



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, JA - IN CHAMBERS)

CIVIL APPLICATION NO. 147 OF 2020

BETWEEN

JOSHUA JAOKO OTIENO.....APPLICANT

AND

ERASTUS OPIYO OTIENO..... RESPONDENT

*(Being an Application for seeking enlargement of time to appeal from the Judgment of the Environment Land Court (G.M.A. Ongondo, J.) dated 8th July, 2020*

*in*

*Migori ELC Case No. 525 of 2017)*

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RULING OF THE COURT

Before me, is a Notice of Motion dated 9th December, 2020 under **Rule 4** of the **Court of Appeal Rules**, all enabling provisions of the law and the **Constitution of Kenya 2010**, seeking an order of Court for leave to file a notice of appeal and record of appeal out of time against the Judgment of **Hon. G.M. A. Ongondo, J.** delivered on 8th July, 2020. In the alternative, the notice of appeal annexed to the application be deemed as having been filed within time together with an attendant order for costs.

The motion is supported by grounds on its body, a supporting affidavit of **Joshua Opiyo Oketch**, the applicant, together with annexures thereto. It has been opposed by a replying affidavit of **Omonde Kiseru Advocate** on record for the respondent sworn on 10th March, 2021. It was canvassed virtually through rival pleadings and written submissions of the respective parties in their absence and without oral highlighting.

Supporting the application, the applicant both in his averments and written submissions asserts that he was the plaintiff in Migori ELC No. 525 of 2017, where he filed a claim against the respondent seeking various reliefs. The matter was canvassed through oral testimony at the conclusion of which parties were directed to file written submissions and matter slated for mention on 21st May, 2020 for further directions but on which day, it was never mentioned because Courts had shut down due to the Covid-19 pandemic. Inquiries at the registry through his advocate revealed that the matter would be mentioned on 23rd September, 2020 for directions on which day both him and his Advocate visited the Court but the matter was never cause listed. When they received no information from the Registry regarding the position on the matter, is when him and his Advocate mounted a search for them to find out its status. That is when they stumbled on the file which indicated that judgment had been delivered against him way back on 8th July, 2020 and by which time, time for initiating an appellate process as of right had long lapsed hence the application under consideration seeking reliefs stated above. It is also his assertion that the intended appeal is arguable with high chances of success. It is, therefore, only fair and just that he be accorded an opportunity to exercise his intended appellate rights.

In rebuttal, the respondent relying both on his advocates, replying affidavit and written submissions submits that applicant's application is a non-starter for

being both premature and incompetent, because since the applicants claim in the ELC was premised on the doctrine of adverse possession through an originating summons under **Order 37 Rules 7** of the **Civil Procedure Rules**, he was obligated in law first of all to seek leave of the trial court to appeal before seeking leave of this Court to file his appeal to this Court out of time. Further that, applicant unsuccessfully sought leave to file appeal to this Court out of time declined by the ELC for similar reasons that he first of all needed leave of the trial court

to appeal against that decision.

In the alternative, that applicant's application as presented does not meet the threshold set in the **Leo Sila Mutiso vs. Rose Hellen Wangaru Mwangi [1999] 2 E.A 231** on the principles that guide the Court in the exercise of its mandate under **Rule 4** of the Court of Appeal Rules under which the application is presented.

My invitation to intervene on behalf of the applicant has substantively been invoked under **Rule 4** of the **Court of Appeal Rules**. The principles of law that guide the exercise of the Court's mandate under the above **Rule** have been crystalized by case law emanating both from this Court and the Supreme Court of Kenya. However, before delving into the application of those principles to the rival position herein, I find it prudent to interrogate a jurisdictional issue raised by the respondent both in his Advocates replying affidavit and written submissions and which the applicant has not rebutted. The reason as to why I am taking this approach is because, the position in law is that issues of jurisdiction where raised have to be dealt with first, because without jurisdiction a court of law has no business proceeding on with the matter, it has to down tools. In the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989]eKLR, Nyarangi J.A.** (as he then was) expressed himself on the issue as follows:

*"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ....":*

*By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. ....*

*Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

The jurisdictional issue raised by the respondent through his advocate and not rebutted by the respondent is that the applicants claim before the ELC having been based on adverse possession and anchored on **Order 37 Rule 7** of the CPR, there is no automatic right of appeal to this Court. The applicant was and still is obligated to seek from the ELC leave to appeal against that decision. It is only after such leave is granted that the applicant can approach this Court for extension of time within which to appeal to this Court.

In support of the above assertion, the respondent has relied on a copy of the intended impugned judgment annexed both to the supporting and replying affidavit. I have perused the same and agree with respondent's submissions that applicant's claim before the ELC was premised on **Section 38** of the **Limitation of Action Act, Cap 22 Laws of Kenya** which I find imprudent to set out as the determination of this application does not turn on the construction and application of this provision. It is sufficient for me to state that the mode of presentation of a claim laid under the above provision is what is provided for in **Order 37, Rule 7** of the CPR namely, by way of an originating summons (OS).

Turning to the alleged lack of an automatic right of appeal, the respondent has relied on **Order 37 Rules 1, 2 and 7** of the **Civil Procedure Rules** as read with **Order 43 Rules 1, 2 and 3** of the CPR. I have construed **Order 37 Rules 1, 2 and 7** of the CPR and find no limitation of right of appeal provided for therein. However, as contended by the respondent, these are not stand alone provisions. They have to be read in conjunction with **Order 43 Rules 1, 2, 3 and 4**. I have likewise construed **Order 43, Rules 1, 2 and 3, Order 37 Rule 7** on which a claim for adverse possession under section 38 of the Limitation of Actions Act was anchored is not one of the Civil Procedure Orders from which an appeal lies as of right under the provision of **section 75(1)(h)** of the **Civil Procedure Act, Rules 2, 3 and 4** of **Order 43** on the other hand provide as follows:

**"(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."**

In light of the above position, my hands are tied. The respondent's objection to the regularity of the application under consideration is well founded. I have to down my tools. The application is struck out for being premature. Applicant is rerouted back to the ELC to seek leave to appeal and thereafter proceed accordingly to law.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**