



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 85 OF 2011

JACINTA WANZA MAKENZI.....PLAINTIFF/APPLICANT

VERSUS

MUHATIA PALA AUCTIONEERS.....1ST DEFENDANT/RESPONDENT

MARDEN KELLI.....2ND DEFENDANT/RESPONDENT

KEVIN MUTINDA KELLI.....3RD DEFENDANT/RESPONDENT

SYLVIA MWENDE KELLI.....4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant has filed a Notice of Motion application dated 13/3/2012 for orders that;

1. Leave be granted to the Plaintiff to appeal against the entire Ruling, Orders and Findings of the Honorable Court delivered on 8/3/2012.
2. Costs of this application be provided for.

The application is premised on the ground that the Court upheld the Defendants/Respondents' preliminary objection thereby dismissing the Plaintiff's suit with costs. It is further premised on an annexed affidavit sworn by the Applicant, Jacinta Wanza Makenzi dated 13/3/2012.

The Defendants/Respondents filed grounds of oppositions in opposition to the application herein. The Defendants aver that the application is an abuse of the court process; that the intended appeal has remote chances of success and that litigation must come to an end.

I have considered the oral submissions made by the Counsels. The issue for determination is whether this Court should grant the Plaintiff/Applicant leave to appeal against a decision of the Court (Mugo. J) dated 8/3/2012. It is established that whether or not the Court would grant leave to appeal is a matter for the discretion of the Court. The Applicant is aggrieved by the decision of Justice Mugo. I note that this application was brought within 5 days after the ruling was read.

When the application came for *inter-partes* hearing, counsel for the Defendants reiterated the contents of the grounds of opposition. On the other hand, counsel for the Plaintiff/Applicant argued that at this stage the parties cannot argue the merits of the grounds of appeal, as the same is for the Court of Appeal. That it is in the interest of justice that the Plaintiff seeks leave to appeal, so as to canvass the grounds of appeal at the Court of appeal. That since the appeal shall be a first appeal, the Court of Appeal shall consider matters of law and fact, and that the findings of the superior Court will be determined by the Court of appeal, hence it shall be an issue of litigation between the parties. Further that in the event that the appeal is unsuccessful, the Defendants shall have recourse of costs.

I agree with counsel for the Plaintiff/Applicant that at this stage, the parties cannot argue the merits of the grounds of appeal. I find that the application was brought within good time. A party who is aggrieved has a right to appeal against the order, and in this case the Applicant has sought the Court's leave to appeal. I therefore allow the Plaintiff/Applicant's application and grant prayer No. 2. The applicant shall file the appeal within 30 days from the date of this ruling. Costs shall be in the cause.

Dated, signed and delivered this **17th** Day of **July** 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

Kabiru.....Court Clerk