



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL 100 OF 2008**

CHARLES ORANGO NYAMBETA.....APPELLANT

VERSUS

JERUSA NYABOKE MATARA.....RESPONDENT

RULING

On 30th June, 2008, the appellant's suit in **C.M.C.C. NO.350 of 2008 at Kisii** was struck out on a preliminary objection raised by the respondent herein. The respondent had argued, **inter alia**, that the suit was bad in law because the appellant had not obtained consent from a Land Control Board as required under **Sections 6(1) and 7 of the Land Control Act**.

The appellant was aggrieved by the said ruling and filed an appeal against the same. He also made an application for stay of the said ruling and for an order of injunction to restrain the respondent from removing and burying the remains of one SAMWEL MATARA ONDIEKI on a parcel of land known as WEST MUGIRANGO/BOSAMARO/EAST/1204.

Before that appellant's application was heard, the respondent filed a notice of preliminary objection and raised the following grounds:

“(i) The Memorandum of Appeal herein and the Notice of Motion dated 3rd July, 2008 are misconceived and are an abuse of due process as the same have been lodged in contravention of the mandatory provisions of section 75 of the Civil Procedure Act and Order XLII rule 1(3) and (4) of the Civil Procedure Rules.

(ii) The Order of Stay sought cannot be granted as the same as sought is strange to law and besides there is nothing to be stayed.

(iii) The appeal as filed is untenable in light of the mandatory provisions of section 6(1) and 7 of the Land Control Act – Chapter 302 of the Laws of Kenya.”

Arguing the preliminary objection, Mr. Nyamurongi for the respondent submitted that the appellant ought to have obtained leave of the trial court before filing the appeal. He emphasized the provisions of **order XLII rule 1(3)** which state in mandatory terms that:

“Applications 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 informally at the time when the order is made, or within 14 days from the date of such order.”

Mr. Nyamurongi did not urge the other grounds of the preliminary objection.

In reply, Mr. Nyambati for the appellant submitted that striking out of the suit was a final determination of the matter, which could result, to a final decree and not just an order. In that regard, there was no need to seek leave.

I think this preliminary objection can be resolved very simply by considering what a “**decree**” is. The Civil Procedure Act defines a decree as

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, ---.”

The decision by the trial magistrate conclusively finalized the matter before that court and the appellant did not require leave of the court to file an appeal against that decision.

My holding is fortified by the Court of Appeal decision in

DR. A. H. VS. HENRY GITONGA MWAMBURA, Civil application No.Nai 280 of 2005 where the Court held that the striking out of a plaint for whatever reason is a drastic action that determines with finality the dispute between the parties and it does not matter what label the extracted formalism of that determination is given, the definition there would be a resultant decree which is appealable as of right.

Section 65(1) of the **Civil Procedure Act** provides that an appeal lies to the High Court from any original decree or part of a decree of a subordinate court on a question of law or fact.

From the foregoing, I hold that the preliminary objection is unfounded in law and dismiss the same with costs to the appellant.

DATED, SIGNED and DELIVERED at KISII this 11th Day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of

Mr. Nyambati for the Appellant

N/A for the Respondent.

D. MUSINGA

JUDGE