



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 221 OF 1997 (97/97UR)

BETWEEN

MIKE MAINA.....APPLICANT

AND

THE COMMISSIONER OF LANDS

THE ATTORNEY GENERAL

(ON BEHALF OF THE MINISTRY OF LANDS AND

THE COMMISSIONER OF LANDS).....RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Mbito J) dated 21st June, 1996

in

H.C.MISC.APPLN. NO.296 OF 1996)

RULING

There is before me what is styled -

"NOTICE OF MOTION (EX-PARTE)" -

and as is obvious from that heading the motion does not state under what provisions of the law it is brought. It was, however, heard before me inter partes and the motion itself sought four orders, namely:-

1.that it (motion) ought to be certified as urgent and heard during vacation. This first order was granted by my learned brother, Shah J.A. on the 28th August, 1997 when he certified the motion as being urgent.

2.that leave be granted to the applicants to file a notice of appeal and address of service out of time

in Civil Appeal No. 157 of 1996.

3.that leave be granted to persons interested, the members of the Karen & Langata District Association, being persons directly interested and affected by the result of the decision of the superior court appealed from in Civil Appeal No. 157 of 1996 and being persons who took no part in the proceedings in the superior court, to be heard, in the appeal and for their counsel to address the Court at the hearing of the appeal which is listed for hearing on 1st October, 1997; and

4.that Karen & Langata District Association be allowed to photocopy the record of appeal for the purpose of being heard thereon at the hearing on 1st October, 1997.

In purported compliance with Rules 42 (1) and 43 (1) of the Court's Rules, the motion is said to be based on a total of fourteen grounds with additional ten sub-grounds. The said grounds and sub-grounds are then said to be supported by what is called a verifying affidavit of some seven paragraphs.

That affidavit is sworn by one Mike Mills who describes himself therein as the Chairman of Karen & Langata District Association. It is Mike Mills and that Association who are described as the "Applicants" in prayer two of the motion and the members of the Association are the ones described as being

"directly interested and affected by the result of the decision of the superior court appealed from in Civil Appeal No. 157 of 1996 and being persons who took no part in the proceedings in the superior court"

in prayer three of the motion. Mr. Owino who appeared in this matter for Mike Maina, the 2nd respondent pointed out to me that the applicants' motion is defective and ought to be dismissed because it does not comply with Rules 42 (1) and 43 (1) of the Court's Rules. Rule 42 (1) provides that subject to the provisions of sub-rule (3) of that rule, and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application. Rule 43 (1) provides that every formal application to the Court shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts.

Mr. Owino's submission is that none of these rules provides for a verifying affidavit and hence the current application is not supported by any affidavit. There is some force in this contention but I think Mr. Mwenesi for the applicants confused the rules of this Court with the provisions of Order 53 of the Civil Procedure Rules under which the dispute was brought before the superior court. The provisions of Order 53 are that an application for judicial review shall be by motion, accompanied by a statement of facts which statement shall be verified by an affidavit. Apparently, Mr. Mwenesi equated the grounds on which their motion is based with "a statement of facts" and then accompanied those grounds with "a verifying affidavit". There is no basis for that kind of thing in this Court but nevertheless, the motion is supported by an affidavit, however short and sketchy, and though wrongly titled, a verifying affidavit. Had there been no affidavit at all, the situation would have been different and I would have been bound to strike out the motion as being incompetent. The irregularity I have dealt with does not, in my view, render the motion incompetent.

I shall next deal with prayers 3 and 4 of the motion. I inquired from Mr. Mwenesi under what rule of the Court's rules I would be entitled to make the orders sought therein. In prayer 4, for instance, if I were to grant to the applicants leave to file a notice of appeal out of time, that would automatically accord them all the rights to which an intending appellant is entitled. Among such rights would be the right to be supplied with the proceedings and I can find no valid reason why I should specifically order that they be allowed to photocopy the proceedings. As to prayer three of the motion, I do not think it would be right for me to make an order the effect of which would be to bind even the full-bench. In my view, if the applicants feel that they are entitled to a hearing there is nothing to stop them appearing in the Court on the day Civil Appeal No. 157 of 1996 is set for hearing and convincing the Court that they ought to be heard. There appears to be some authority for that in the case of COMMERCIAL BANK OF AFRICA LTD VS ISAAC KAMAU NDIRANGU, CIVIL APPEAL NO. 157 OF 1991 (Unreported) where Cockar, JA as he then was, stated in his judgment at pages 6 to 7:-

"It is to be noted that the interested party had not appealed against the ruling although he could have done so had he so wished - Court of Appeal Rules 74 and 76 (1). It was as a result of appropriate steps taken by Mr. Gaturu for the bank, on a direction from the court, that on the day of the hearing of the appeal, Mr. Richard Kairu appeared on behalf of the interested party. He had no right to address the court but we nevertheless allowed him to make submissions on behalf of the interested party and he did so."

I do not see any reason for me to make the orders sought in prayer three and in any case, if I understand the position correctly, Mike Mills is seeking to be allowed to appeal on behalf of the Karen & Langata District Association of which he is the chairman. If I grant to them the leave sought in prayer one then they will be heard as of right. If they want to address the Court separately in Civil Appeal No. 157 of 1996, then they must wait and convince the bench which shall hear that appeal that they ought to be heard.

As regards prayer one, the applicants say that though they were not parties in the superior court, they are interested in the proceedings and the order of the superior court will affect their rights. They are apparently residents of the area in which the forest out of which the disputed land was carved lies and they ask that before the forest is given out to private developers such as the 2nd respondent, they should be heard. I am not prepared to rule in this motion that the applicants have no interest and, therefore, are not even entitled to be heard. If they have no interest worth protecting and I allowed them to file an appeal, that appeal will fail with all the consequences attendant upon such failure. But I do not think I ought to determine that point in this application.

Should I extend the time for the applicants to file a notice of appeal? Before I do that I must consider the reason or reasons as to why they did not file their notice on time. The evidence I have before me on that point is that they were unaware of the suit in the superior court and that they only became aware of the dispute in June 1997 when they learned of the existence of Civil Appeal No. 157 of 1996. This application was itself filed on the 27th August, 1997, apparently after it was established that Civil Appeal No. 157 of 1996 is slated for hearing on 1st October, 1997. These averments were really not challenged by the respondents and I see no reason to doubt them. I think I should grant to the applicants the extension sought in prayer one.

Accordingly I allow prayer one in the notice of motion and order that the applicants shall file their notice of appeal within 3 days from the date hereof and must thereafter file their record of appeal within 14 days from the date of filing of the notice of appeal. I reject prayers 2, 3 and 4 of the motion. The costs of the application shall be in the appeal to be so filed. Those shall be my orders.

Dated and delivered at Nairobi this 10th day of September, 1997.

R. S. C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR