



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 17 OF 2011

MAURICE ANTONY WANJALA MUSE.....PLAINTIFF

VERSUS

ANNA WANYAMA WANJALA1ST DEFENDANT

JOHN SIMIYU WEPUKHULU.....2ND DEFENDANT

ISAAC WAFULA WANAKACHA.....3RD DEFENDANT

OMOTO DAVID ALIAS OMOTO PHILIP.....4TH DEFENDANT

SOLOMON WANYONYI KHAEMBA.....5TH DEFENDANT

ABRAHAM CHENGE WEKESA.....6TH DEFENDANT

PENANA MTONYI.....7TH DEFENDANT

MARY AMBOGO.....8TH DEFENDANT

NELLY SIKHOYA BALANGA.....9TH DEFENDANT

ANNE NEKESA WEKESA.....10TH DEFENDANT

JOTHAM SIMITA.....11TH DEFENDANT

WYCLIFFE AIRO SIRIKWA.....12TH DEFENDANT

RULING

1. The application dated **30/10/2019** has been brought by the defendants under **Order 43 Rule 3 of the Civil Procedure Rules**. They seek the following orders:-

(a) That this application be certified urgent and be heard *ex-parte* in any event.

(b) That the 2nd - 12th defendants/applicant be granted leave to appeal against the ruling of this court delivered on 9th October, 2019 dismissing the 2nd - 12th defendants/applicants' application dated 27th August, 2019.

(c) Costs be in cause.

2. The application is supported by the affidavit of the 2nd defendant on his behalf and on behalf of his co-applicants sworn on **31/10/2019**.

3. The grounds relied upon are that the 2nd - 12th defendants' application dated **27/8/2019** was dismissed on **9/10/2019** and the applicants

were dissatisfied with the ruling and are desirous of appealing against it at the Court of Appeal; that no leave to appeal was granted and/or sought orally in court and as such leave is mandatorily required before appealing and that it is in the interest of justice that the orders sought be granted.

4. In response to that application, the plaintiff filed a replying affidavit dated and sworn on **5/12/2019**. He deponed that the jurisdiction of the court has not been properly invoked; that the ruling is appealable as a matter of right by dint of **Section 75** of Civil Procedure Act and **Order 43** of the Civil Procedure Rules and no leave thus required; a notice of appeal should have been lodged and served on the plaintiff before the application which was not done; that without a valid notice of appeal there is no basis for seeking leave to appeal; that no extension of time within which to lodge and serve the notice of appeal out of time has been sought; that the applicants are guilty of laches and no reason has been advised for the delay of almost one month since the ruling was delivered and that the plaintiff is entitled to enjoy the fruits of his judgment which remains in force yet the application will derail the execution.

5. At the hearing of the application on **5/11/019** Mr. Wafula for the defendants submitted that he relies entirely on the documents filed on the file record and sought a ruling date. Mr. Chebii holding brief for Mr. Amasakha also relied on the replying affidavit of the plaintiff only.

6. The issue before this court is whether leave is necessary and if so it should be granted. **Section 75** of the **Civil Procedure Act** provides as follows:

“75. Orders from which appeal lies

(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-

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

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

(2) No appeal shall lie from any order passed in appeal under this section.”

7. **Order 43** of the **CPR** set out the range of orders in respect of which an appeal shall lie as of right under **Section 75 (1) (h)** of the Act.

8. **Order 43 rule 1 (g)** of the **Civil Procedure Rules** provides as follows:

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of Section 75(1) (h) of the Act-

(a) Order 1 (parties to suits);

(b)

.....

.....

(g) Order 10, rule 11 (setting aside judgment in default of appearance).

(f)

9. The application dated **27/8/2019** which was dismissed and which led to the instant application was brought under the provisions of **Order 10 Rule 11** of the **Civil Procedure Rules**, **Section 1A, 3 and 3A** of the **Civil Procedure Act**.

10. An order made in respect of an application under **Order 10 Rule 11** of the **Civil Procedure Rules** is an Order appealable as of right

under **Order 43 (1) (g)** of the Civil Procedure Rules. In my view therefore the respondents' assertion that the applicants do not need this court's leave to appeal is correct.

11. The upshot of foregoing dated **30/10/2019** lacks merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this 27th day of November, 2019.

MWANGI NJOROGE

JUDGE

27/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nakitale holding brief for Wafula for Applicant

Ms. Munialo holding brief for Amasakha for Respondent

COURT

Ruling read in open court at 3.20 p.m.

MWANGI NJOROGE

JUDGE

27/11/2019