IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 17 OF 2017

BETWEEN

LUCY WANJIKU NYAGA ALIAS LUCY WANJIKU MAINA.....APPELLANT

AND

JAMES MWANIKI MUNYI .....1ST RESPONDENT

JOHN MILTON NYAGAH.....2ND RESPONDENT

(An appeal from the Ruling and Orders of the Environment and Land Court at Kerugoya (B. N. Olao, J) dated 4th November, 2016 ***in ELC Case No. 357 of 2015***

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JUDGMENT OF THE COURT

The appeal before us is basically against an order made by the Environment and Land Court **(ELC)** in Kerugoya **(Olao, J.)** on 4th November, 2016, dismissing a Preliminary Objection **(PO)** taken out by the appellant against the main suit and a notice of motion filed by the respondents. The trial court also made a decision on the notice of motion, granting it, but there is no ground of appeal related to the merit decision of that application. The respondents contend, amongst other grounds, that the appeal does not lie and is incompetent since no leave was sought or granted to file any appeal. It is logical, therefore, that we examine that objection first. It is also necessary to put the matter in context.

The main dispute relates to a parcel of land registered under the **Registered Land Act** (now repealed), as Mbeere/Kirima/2056 **(plot 2056),** measuring approximately 11.27 Hectares (about 28 Acres), which has a long history. From the record before us, it underwent several disputes during the land adjudication process in the 1970s when it was awarded to the Ndirangu family comprising four sons: Itumu Mithambo Ndirangu **(Itumu),** Karani Ngige Ndirangu **(Karani),** Munyi Ngige Ndirangu **(Munyi),** and Easton Nyaga Ndirangu **(Easton).** However, before the Title could be registered in the names of those family members, Easton had the entire land registered in his own name as the sole proprietor in 2006. Itumu went before the Land Disputes Tribunal **(LDT)** in Gachoka and filed **Claim No 438/2010** to reclaim the shares of the rest of the family, except Karani who had already been given a share of the family land. The LDT heard the matter and decided that the registration of Easton as the sole proprietor was made under unclear circumstances and ordered cancellation of the Title. It directed that the land be subdivided and allotted to the Ndirangu family members. There was no challenge to that decision and so, Itumu proceeded to Siakago Principal Magistrate's Court in **LDTC No. 20/2011** and obtained a Decree for cancellation of the Title, which decree was issued on 18th August, 2011.

Itumu died on 15th January, 2012 and his brother, Munyi followed suit on 18th October, 2013. Unknown to the rest of the family, Easton went ahead in 2014 to have the whole land subdivided into 56 sub-plots, sold and transferred 36 of them to third parties and registered 20 others in the name of his wife, Lucy Wanjiku Nyaga **(Lucy)**, who is the appellant before us. Easton also went before the High Court in Embu and filed a Judicial Review **(JR)** application **No. 58/2011** (later transferred to Kerugoya High Court as **JR No. 11 of 2014**). He was seeking an order for quashing the decree issued by the Siakago Court in LDTC No. 20/2011. But he died before prosecuting the JR application and no one was substituted to proceed with it. It must therefore have abated.

On 16th April, 2016, Itumu's son, John Milton Nyaga **(John)** who is the 2nd respondent before us, was issued with a grant of representation limited to *"following up LDTC 438/2011 for the benefit of the deceased's estate."* On the same day, the son of Munyi, James Mwaniki Munyi **(James)**, the 1st respondent before us, was also issued with a grant limited to *"pursuing the interests of the deceased's estate in Gachoka LDTC 20/2011"*.

Instead of pursuing the purposes for which the grants were issued, the two went before the ELC and filed **ELCC 357/2015** against Lucy seeking a share of the 20 plots registered in her name from the original plot 2056. They stated that they were suing not only as the personal representatives of their deceased fathers, but also in their own capacity. Pending the hearing of the suit, they sought preservation of the 20 plots through registration of inhibitions under ***section 68 (1)*** of the ***Land Registration Act, 2012.*** That is the application which Lucy took objection to, as well as the main suit, and filed the PO the subject matter of this appeal.

The PO raised two main issues which are the selfsame issues urged before us. Firstly, that the suit, and the application based on it, were incompetent because James and John had no *locus standi* to file and pursue it on behalf of the estates of the deceased. All they had were limited grants which were not relevant to the suit filed. Secondly, it was contended, the suit was *res judicata* in view of Kerugoya JR 11/2011 (formerly Embu 58/2011).

The trial court examined the two issues and found on the first one, that indeed the grants were issued for pursuit of other matters and not specifically for filing the new suit. James and John could not therefore purport to pursue the suit in their capacity as personal representatives of the deceased in the suit. There is no cross appeal on that finding. The trial court further found and held that the two were, in addition, expressly suing in their individual capacities and they could not therefore be shut out on a PO from agitating their interests for whatever they were worth. It was for the trial court seized of the matter to determine, upon hearing evidence, whether their interest was identifiable. We have not seen any ground of appeal challenging that finding.

On the issue of *res judicata,* the court was unable to determine the factual state of the JR application because, according to Lucy and her counsel, the Kerugoya court file had gone missing, and all that could be confirmed was that leave was granted to file the JR. Whether it was filed or not remained a mystery. There was no basis therefore for making a finding that the former suit existed and, if it did, that it had been decided. At any rate, the trial court held, the issue raised in the suit was *'trust'* which was subject to proof and could not have been agitated in the JR application. *Res judicata* could not therefore arise.

Adverting now to the objection raised by the respondents, learned counsel, **Mr. Edwin Kirunja Njagi,** referred us to ***section 75*** of the ***Civil Procedure Act (CPA)*** which requires that leave be granted, and submitted that there was no leave sought or granted before instituting the appeal. In his view, the appeal was a nullity and void *ab initio* and should be so declared. He relied on the dicta of Lord Denning in ***Macfoy vs United Africa Co. Ltd [1961] 3 All E. R. 1169*** that a void act is a nullity and there was no need of an order of the court to declare it so although it is convenient to do so. Counsel further relied on the decision of this Court in ***Kenya Commercial Bank Limited vs Manaseh Esipeya [1999] eKLR*** and ***Kasamani & Company Advocates vs Lab Construction Ltd, Civil Appeal No. 224 of 1996*** for the proposition that a ruling resulting from a PO is only appealable with leave under ***section 75 CPA***.

In response, learned counsel for the appellant, **Mr. Quantai Samuel Kirimi,** submitted that there was a notice of appeal filed which gives jurisdiction to this Court to hear and determine the appeal. In his view, the notice of appeal serves as leave even if one was required. He also relied on ***sections 3A*** of the Appellate Jurisdiction Act and ***Article 159*** of the Constitution to urge that the provisions of ***section 75*** of ***CPA*** should be overridden in the interests of justice.

We have considered the objection raised and have come to the conclusion that it is well founded in law. ***Section 75*** of ***CPA*** provides for appeals from Orders and lists the orders from which an appeal shall lie. As read with ***section 75 (h)***, and ***Order 43*** of the ***Civil Procedure Rules (CPR),*** it provides:

> **"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.....**
>
> **(h) any order made under rules from which an appeal is expressly allowed."**

The PO dated 5th February, 2016 was not based on any provision of the law or procedure. As stated earlier, it objected to the suit and the motion on the basis that the suit was *res judicata* and that the applicants had no *locus standi*. The decision made on such issues result in orders which are not listed in ***section 75*** or ***Order 43***. Leave to appeal was therefore required. As this Court stated in the case of ***Kenya Commercial Bank Ltd vs Tony Manaseh Esipeya case (supra)***, where the PO was based on limitation of actions:

> *"……the point taken in paragraph 12 of the defence was that the claim was time barred, a clear limitation point, which could have been made the subject of an application under Order 6 Rule 13 of the Civil Procedure Rules (now Order 2 Rule 15 of the Civil Procedure Rules). An order on an application under Order 6 Rule 13 is appealable as of right under Order 42 Rule 1 (now Order 43 of the Civil Procedure Rule). But having chosen to raise the limitation point by way of a preliminary objection under no particular order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior court which was neither sought nor obtained".* [Emphasis added].

In the case of ***Mandavia vs Rattan Singh [1965] EA 118***, where the PO was based on *res judicata* but was rejected, the predecessor of this Court held, *inter alia*, that, where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or *res judicata* fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.

It was urged by the appellant that the filing of the notice of appeal conferred the necessary leave if not jurisdiction to the Court to consider the appeal, but that too will not avail her. As this Court stated in the case of ***Peter Nyaga Murake vs Joseph Mutunga, C. A. 86 of 2015:***

> **"Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. The procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid**

Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water".

It was further contended that the provisions of the Constitution and ***section 3A*** of the Appellate Jurisdiction Act could be invoked to override the provisions of ***section 75***. Again that cannot avail the appellant as this Court has previously held. When considering the curative provision of ***Article 159 (2) (d)*** of the Constitution in the case of ***Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR,*** **this Court observed:**

"The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay , a general white wash, that cures and mends all ills, misdeeds and defaults of litigation".

The same position was taken in ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** where the Court stated thus:

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases."

It is common ground that the appellant never sought or obtained leave to appeal against the rejection of the preliminary objection raised on points of law. That was a blatant breach of substantive law which ***section 75*** is, not simply a procedural lapse. All the seven grounds of appeal laid before us relate to the decision on the Preliminary Objection. Only an order could have arisen from the decision of the ELC on such objection and it required leave of that court or of this Court, if sought, to confer the jurisdiction to hear the appeal. We agree with the respondents that the appeal is a non-starter and must be declared a nullity *ab initio*. We so find.

In the result, we order that the appeal be and is hereby struck out with costs to the respondents.

Dated and delivered at Nyeri this 11TH day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR