



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 222 OF 2018

(FORMERLY HCCC No. 86 OF 2010 (O.S))

GEORGE MWANGI NDIRANGU alias Njogu Ndirangu1ST APPLICANT

MICHAEL NDERITU NDIRANGU alias Nderitu Ndungu.....2ND APPLICANT

FREDRICK KARIUKI NDIRANGU alias Kariuki Ndungu3RD APPLICANT

BENJAMIN MAINA NDIRANGU alias Maina Ndungu4TH APPLICANT

NGURE NDIRANGU NJOGU alias Ngure Ndungu5TH APPLICANT

KAGEMA NDIRANGU NJOGU alias Kagema Ndungu.....6TH APPLICANT

KINARO NDIRANGU NJOGU alias Rinewo Ndungu 7TH APPLICANT

PETER SHAU KURIA alias Chau Kiniga 8TH APPLICANT

JOSEPH KINYANJUI KURIA alias Karanja Kuria..... 9TH APPLICANT

JOSPHAT WAINAINA KURIA alias Chege Kuria.....10TH APPLICANT

VERSUS

MUHU HOLDINGS LIMITED..... RESPONDENT

RULING

1. By Notice of Motion dated 17th October 2019, Muhu Holdings Limited the respondent/applicant seeks leave to appeal against this court's ruling delivered on 18th September 2019 as well as an order of stay of proceedings herein pending hearing and determination of an intended appeal. The application is supported by an affidavit sworn on 17th October 2019 by Serah Mweru Muhu. She deposed that being dissatisfied with this court's aforesaid ruling, she instructed her advocates who filed notice of appeal against it on 2nd October 2019 and who wrote to the court seeking typed proceedings on 3rd October 2019. She added that there is a risk that this suit will be heard and determined before the appeal is concluded and further that the appeal raises arguable points.

2. The applicants/respondents opposed the application through grounds of opposition in which they contend that leave to appeal cannot be granted retroactively in view of the notice of appeal filed by the respondent/applicant on 2nd October 2019, that no sufficient grounds have been laid to warrant stay of proceedings, that no prejudice will be occasioned to the respondent/applicant if this suit is heard and determined on the merits and that the respondent/applicant has no arguable appeal.

3. The application was canvassed through written submissions. It is argued on behalf of the respondent/applicant that the intended appeal raises serious points of law and fact which constitute substantial issues that need to be ventilated in the Appellate Court. This court is therefore urged to exercise its discretion and grant the orders sought. Among others, the case of **Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib [2015] eKLR** is relied on in support of those submissions. Regarding the issue of the respondent/applicant having filed notice of appeal prior to the present application, it is argued that validity of the notice of appeal can only be determined by the Court of Appeal and that **Rule 75 (4) of the Court of Appeal Rules** makes it clear that it is not necessary to obtain leave before lodging the notice of appeal. Citing the case of **Kenya Wildlife Service v James Mutembei [2019] eKLR**, it is argued that stay of proceedings should be granted

since it will avoid wastage of judicial time and it will enable the respondent/applicant to pursue its appeal which it considers arguable.

4. In response, it is argued on behalf of the applicants/respondents that leave to appeal cannot be granted at this stage since by filing notice of appeal, the respondent/applicant has already commenced the appeal process. Citing the cases of **Kenya Wildlife Service v James Mutembei** (supra) and **Christopher Ndolo Mutuku & another v Cfc Stanbic Bank Limited [2015] eKLR**, it is argued that the respondent/applicant has not met the threshold for granting stay of proceedings. It is further argued that the applicants/respondents will be prejudiced if the orders sought are granted and that substantive justice will only be achieved by the expeditious disposal of this suit through a hearing and determination on the merits. Accordingly, the applicants/respondents urge the court to dismiss the application.

5. I have carefully considered the application, the grounds of opposition and the submissions. The respondent/applicant seeks leave to appeal against this court's ruling delivered on 18th September 2019 as well as an order of stay of proceedings herein pending hearing and determination of an intended appeal. In the said ruling, I dismissed the respondent/applicant's preliminary objection which had raised issues of *res judicata*.

6. While every party to a litigation has a right to a fair hearing which entails the right to appeal against a decision that he/she is dissatisfied with, **Section 75 (1)** of the **Civil Procedure Act** and **Order 43 Rule 1** of the **Civil Procedure Rules** specify instances in which an appeal lies as of right and those in which an appeal can only be filed with leave of the court. That dichotomy is necessary so as to safeguard the administration of justice. See **Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib** (supra). A reading of **Section 75 (1)** of the **Civil Procedure Act** and **Order 43 Rule 1** of the **Civil Procedure Rules** shows that leave is required in regard to an appeal against this court's ruling of 18th September 2019.

7. **Order 43 Rule 1 (3)** provides:

An 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 orally at the time when the order is made, or within fourteen days from the date of such order.

8. The record herein shows that no leave was sought orally upon delivery of the ruling. It follows therefore that a formal application for such leave ought to have been filed within fourteen days from 18th September 2019. The present application was filed on 23rd October 2019 which is over two weeks after the deadline set by the rules. No explanation has been offered as to the reasons for the delay. Equally, the court has not been asked to extend time within which to file the application. That alone renders the application for leave to appeal incompetent. See **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR**. Nevertheless, I will consider the merits of the application.

9. The principles governing an application for leave were considered by the Court of Appeal in **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another** (supra) where the court stated as follows:

... where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. ... Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.

10. The respondent/applicant contends that the intended appeal raises serious points of law and fact revolving around *res judicata*. I see nothing new or serious in those arguments. They are the very same ones that were canvassed before this court leading up to the ruling of 18th September 2019. In any case, *res judicata* is a matter that more than adequate judicial ink has been spent on. I doubt if the proposed appeal will add value to the principles already set. In the circumstances, I do not consider that this is an appropriate case in which to exercise discretion to grant leave to appeal in favour of the respondent/applicant.

11. The respondent/applicant also seeks stay of proceedings pending hearing and determination of the proposed appeal. Since I have come to the conclusion that the respondent/applicant does not in the circumstances merit leave to appeal against this court's ruling of 18th September 2019, the prayer for stay of proceedings pending hearing and determination of a non-existent appeal is moot.

12. In the result, Notice of Motion dated 17th October 2019 is dismissed with costs to the applicants/respondents.

Dated, signed and delivered at Nakuru this 24th day of September 2020.

D. O. OHUNGO

JUDGE