



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: AKIWUMI, TUNOI & LAKHA, JJ.A.)  
CIVIL APPEAL NO. 199 OF 1996

BETWEEN

ANDREW KIMANI NGUMBA

MBANGU INVESTMENTS INC ..... APPELLANTS

AND

ZAKARIA MUIGAI GAKIBE ..... RESPONDENT

(Appeal from the ruling and Order of the High Court of Kenya  
at Nairobi (Justice Ole Keiwua) dated 10th November, 1995

in

H.C.C.C. NO. 1850 OF 1993)

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RULING OF THE COURT

At the commencement of the hearing of this appeal, Mr. Tobiko, advocate for the respondent, moved the Court, pursuant to a motion on notice filed on May 12, 1997 and under Rule 80 of the Rules of this Court, to strike out the appeal on the ground that no appeal lies against the order of November 10, 1995 made by the superior court (Ole Keiwua, J.) save with leave. The ground for such an application was that the said order of the superior court was not one from which an appeal lay as of right but only with leave which was refused by the superior court on March 19, 1996 and none had been granted by or sought of this Court.

Briefly, this application arises from proceedings commenced by the respondent in the superior court seeking specific performance of an alleged contract to purchase all that piece of land known as L.R. NO. 74/16 situate at Kasarani Area, Nairobi measuring 22.0 acres or thereabout. The applicant filed a defence and counterclaimed for judgment, inter alia, for general damages and an order of eviction from the said property against the respondent. The decision of the superior court against which it is sought to appeal is from an application which granted an extension of time within which the respondent may apply for the consent of the Nairobi Land Control Board for the sale of the suit property under the provisions of section 8 of the Land Control Act Cap 302.

In opposing the application to strike out before us, Mr. Gatonye appearing with Mr. Gathenji for the appellant contended that the appeal lay as of right so that no leave was required. He submitted that the decision of the learned judge which is the subject of the appeal fell within the provisions of Order XLII rule 3 of the Civil Procedure Rules from which leave was exempted being a final order affecting rights of

the parties or property and was appealable as of right. The relevant provisions of the Civil Procedure Act for the purposes of this appeal are as follows:-

"75(1) 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: .....

(h) Any order made under rules from which an appeal is expressly allowed by rules.

"76(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

The Civil Procedure Rules provide for appeals from orders in Order XLII the relevant provision of which is:

"(2) An appeal shall lie with the leave of the court from any other order made under these Rules."

It is, therefore, clear from the foregoing that under the Civil Procedure Act an appeal only lay from an order in the circumstances set out in Section 75 and that by Section 76 it is specifically stated that, save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction.

The only provision which could possibly be applicable is section 75(1)(h), which provides that an appeal may lie from any order "made under rules" from which an appeal is "expressly allowed by rules." This category of orders must be ascertained by reference to Order XLII, rule 1(1). It gives an appeal as of right from thirty-one special types of orders set out in paragraphs (a) to (ee) inclusive of sub-rule (1). All these are clearly "made under rules". Sub-rule (2) then proceeds:-

"(2) An appeal shall lie with the leave of the court from any other order **made under these Rules.**" (Emphasis supplied)

It follows that unless the order is made under the Civil Procedure Rules those Rules cannot be effective to make it appealable, either as of right or with leave. An order made under section 8 of the Land Control Act, Cap. 302, as in the instant case is not one of those orders which by virtue of Section 75 of the Civil Procedure Act, either alone or combined with Order XLII of the Civil Procedure Rules, is specifically made appealable without leave.

The order in question in this application was not made under the Civil Procedure Rules (and the contrary was not contended) but under section 8 of the Land Control Act, Cap. 302; so it cannot be appealable as being within those under sub-rule (2) of Order XLII which refers only to appeals from other orders "made under these Rules".

Mr. Gatonye for the respondent, however, contends that the decision sought to be appealed against was a final order in that it determines the rights of the parties and as such was a decision which was exempted from the requirement of leave for the purpose of an appeal. In this, he relies on the provisions of Order XLII rule 3 which is as follows:-

"3. Nothing in this Order shall apply to any adjudication which, 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."

It is interesting to note that the main words of the above rule are taken from the definition of "decree". The term "decree" is defined in Section 2 of the Civil Procedure Act (the Act) as meaning:-

"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. ...."

As can be readily seen, this definition limits the point of decision to matters which determine the rights of the parties. The decision in a case must be arrived at after the whole hearing of the case (Section 25 of the Act ) except when it can be reached on a preliminary question of law: Order XIV Rule 2. The "rights" in the definition section must, in our judgment, mean substantial rights i.e. rights with regard to which relief is sought. If this was not so, then every decision upon such points as limitation and jurisdiction can give rise to a preliminary decree. A finding which does not determine any of the substantial rights which a court is asked to give or withhold cannot, in our judgment, give rise to a decree as defined and is not final. Let us examine what the learned judge held in the instant case. He concluded:-

"Accordingly, in my judgment I hold that these are sufficient reasons to call for the exercise of my discretion to extend time under the proviso to section 8 of the Land Control Act. I do extend the time within which the application to the Land Control Board can be made. It must be made and submitted to the Board within 60 days from the date hereof. If the 1st defendant will not sign the application in question, the Registrar of this court is directed to do so on the 1st defendant's behalf.

The plaintiff will have his costs of the application."

Controversy on every detail of procedure and rule of evidence, if decided, cannot give rise to a decree. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as the rules of procedure and evidence which have to be enforced and followed. But these latter are means to an end, and the end is the right or rights claimed, and to be, or not to be decreed. The far wider construction sought to be put upon the meaning of decree is, in our judgment, uncalled for and will lead in practice to disastrous consequences. In our judgment, the words defining the "decree" in section 2 of the Act should be given a limited construction and must relate to the rights of the parties which are not decided by decisions which have the effect, as in the instant case, only of regulating procedure and the nature of evidence and not deciding the rights of the parties.

A decree, in our judgment, must completely dispose of the suit and the definition limits the point of decision to matters which determine the rights of the parties. There is the highest authority (for giving the term decree the above limited interpretation) in the judgment of the Privy Council in *Tzamburakis vs. Rodoussakis* (1958) E.A. 400 at 404 G-H, setting aside the Order of the Court of Appeal for Eastern Africa (1956) 23 E.A.C.A. 247.

For the sake of completeness, we may add that we have not referred to the authorities from other jurisdictions as to what constitutes a "final" order. We do not think these authorities are of much assistance in the instant case, since they turn on the specific provisions of the relevant legislation which draws a distinction, for purposes of appeal, between final and interlocutory orders. We find that the order under consideration is clearly not a final order, in that it does not finally dispose of the rights of the parties as claimed in the pleadings.

Accordingly and, for the reasons above stated, the decision of the superior court from which it is sought to appeal is an order from which no appeal lies without leave. The notice of motion before us and dated May 12, 1997 succeeds and is granted as prayed. Leave to appeal not having been obtained the appeal is incompetent and must be, as it hereby is, struck out with costs.

Dated and delivered at Nairobi this 28th day of May, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR