



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO 20 OF 2010

SAMMY KANYINGI MUGEREKI

(Suing as administrator ad

Colligenda Bona for the estate of

KAHUKI KARANJA (Deceased).....PLAINTIFF

VERSUS

JOSEPH MWAURA MUROKI.....1ST DEFENDANT

PAUL CHOMBA.....2ND DEFENDANT

RULING

1. By a Plaint dated and filed herein on 16th March 2010, the Plaintiff asked for Judgment to be entered against the 1st and 2nd Defendant jointly and severally and that:

(a) The 1st and 2nd Defendants, their servants and or agents be restrained by way of injunction from wasting, damaging, or alienating from their possession the parcel of land in Lamu/Lake Kenyatta/1460 from the estate of the late Kahuki Karanja and or dealing in it in any way whatsoever.

(b) That the title in the land if registered in either the name of the 1st or 2nd Defendant be cancelled by (an) order of this Court and the same be registered in the name of the Plaintiff as an administrator ad colligenda bona of the estate of the late Kahuki Karanja.

2. After hearing the case, this Court allowed the Plaintiff's claim on 27th February 2015. Subsequently and by an application dated 9th April 2015, the 2nd Defendant sought an order of stay of the execution of the Judgment and/or decree pending the hearing and determination of an intended appeal. In a Ruling delivered on 2nd October 2015, the application for stay was allowed.

3. Apparently and despite lodging a Notice of Appeal dated 10th March 2015 on 11th March 2015, no further proceedings were taken in regard thereto. Consequently, by a Notice of Motion dated and filed herein on 25th May 2016, the Plaintiff sought the following orders:-

1. That the Court be pleased to vary, set aside and or vacate its order dated the 2nd October 2015 staying the Judgment dated 27th February 2015 upon such terms as may appear just; and

2. That the costs of this application be paid by the Respondents.

4. In response to the said application, the Defendants have taken out a Notice of Preliminary Objection dated 30th June 2016 and filed in Court on 4th July 2016 objecting to the application on the grounds that:-

1. The Court has no jurisdiction to vary, set aside or vacate its orders; and

2. The only option that was open to the applicant was to appeal.

5. I have considered the application and the Preliminary Objection raised thereto. I have equally considered the written submissions filed herein by the Learned Advocates for the parties.

6. Order 42 Rule 6 (4) of the Civil Procedure Rules provides as follows:-

“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

7. The Plaintiff does not dispute the fact that the Defendants have lodged a Notice of Appeal pursuant to Rule 75 of the Court of Appeal Rules in regard to the decision rendered on 27th February 2015. Rule 4 of the Court of Appeal Rules stipulates that:-

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the Notice of Appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

8. In the matter before me, the Plaintiff complains that since the Defendants obtained an order of stay on 2nd October 2015 they have not appealed or shown an indication to do so. It is their case that the failure to take any steps in the matter can only lead to the conclusion that the Defendants have lost interest in pursuing the appeal. That may as well be so. The Plaintiffs have however come to the wrong Court to express their grievances.

9. Having conceded that a Notice of Appeal was lodged herein on 11th March 2015 and served upon them, that Notice is deemed to be an appeal to the Court of Appeal by dint of Order 42 Rule 6 (4) of the Civil Procedure Rules. Accordingly, the only option open to the Plaintiff in the event of the Defendants failing to take any steps to prosecute the appeal is to move “the Court” as per Rule 84 of the Court of Appeal Rules.

10. The word “Court” is defined under Section 2 of the Court of Appeal Rules, 2010 to mean:-

“the Court of Appeal and includes a division thereof and a single Judge exercising any power vested in him sitting alone.”

11. Evidently, this is the wrong Court and there is therefore merit in the Preliminary Objection dated 30th June 2016 and filed herein on 4th July 2016.

12. Accordingly the Notice of Motion dated 25th May 2016 is hereby dismissed with costs.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE