



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.MISC.11 OF 2017**

**GEOFFREY NJUGUNA MUNGA.....APPELLANT/APPLICANT**

**-VERSUS-**

**GEOFFREY KARONGO & 9 OTHERS.....RESPONDENTS**

**RULING**

The Appellant/Applicant has brought this Notice *of Motion* application dated 29<sup>th</sup> June 2016, and sought for the following orders:-

***1) That this court be pleased to grant leave to the Applicant to file an intended appeal out of time from the Ruling delivered in Kiambu Law Courts, CMCC 92 of 2010, Geoffrey Karongo Munga & 9 Others...Vs...Geoffrey Njuguna Munga on the 20<sup>th</sup> April 2016.***

***2) Costs of this suit to be provided for.***

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of the **Applicant**. These grounds are:-

***1) That Judgement was given in favour of the Respondents in Kiambu Law Courts,CMCC 92 of 2010 Geoffrey Karongo Munga & 9 Others...Vs...Geoffrey Njuguna Munga on the 20<sup>th</sup> April 2016.***

***2) That the Applicant was of the view that the court's finding was erroneous.***

***3) That however the Applicant through his Advocates on record initially approached the ruling with the idea that typed proceedings were required to file the memo of appeal.***

***4) That the time within which to lodge the appeal has however since lapsed and the Applicant now seek leave to appeal out of time.***

***5) That the applicant is willing to abide as to such terms of security as may be ordered by this court.***

In his Supporting Affidavit the Appellant/Applicant averred that he was dissatisfied with **the Ruling of Hon. J. S. Kituku**, delivered on 20<sup>th</sup> April 2016, and he is desirous of filing an appeal. However, the time within which to lodge the appeal has since lapsed and he now seeks for leave to file this Appeal out

of time. He further averred that he has an arguable appeal with good chances of success and urged the Court to allow his application.

The application is contested and **Geoffrey Karongo Munga**, filed a Replying Affidavit and averred that the subject Order/Ruling was issued pursuant to an order of the High Court in **Civil Appeal No.608 of 2013**, which order had directed the lower court on how to carry out specific instructions on the implementation of an earlier **Ruling of Kiambu Land Registrar**. It was his contention that **clause no.5(k)** of the aforesaid High Court Order directed that; **“There be a mention date in the High Court, Civil Appeal No.608 of 2013 to confirm compliance of the above orders on expiry of 90 days from the date of this order or on the 4<sup>th</sup> May 2015”**.

Therefore, he contended that the High Court still retained and reserved some rooms for the parties to go back to it on the issue of implementation of the Orders and the **Appeal in 608 of 2013** is still alive. He further contended that the Applicant should have moved to the High Court at the appropriate moment in time. Further that the High Court Order of **10<sup>th</sup> March 2015**, was issued by consent of the parties and as such, the same cannot be appealed against by the parties. He urged the Court to dismiss the Appellant/Applicant’s application with costs.

The **Notice of Motion** was canvassed by way of **Written Submissions** which this Court has carefully considered. The application herein is anchored under **Sections 79G** and **3A** of the **Civil Procedure Act** and all other enabling provisions of law.

**Section 79G** of the Civil Procedure Act provides:-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”**.

Further Section 3A gives the Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

It is not in doubt that the Ruling that is intended to be appealed against and which was delivered by learned Magistrate Hon. J. S. Kituku was delivered on **20<sup>th</sup> April 2016**. The said Ruling was delivered pursuant to an order issued by the High Court on **10<sup>th</sup> March 2015**. The said order of the High Court was issued after consent was filed by the parties herein. Of particular interest to this application is clause no.5(i) and (k).

In clause no.5(i) of the order issued on **10<sup>th</sup> March 2015**, it was stated that:-

**“That upon filing of survey reports and examinations, the Court do give further orders as may be necessary for removal of any obstruction, maintenance of beacons and such other orders is it may deem necessary”**.

Further clause 5(k) stated that:-

**“There be a mention in the High Court, Civil Appeal No.608 of 2013, to confirm compliance of the above orders on expiry of 90 days from the date of this order”**.

From the reading of the above stated order of the High Court, it is clear that the Honourable Magistrate was implementing an order that was agreed upon by the parties at the High Court. The Court finds that in the second last paragraph of his Judgement, the Hon. Magistrate stated that:-

***“pursuant to paragraph 5(i) of the High Court, I direct the gate pillar at the entrance of parcel 2068 and the barbed wire which separate parcel no.2068 and other two parcels be removed by the owner within 21 days from the date hereof.”***

It is therefore clear that the above direction was given in compliance with the consent order issued by the Court on **10<sup>th</sup> March 2015**. If the Applicant was dissatisfied with the said direction/order, then as directed by the High Court in clause No.5(k), he ought to have gone back to the said High Court in **Civil Appeal No.608 of 2013** to confirm if the said order complied with the order issued on **10<sup>th</sup> March 2015**.

Having now carefully considered the rival arguments herein, this Court concurs with the submissions made by the Respondents that the order of the lower Court issued on **20<sup>th</sup> April 2016** was in compliance with the High Court Order in clause no.5(i). Therefore if the Applicant is not satisfied with the manner in which the said orders were implemented by the lower court, he ought to have gone back to the High Court in **Civil Appeal No.608 of 2013**, seeking clarification on whether the order was complied with accordingly or not.

This Court arrives at a finding that the **instant applicant is not merited** and consequently, the Court **dismisses the Notice of Motion** dated **29<sup>th</sup> June 2016 with costs to the Respondents**.

It is so ordered.

Dated, Signed and Delivered at Thika this **13<sup>th</sup>** day of **October 2017**.

**L. GACHERU**

**JUDGE**

In the presence of

M/S Mwangi for Appellant/Applicant

Mr. Muchiri for Respondent

Timothy - Court clerk.

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**13/10/2017**