



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ENVIRONMENT & LAND CASE NO.562 OF 2012

BEBJI PETROLEUM LIMITED.....PLAINTIFF

V E R S U S

SARAH WANJIKU & 3 OTHERS.....DEFENDANTS

R U L I N G

(Application for leave to appeal an order of dismissal of suit for non-attendance; application allowed)

The application before me is that dated 19 November 2018 filed by the plaintiff. The principal order sought is for leave to appeal the decision of this court made on 5 November 2018, which was essentially a refusal to adjourn the matter and which led to the dismissal of the plaintiff's suit for non-attendance.

By way of background, this suit was commenced on 26 October 2009 through a plaint which was later amended. In the suit, the plaintiff claimed to be the owner of the land parcel Eldoret Municipality Block 6/193 which he averred is occupied by the 1st, 2nd and 3rd defendants. It sought orders to have them evicted from the suit land and for them to be permanently restrained from the same. The defence filed on behalf of the defendants is that the land was set aside for Uasin Gishu High School and that the 1st and 2nd defendants occupy the house in the suit land by virtue of their employment as teachers in the said school.

This, now being a fairly old case, was scheduled to be heard during service week, which is an exercise aimed at finalizing old cases. The hearing was fixed for 5 November 2018. On this day, the plaintiff did not appear but her counsel was present and he applied for adjournment. The application was opposed by counsel for the defendants and I was not persuaded to allow the adjournment. In the absence of the plaintiff, I proceeded to dismiss the suit for non-attendance of the plaintiff with costs to the defendants.

It will be seen that through this application, the plaintiff wishes to be granted leave to appeal my decision of refusing the adjournment and dismissing the suit. The application is brought inter alia pursuant to the provisions of Section 75 of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 43 Rules 1 (2) (3) of the Civil Procedure Rules, 2010. Ms. Kuyaki, learned counsel for the 1st and 2nd defendants did not oppose the application. Mr. Wabwire, learned counsel for the 3rd defendant, stated that he does not oppose the substance of the application but wondered whether this court has jurisdiction, his view being that the application ought to have been filed before the Court of Appeal. The view of Mr. Kamau, learned counsel holding brief for Mr. Kigamwa, for the plaintiff, was that this court has jurisdiction pursuant to the provisions of Section 75 of the Civil Procedure Act.

I have considered the application. I have also taken note of the provisions of Section 75 of the Civil Procedure Act, which is drawn as follows:-

S. 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.

Although only Section 75 of the Civil Procedure Act, was cited in the application, I think the provisions of Order 43 Rule 1 are also operative. The said provision is drawn as follows:-

Appeals from Orders [Order 43, rule 1.]

(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) Order 2 (pleadings generally);

c) Order 3 (frame and institution of suit);

(d) Order 4, rule 9 (return of plaint);

(e) Order 7, rule 12 (exclusion of counterclaim);

(f) Order 8 (amendment of pleadings);

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

(h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);

(i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);

(j) Order 19 (affidavits);

- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).

(2) *An appeal shall lie with the leave of the court from any other order made under these Rules.*

(3) *An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.*

(4) *Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refusing such relief.*

From the above provisions, it will be seen from Section 75, that where an order requires leave to appeal, the court which issued the order or the court to which the appeal against the said order is preferred, have jurisdiction to grant leave. However, Order 43 Rule 3 is explicit that applications for leave to appeal shall in the first instance be made to the court that made the order sought to be appealed from. This can either be done orally at the time the order is made or within 14 days from the date of the order.

The argument of Mr. Wabwire, that the plaintiff needed to file his application for leave to appeal before the appellate court therefore holds no water.

Before I go to the issue of whether or not to give leave, I need to satisfy myself that this is a situation where leave to appeal is needed, and that there is no right of appeal. Under Order 43 Rule 1 (h), one has a right of appeal under Order 12, rule 7. Order 12 Rule 7 is the provision allowing one to apply to set aside judgment or an order of dismissal for non-attendance. The other rules of Order 12 are not listed, meaning

that leave to appeal is required. In the instance of this case, on the date of the hearing, the defendants themselves were also absent, meaning that the dismissal was under Order 12 Rule 1, and thus leave to appeal is necessary.

I note that this application was filed on 19 November 2018, which is just within the 14 day's period required under Order 43 Rule 3. The application is therefore within time.

I have no reason not to grant leave to the plaintiff to appeal the decision of 5 November 2018. I therefore allow the application and do give leave to the plaintiff to appeal the said decision.

On costs, the same shall be within the intended appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH NOVEMBER, 2018

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT - ELDORET