



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A
ELCA NO. E005 OF 2021

SAMUEL MWANGI WAWERU Legal representative of the late
EPHANTUS WAWERU MUBIA Alias WAWERU MUBIA –Dcd).....APPELLANT
VERSUS
JOSEPH MUBIA WANDETO.....1ST RESPONDENT

An Appeal against the ruling delivered on the 2/3/2021
in LDT NO 131 of 2006 by HON EM NYAGAH, SPM

RULING

1. The background of this case arises from LDT No 84/2006/5 of 5/12/2006 wherein Joseph Mubia Wandeto and Waweru Mubia brought a dispute before the Kiharu Land Dispute Tribunal over parcel No LOC11/MUCHUNGUCHA/25. Both parties are related being nephew and Uncle respectively.
2. The Tribunal pronounced itself as follows;

“it is our opinion that the land belongs to both Wandeto Mubia and Waweru Mubia. The land should be divided into two equal portions one belonging to Wandeto Mubia and the other to Waweru Mubia. This judgement is read to both parties on the 28/11/2006.”
3. The said award was adopted by the Court on the 21/7/2011 and the orders issued on the 13/8/2019.
4. According to the grant issued to the appellant on the 6/5/14 Ephantus Waweru Mubia alias Waweru Mubia passed away. On the 6/5/14 the appellant was appointed the personal representative of his estate.
5. On the 1/7/2020 the Respondent vide a notice of motion sought orders for the substitution of the appellant in place of Ephantus Waweru Mubia alias Waweru Mubia, deceased. The Court granted the application on 2/3/2021.
6. Aggrieved by the said decision of the learned Senior Principal Magistrate (SPM), the Appellant filed the current Appeal. The record of Appeal filed on the 14/6/2021 lists 11 grounds faulting the decision of the learned SPM Court.
7. In impugning the Appeal, the Respondent filed a Preliminary Objection on the following grounds;

a. That the memorandum of Appeal dated 29/3/2021 was filed without prior leave to Appeal despite the same being a mandatory requirement under Order 43 Rule (1), (2) and (3) of the Civil Procedure Rules in that the impugned notice of motion dated 1/7/2020 at page 30 of the record was brought under Order 24 Rule 4 and 10. Order 43 Rule (1) (m) of the Civil Procedure Rules excludes the Appellant from the rules under which there is an automatic right of Appeal. Order 43 Rule 2 is to the effect that an Appeal shall be with the leave of the Court from any other order made under these Rules. Order 43 Rule (3) is to the effect that leave to Appeal should be sought either orally at the time when the order is made or within 14 days from the date of such order.

b. No such leave was granted hence none has been included in the record of Appeal dated 9/6/2021. Indeed the ruling at page 50 of the record does not disclose such leave.

c. May the Appeal be struck out with costs as it is incompetent and bad in law.

8. Parties filed written submissions which I have read and considered.

9. The Respondent submitted that no leave of the Court was sought prior to the Appeal being filed contrary to the provisions of Order 43 Rule 1 read together with section 75 (1) (h) of the Civil Procedure Act. That an Appeal on a decision of the Court filed under Order 24 Rule 4 and 10 of the Civil Procedure Rules requires leave of the Court. That there being no leave the Appeal is therefore incompetent and as such a candidate for dismissal.

10. The Appellant on the other hand submitted and argued that the sections under attack have not been couched in mandatory terms and therefore the objection is misplaced and bad in law.

11. The Appellant urged the Court to look into the substance of the matter and not dwell on technicalities. That the Court to apply its mind on the justice of the case.

12. The single issue before me is whether the objection is a pure point of law.

13. In the celebrated case of **Mukisa Biscuits Manufacturing Company v West End Distributors Limited [1969] EA 696** a Preliminary Objection was defined as “consisting of a 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 to 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 opined that it must be a pure point of law which assumes that all facts pleaded are correct and need not be ascertained. Further that it should not call upon the Court to exercise its discretionary powers.

14. Order 43 sets out instances where a party to an Appeal requires to seek and obtain leave of the Court to file an Appeal. The opening preamble of Order 43 states as follows;

“ an Appeal shall lie as of right from the following orders under the provisions of section 75(1) (h) of the Civil Procedure Act.”

15. The specific orders which do not require leave have been listed deliberately thereunder. The provision goes on to state under sub rule 2 that an Appeal shall lie with the leave of the Court from any other order made under these rules.

16. Section 75 of the Civil Procedure Act states as follows;

“ 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....

h. any order made under rules from which an Appeal is expressly allowed by rules”.

17. Order 24, Rule 4.] Procedure in case of death of one of several Defendants or of sole Defendant. 4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

18. From the above provision it is clear that the Court must be moved under Order 24 Rule 4.

19. The application was brought under Order 24 Rule 4 and 10 which going by the above provisions require an Applicant to seek leave of the Court. The submissions by the appellant to the effect that the provisions are not mandatory are untrue.

20. In the end I am satisfied that the preliminary objection is a pure point of law with the consequence that the objection is upheld.

21. The Appeal is struck out with costs to be borne by the Appellant.

22. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Appellant: Absent

Mbuthia for the Respondent

Court Assistant: Kuyiki/Alex