



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Civil Appeal 276 of 2009

ANN WOKI KARANJA APPELLANT

VERSUS

NDICHU MURUGAMI..... RESPONDENT

RULING

1. Ann Woki Karanja, who is the appellant to this appeal, (hereinafter referred to as the applicant), has moved this Court by way of a Notice of Motion dated 26th June, 2009, under Section 3, and 3A of the Civil Procedure Act and the inherent powers of the Court. She seeks orders as follows:

(a) That the intended appellant/applicant be and is hereby granted leave to appeal against the ruling and order of the Hon. Wachira, R.M. made on 4th May, 2009 in terms of the memorandum of appeal attached hereto.

(b) That the memorandum of appeal dated 2nd June, 2009 and filed on 4th June, 2009 be deemed to have been filed and served with such leave.

(c) That the costs of this application be costs in the cause.

2. The background to the application as is evident from the supporting affidavit and annexures is as follows: The applicant and the respondent, Ndichu Murugami were involved in a land dispute which was arbitrated upon under the Land Disputes Tribunal Act No. 18 of 1990. The award of the Tribunal was adopted by Kikuyu Court in Misc. Application No. 20 of 2007 as a judgment of the Court. A copy of the award has not been availed, but a copy of the decree given on 18th February, 2008, following the award which was annexed, states as follows:

“It is hereby ordered:

(i) That the Tribunal’s award is adopted as a judgment of this Court.

(ii) That the Kiambu Land Surveyor visit plot Nos. Dagoretti/Thogoto/1234 and Dagoretti/Thogoto/961 and determine the correct position of their common boundary.

(iii) That the boundary so set by the surveyor as above should be clear and if the objector's building is on the boundary, the building should be moved to leave un-interfered boundary.

(iv) That the parties in dispute to share the costs of the case equally.

Given under my hand and seal of the Court this 18th day of January, 2008.”

3. Subsequently by a Notice of Motion dated 3rd March, 2009 brought under Section 7(2) of the Land Disputes Tribunal Act No. 18 of 1990, Section 3, and 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules, the applicant moved the Court for orders as follows:

(a) That the Honourable Court be pleased to grant an order directing the respondent his agent and/or servant to demolish and/or remove the stone wall, septic tank, toilet breather and all other encroachments touching and/or lying on the common boundary between plots Nos. Dagoretti/Thogoto/1234 and Dagoretti/Thogoto/961 within such period of time as this Honourable Court may deem fit to order.

(b) That in default of the respondent to so comply as directed by the Honourable Court under prayer (a) above, the Honourable Court be pleased to grant an order directing the Officer Commanding Kikuyu Police Station to enforce compliance of the Court order granted under prayer (a) hereinabove at the respondent's expense.

(c) That the cost of this application, costs for the demolition as sought in prayer (a) and (b) above together with any other incidental expenses be borne by the respondent.

4. That application was based on grounds inter alia, that the respondent has refused or failed to comply with the decree of the Court dated 18th January, 2008. The application was heard and dismissed by Hon. L.M. Wachira on 4th May, 2009 on grounds that it lacked merit. The applicant subsequently filed an application under Order XLII Rules 1(3) and (4) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking leave of the Court to appeal against the ruling and order made on 4th May, 2009. The application for leave was however rejected.

5. Thereafter the applicant moved to this Court and filed a memorandum of appeal against the ruling of 4th May, 2009 delivered in Misc. Cause No. 20 of 2007. This was followed by the present application seeking leave of this Court to appeal against the ruling and order of Hon. Wachira, made on 4th May, 2009 and also to have the memorandum of appeal deemed properly filed.

6. It has been argued that the proper Court to enforce the decree emanating from the award of the

Tribunal was the Chief Magistrate's Court at Kikuyu under Section 38 of the Civil Procedure Act, and that no attempt was made to enforce the decree from the Chief Magistrate's Court at Kikuyu. It was further submitted that the application for enforcement of the decree before the Hon. Magistrate in Kikuyu filed by the applicant, was an attempt to open the case for further litigation. It was contended that the respondent had fully complied with the orders of the Court and Tribunal, and the applicant's Motion was only intended to harass and intimidate the respondent.

7. I have considered the application and the submissions which have been made. I find that the applicant's Motion dated 3rd March, 2009 was an attempt to enforce the decree arising from the Tribunal award which it was alleged the respondent had failed to comply with. It is apparent that the applicant's Notice of Motion dated 3rd March, 2009 related to the execution of the decree. Under Section 34 of the Civil Procedure Act, such questions can only be determined by the Court in which the decree was being executed. That does not however mean that where a party is dissatisfied with the decision of the Court executing the decree, he cannot question that decision. This Court has powers under section 75(1) of the Civil Procedure Act as read with Order XLII Rule 1(3) of the Civil Procedure Rules, to grant the applicant leave to appeal against the decision of the executing Court provided the appeal raises arguable issues.

8. I am satisfied from the memorandum that in this case, the memorandum of appeal which was filed does raise arguable issues, and it would be fair and just to grant leave to the applicant to appeal against the order of the lower Court so that the appellant can have the opportunity of exhausting the legal redress available to her.

9. Accordingly, I do grant the application dated 26th June, 2009 and issue orders as prayed.

Dated and delivered this 20th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Nganga for the appellant/applicant

Nderitu for the respondent

Eric, court clerk