



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C.A CASE NO. 2 OF 2018**

**ITA NGURU.....1<sup>ST</sup> APPELLANT**

**CELINE MUTHONI ITA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSPHAT NJUE.....RESPONDENT**

**RULING**

1. By a notice of motion dated 13<sup>th</sup> February 2018 brought under **Order 42 Rule 6 of the Civil Procedure Rules** and **all enabling provisions of the law**, the Appellants sought a temporary injunction restraining the Respondent from interfering with their occupation and use of an undisclosed sub-division of *Title No. Mbeere/Kirima/2244* pending the hearing and determination of the appeal.

2. The said application was supported by an affidavit sworn by the 2<sup>nd</sup> Appellant, Celine Muthoni Ita, which was undated. It was contended that on 14<sup>th</sup> December 2017, the Magistrate's court in Siakago PMCC No. 80 of 2017 had issued an eviction order against the Appellants. It was further stated that the said order was a *negative* order hence incapable of being stayed. A perusal of the exhibits to the supporting affidavit, however, revealed that the Magistrate's Court had simply issued an interim injunction restraining the Appellants from entering, destroying trees and fences, and from cultivating or planting on all that parcel of land known as *Title No. Mbeere/Kirima/2985* (hereinafter called *parcel No. 2985*) pending the hearing and determination of that suit.

3. The Respondent filed a replying affidavit sworn on 28<sup>th</sup> February 2018 in opposition to the said application. It was stated that the Appellants were occupying *Title No. Mbeere/Kirima/2999* (hereinafter called *parcel No. 2999*) which was adjacent to his own parcel No. 2985 and that the Magistrate's Court at Siakago had only issued an interim injunction with respect to parcel No. 2985. The Respondent further contended that the instant application was bad in law and that it was filed out of time without leave of court hence it was incompetent.

4. When the said application was listed for hearing on 21<sup>st</sup> March 2018, the advocates for the parties agreed to dispose of it through written submissions. The Respondent filed his submissions on 21<sup>st</sup> March 2018 whereas the Appellants filed theirs on 11<sup>th</sup> April 2018.

5. Since the competency of the appeal has been challenged by the Respondent, it would be prudent to deal with that issue in the first instance. This is because the instant application is predicated upon the existence of the appeal. The provisions of **Order 42 Rule 6 (6)** under which the instant application was filed state that;

**“(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

6. It is, therefore, evident that this court can only invoke its appellate jurisdiction to grant interim relief if, and only if, the Appellants have complied with the prescribed procedure for filing appeals from the Magistrate's court.

7. Under **section 79 G of the Civil Procedure Rules, and section 10A of the Environment and Land Court Act** an appeal against decree or order of the Magistrates should be instituted within 30 days from the date of the order or decree. There is no dispute that the order of the Magistrate's court was made on 14<sup>th</sup> December 2017. There is no dispute that the memorandum of appeal herein was filed on 13<sup>th</sup> February 2018.

8. The main question for determination with regard to the competency of the appeal is whether the memorandum of appeal was filed within or without the stipulated period. Under the provisions of **Order 50 Rule 4 of the Civil Procedure Rules**, there are certain days which are excluded from the computation of time. The said Rule provides that;

**“4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.”**

9. The application of that rule to this appeal would mean that only the period between 21<sup>st</sup> December 2017 and 13<sup>th</sup> January 2018 were excluded from the computation of time. Thus, by filing their appeal on 13<sup>th</sup> February 2018, the Appellants were out of time by about 6 days. That period of delay is relatively short and if the Appellants were minded, they could easily have obtained an extension of time. However, no such extension of time was sought to enable them file the appeal out of time.

10. In the circumstances of this case, the court finds and holds that the instant appeal was filed out of time without leave of court. The court further holds that the appeal is incompetent. Accordingly, the notice of motion dated 13<sup>th</sup> February 2018 which is predicated upon such incompetent appeal does not lie. It has no legs to stand on. The said application is accordingly struck out with costs to the Respondent.

11. What, then, shall become of the incompetent memorandum of appeal? The court is of the view that it shall not serve any useful purpose to keep it pending. The memo of appeal dated and filed on 13<sup>th</sup> February 2018 is accordingly struck out with costs.

12. The upshot of the foregoing is that the Appellants’ memorandum of appeal and the notice of motion both dated and filed on 13<sup>th</sup> February 2018 are hereby struck out with costs to the Respondent.

13. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 25<sup>TH</sup> DAY of OCTOBER, 2018.**

In the presence of Mr Abubakar for the Appellants and Mr. Mogusu holding brief for Mr. Momanyi for the Respondent.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**25.10.18**