orders. The applicant has not invoked the jurisdiction of this court to make the orders sought. Counsel relied on a persuasive authority **KALAYU KIAMBA V. JACOB GICHUNGE MERU HCCA NO. 38 OF 2007**. The application in the cited case had been brought under OXLIV and sought review and setting aside of summary rejection of his appeal. Clearly the cited case does not support the applicant in his application.

In the circumstances I strike out the application dated 21<sup>st</sup> July 2008 for failure by the applicant to invoke the jurisdiction of the court.

Dated Signed and delivered at Meru this 26<sup>th</sup> day of November 2010.

**LESIT, J**

**JUDGE**

In the presence of the parties  
Kirimi /Mwonjaru – Court Clerk.  
Mr. Kirima for appellant  
Respondent in person

**LESIT, J**  
**JUDGE**

DATE  
CORAM  
Hon. Lady Justice J. Lesiit – Judge

C/Clerk Kirimi/Mwonjaru

Mr. Kirima Plaintiff/Applicant  
Respondent in person

**ORDER**

Judgment/Ruling delivered in open court.

**J. LESIIT**  
**JUDGE.**