



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 376 OF 1999

EUNICE KIRUNDI KINYUA.....PLAINTIFF/RESPONDENT

-VERSUS-

JOSPHAT MWATHI KIBIRI.....DEFENDANT/APPLICANT

RULING

1. Josphat Mwathi Kibiri, who is the applicant in this motion filed a notice of motion under sections 1A, 1B, 3A, 75 (1) (h) of the Civil Procedure Act [Cap 21] Laws of Kenya and under Order 46 Rule 6, Order 43, Order 51 Rule 1 of the Civil Procedure Rules of 2010 and under article 159 (2) (e) of 2010 Constitution of Kenya and Rule 3 (1) of the High Court (Practice and Procedure) Rules of the Judicature Act and under other provisions of the law, which he amended on 12th September, 2018 in which he sought the following orders.

1) That the application herein be certified as urgent, to be heard forthwith and *ex parte* in the first instance and during the High Court Vacation and be fixed for *inter partes* hearing thereafter.

2) That pending the hearing and determination of this application *inter partes* or further orders of the court this Honourable Court be pleased to grant to the defendant/applicant an interim stay of execution of the judgement delivered on the 14th February, 2011, together with the orders granted on the 11th April, 2017 pursuant to the plaintiff/respondent's application dated 20th December, 2016.

3) That the Honourable Court be pleased to grant the defendant/applicant leave to appeal against the whole of the ruling delivered on the 31st day of July, 2018 pursuant to his application dated 31st May, 2017.

2. I certified the application as urgent warranting it to be heard and determined under the vacation rules.

3. The applicant's motion is supported by five grounds that are set out on the face of the amended notice of motion dated 12th September, 2018. The major grounds are as follows. First, he has stated that he is aggrieved by the ruling of the court that was delivered on 31st July, 2018 by Hon. Justice Ndungu on behalf of Hon. Lady Justice R. Lagat Korir, which she signed at Garsen on 31st July, 2018. Second, he has stated that the ruling and order in respect of which he intended to appeal against requires leave of this court, as it does not lie as of right. Third, he has stated that his intended appeal has high chances of success and that the application has been brought without unreasonable delay.

4. The applicant has deponed to an eight paragraphs supporting affidavit dated 29th August, 2018. In that affidavit, he has deponed to the following major matters. First, he has averred that the judgement delivered on 14th February, 2011 and orders granted on 11th April, 2017 pursuant to the plaintiff/respondent's application dated 20th December, 2016 be declared as having abated exactly one year after his death.

5. Furthermore, he has also deponed that the ruling and order that the applicant intends to challenge is not appealable as of right and for that reason leave of this court has to be sought to enable him appeal to the Court of Appeal.

6. The applicant in his further supporting affidavit dated 11th September, 2018 has deponed to a six paragraphs affidavit. In that affidavit he has stated that on 28th August, 2018, he received a letter from the District Survey Office at Nyahururu, which was addressed to the area chief of Rurii Location in which the survey office indicated their intention to visit the subject parcel of land on 12th September, 2018 with a view to excise five acres of land out of the suit land. And for that reason he instructed his advocates to seek stay of execution of the orders and judgement and in the process seek leave to appeal against the orders of this court that were made on 31st July, 2018. He has further stated that his application has high chances of success and unless an order of stay of execution is granted, his intended appeal may be rendered nugatory.

7. Furthermore, he has also averred that it is in the interest of justice that the subject land be preserved in its current state pending the hearing

and determination of the instant application for leave to appeal. He has further averred that if leave is granted, it should operate as a further stay of execution of the challenged judgement pending the hearing and determination of the intended appeal.

8. On 13th September, 2018, counsel for the applicant made oral submissions in court. He submitted that parties to a suit must be alive between the time of filing of the pleadings up to the time of delivery of the judgment. In this regard, he has submitted that Josphat Mwathi Kibiri had died before the delivery of judgement, which made that judgement to be a nullity.

9. He further submitted that if he had died after the delivery of the judgement, there would be no need for substitution as required by Order 24 Rule 10, which previously was Order 23. The decision of the High Court (Visram, J) in *Agnes Wanjiku Wangonde v. Uchumi Supermarket Ltd Civil Appeal No. 137 of 2002 (Nairobi)* seems to support his submission. It was held in that case that Order 23 Rule 11 (now Order 24 Rule 10) did not require substitution in proceedings in execution of a court order.

10. It was also the submission of counsel that the death of Josephat Mwathi Kibiri, was not brought to the attention of the court, when judgement was delivered. He also submitted that representation of the deceased by his son when judgement was delivered did not make the delivery of that judgement valid. He finally submitted that the representation by the son lapsed with the death of his father.

11. I have considered the affidavit evidence of the applicant and the applicable law.

12. Furthermore, I find there is merit in the arguments of counsel that leave of this court is required to enable him appeal to the Court of Appeal, since he has no right of appeal as of right.

13. In the circumstances, I agree with counsel that there is a lacuna in the law in a situation where a judgement is delivered long after the death of one of the parties. I therefore find that this is a fit and proper case for the grant of leave to appeal to the Court of Appeal which I hereby grant. Additionally, the grant of this leave shall operate as a stay of execution of the judgement and/ or order pending the hearing and determination of the intended appeal.

Ruling dated, signed and delivered in open court at Narok this 18th day of September, 2018 in the presence of Mr. Kambo holding brief for Mr. Mathea for the defendant/ applicant and in the absence of the plaintiff/respondent.

J. M. BWONWONGA

JUDGE

18/9/2018