REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC APPEAL NO.5 OF 2017

(FORMERLY ELC APP.NO.19 OF 2015 – NYERI)

GEORGE KAMANDE GITAU................................APPELLANT

-VERSUS-

EPHANTUS KAMANDE MACHARIA.................DEFENDANT

JUDGEMENT

(Being an Appeal from the Judgement of Hon. J. W. Onchuru, Ag.Principal Magistrate in Civil Suit No.538 of 2010 AT Thika delivered on 22nd January 2014)

This is an ***Appeal*** filed by ***George Kamande Gitau (Appellant),*** who was the Plaintiff in ***Thika PMCC No.538 of 2010***. The ***Memorandum of Appeal*** was filed on ***24th January 2014*** at ***Muranga High Court*** being ***Civil Appeal No.3 of 2014***.

Subsequent thereto, the Appellant filed a ***Notice of Motion*** application dated ***14th April 2014,*** and sought for an order of stay of execution of the Judgement in ***Civil Suit No.538 of 2010,*** pending the hearing and determination of the Appeal and in the alternative that *status quo* be maintained, pending the hearing and determination of the instant Appeal.

The said ***Notice of Motion*** was contested by the Respondent herein

Ephantus Kamande, who was the Defendant in ***Civil Suit No.538 of 2010***. The ***Grounds of Opposition*** were filed on ***30th April 2014***.

On the first instance when the ***Notice of Motion*** was placed before the Judge on ***16th April 2014***, he granted stay of execution on interim basis and the matter was slotted for hearing on **30th April 2014**. However, the said ***Notice of Motion*** application was taken out on various dates and on ***3rd March 2015***, when the same was again slotted for hearing, the Court noted that the said Appeal ought to have been filed in an Environment and Land Court and the same was ordered transferred to ***Environment and Land Court, Nyeri.*** Subsequently, the instance file was transferred to ***Nyeri Environment and Land Court*** and when the parties appeared before the Judge on ***2nd December 2016***, the following ***Consent*** was recorded;

> ***"By consent, the Notice of Motion application dated 14th April 2014 is compromised by adopting the consent recorded on 26th January 2016***
>
> ***ii) The Appeal shall be disposed off by way of written submissions. The Appellant to file and serve his written submissions within 21 days from the date hereof and Respondent to file his written submissions 21 days upon receipt.***
>
> ***iii) Mention on 18th January 2017 for a Judgement date."***

However, on ***18th January 2017***, none of the parties appeared in court and the matter was taken out. Further with establishment of ***Thika Environment and Land Court***, this matter was ordered transferred to this court on ***8th February 2017***.

The matter was first mentioned before this Court on ***30th March 2017*** and later ***24th July 2017,*** wherein the parties reiterated their willingness to proceed with the Appeal by way of written submissions.

The Court therefore reconfirmed the earlier directions given by the court on ***2nd December 2016,*** and directed parties to file their written submissions. By ***22nd November 2017***, when the matter was mentioned before me, the parties had filed their written submissions to support their respective positions. The Court set the Judgement for ***23rd February 2018*** and thus this determination.

It was important to set the above background and emphasize that this is an Appeal inherited from ***Nyeri, Environment and Land Court*** with directions that the Appeal be heard by way of written submissions. However, having gone through the court records, the Court has noted that several crucial steps were omitted.

The Court has noted that this Appeal was never placed before the Judge for perusal and directions as provided by ***Section 79(B)*** of the ***Civil Procedure Act*** which provides that:-

> ***"Before an Appeal from a Subordinate Court to the High Court is heard, a Judge of the High Court shall peruse it and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding Section 79(c) reject the Appeal summarily".***

The above step was omitted and therefore not clear whether this

Appeal was admitted or not. The Court finds that the above omission could have occurred because immediately the Appeal was filed, the Applicant also filed an interlocutory application for stay of execution of the Judgement and before the said application could be canvassed fully, a Consent was filed and directions on how to canvass the Appeals were taken.

Further the Court has perused the ***Record of Appeal*** and has noted that there is no ***decree*** that was extracted and attached to the Judgement appealed against.

Order 42 Rule 2 of the ***Civil Procedure Rules*** provides as follows;-

> ***"where no certified copy of decree or order appealed against is filed with the memorandum, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the Appeal summarily under Section 79(B) of the Act until such certified copy is filed."***

The Above provision of law provides that it is mandatory for the Appellant to file such a certified copy of the ***Decree*** as soon as possible. The Appellant herein did not file the Decree with the Memorandum of Appeal and also as soon as possible as provided by Order 42 Rule 2.

Further, since the court did not consider whether to reject the Appeal summarily under Section 79(B) of Civil Procedure Act, the said Decree was not requested by the court. Failure to list the matter for directions before the Judge was contravention of ***Order 42 Rule 11*** which provides that:-

> ***"Upon filing of the Appeal, the Appellant shall within thirty days cause the matter to be listed before a Judge for directions under Section 79(B) of the Act".***

It was therefore ***incumbent*** upon the Appellant to list the matter before the Judge for directions under Section 79(B) of the Civil Procedure Act. The Appellant did not do so and this was a clear contravention of the law.

Order 42 Rule 13 is also very clear on the ***time line*** for listing the matter for directions before the Judge. The said order ***42 Rule 13*** provides:-

> ***"On notice to the parties delivered not less than twenty one days after the date of service of the Memorandum of Appeal, the appellate shall cause the Appeal to be listed for the giving of directions by a Judge in Chambers".***

The above provision of law was also not complied with and the Appeal herein was prematurely fixed for hearing.

The Court has also perused the Record of Appeal and the annextures thereto and noted that the original court file from the trial Magistrate is missing. This is so because the Appeal was fixed for hearing prematurely before all the steps and timelines were adhered to. The Court has considered ***Order 42 Rule 13(4)*** and it provides as follows:-

> ***"Before allowing the Appeal to go for hearing, the Judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party: that is to say;-***
>
> ***a) Memorandum of Appeal***
>
> ***b) Pleadings***
>
> ***c) Notes of trial Magistrate made at the hearing.***
>
> ***d) …..***

e) ….

f) The Judgement, order of decree appealed from and where appropriate, the order (if any) giving leave to appeal".

In the instant Appeal, there is a Memorandum of Appeal and the Pleadings. However, the Magistrate's notes are the typed proceedings not the original court proceedings. The Judgement is also attached but **not** the ***Decree*** that is being appealed against. This is a clear contravention of Order 42 of the Civil Procedure Rules.

The Court having carefully considered the instant Appeal and the court records, finds that the Appellant herein has contravened the very clear mandatory provisions of law and the said omissions have rendered this Appeal incompetent.

Further the said omissions are fatal to this Appeal and cannot be salvaged by ***Article 159(2)(d) of the Constitution*** which provides that:-

"Justice shall be administered without undue regard to procedural technicalities."

Further the Court finds that failure to adhere to mandatory provisions of law such as attaching the decree appealed against is not just a procedural technicality which can be remedied by ***Article 159 (2)(d) of the Constitution,*** but it goes to the root of the Appeal and renders it fatally defective and thus incompetent.

Further, the Court finds that the Appellant is only appealing against

the Judgement and not Judgement and decree of the court. The above omission cannot be salvaged by invoking the inherent power of the Court as provided by ***Section 3A*** of the Civil Procedure Act which donated power to court to make such orders that are necessary for the end of justice and to prevent abuse of the court process. This Court has found that the Appeal herein is incompetent and it will not go into the merit of the same.

Having now carefully considered the instant Appeal, the court records, the annextures thereto and the relevant provisions of law, the Court finds that the Appeal herein is fatally defective and incompetent in law and consequently, the Court dismisses the entire Appeal with costs to the Respondent as there is no competent Appeal before this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mwiti holding brief for Mr. Mugo for Appellant

Mr. Kangethe for Respondent

Diana - Court clerk.

Court – Judgement read in open court in the presence of the above parties.

L. GACHERU

JUDGE

23/2/2018