



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 206 OF 2017

JOYCE MUTINDI MUTHAMA.....1ST PETITIONER

JEFFERSON MWENDA MUTHAMA.....2ND PETITIONER

VERSUS

JOSEPHAT KYOLOLO WAMBUA.....1ST RESPONDENT

MIKE MULUNGA MUTUA.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL TRIBUNAL.....3RD RESPONDENT

RULING

1. In the Application dated 27th April, 2018, the 1st and 2nd Respondents are seeking for the following orders:

a. That leave be granted to the 1st and 2nd Respondents herein to Appeal against the entire Ruling and order of the Hon. Mr. Justice Oscar A. Angote delivered on 13th April, 2018.

b. That the costs of this Application be granted to the 1st and 2nd Respondents.

2. The Application is premised on the grounds that this court delivered its Ruling on 13th April, 2018 dismissing the Respondents' Preliminary Objections dated 9th January, 2018; that the 2nd and 3rd Respondents are aggrieved by the said Ruling and that it is apparent that leave to Appeal may not be automatic.

3. The Petitioners' advocate submitted that there is no issue to Appeal against as the Petition is yet to be heard and that no determination has been made as regards the Petition.

4. The Respondents' advocate submitted that leave to Appeal is a prerequisite to the assumption of jurisdiction by the court on Appeal; that failure to seek the leave of the lower court deprives the court on Appeal the jurisdiction which cannot be cured by Article 159 of the Constitution and that the Appeal has high chances of success.

5. This matter was commenced by way of a Petition. In the Petition, the Petitioners allege that the Respondents have infringed on their constitutional rights. Before the Petition could be heard, the 1st and 2nd Respondents filed a Notice of Preliminary Objection. In the said Notice of Preliminary Objection, the Respondents averred that the Environment and Land Court does not have jurisdiction to entertain claims for redress of violation of fundamental rights that fall outside Articles 40, 42, 69 and 70 of the Constitution; that the Environment and Land court does not have supervisory jurisdiction over inferior tribunals and that the Petitioners have not complied with the provisions of Section 9(2) of the Fair Administrative Actions Act.

6. After hearing the Preliminary Objection, the court, vide its Ruling dated 13th April, 2018, dismissed it with costs. The Respondents/Applicants are now seeking leave to Appeal against the said order of the court.

7. Article 164(3) of the Constitution grants to the Court of Appeal the jurisdiction to hear Appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. Section 16 of the Environment and Land Court provides as follows:

“Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.”

8. The above provision shows that any Judgment, award, order or decree issued by the Environment and Land Court is appealable to the Court of Appeal as of right. Indeed, considering that the order being appealed is not governed by the Civil Procedure Rules, but rather the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 (*The Mutunga Rules*), the question of leave to Appeal does not arise. Indeed, "*the Mutunga Rules*" do not provide that a party must seek for leave to Appeal against an order made under the Rules.

9. For those reasons, I find the Respondents' Application dated 27th April, 2018 to be unmeritorious. The same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE