



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AZANGALALA, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 172 OF 2006

BETWEEN

JOSEPH KAMAU MUSA.....1ST APPELLANT
JAMES KARIUKI MUCHIRI..... 2ND APPELLANT
DAVID MUCHIRI.....3RD APPELLANT
RUIGU NJIRIRI.....4TH APPELLANT
JOSEPH NJEHU BORO & OTHERS.....5TH APPELLANT

AND

ERERI COMPANY LIMITED.....1ST RESPONDENT
GIKONYO NDIRANGU.....2ND RESPONDENT
RIUGU KABUCHO.....3RD RESPONDENT
DR. GEORGE KAMAU GIKANGA.....4TH RESPONDENT

(An appeal against from the Judgment of the High Court of Kenya at Nairobi (Mbiti, J.) dated 19th November, 1997

in

H.C.C.C. No. 3746 of 1988)

As Consolidated With 3200 of 1990)

CONSOLIDATED WITH

CIVIL APPEAL NO. 21 OF 2014

BETWEEN

ERERI COMPANY LIMITED.....APPELLANT

AND

COMMISSIONER OF LANDS & 110 OTHERS RESPONDENTS

in

Judicial Review Case No. 76 of 2011

RULING OF THE COURT

[1] When these consolidated appeals came up for hearing on 15th December, 2015, it was brought to the attention of the Court that the appeals affect thousands of other people who purchased portions of the disputed land and who may not be aware of the existence of the appeals. Those people had not been notified of the appeals as required by **Rule 77 (1)** of the **Court of Appeal Rules** as it transpired that copies of the notices of appeal lodged in the appeals, had not been served upon them and no leave to dispense with such service had been obtained. The Court, therefore, ordered the appellants to cause an advertisement of the appeals in both the Standard and the Daily Nation newspapers within twenty one (21) days of the date of the order.

[2] The order was duly complied with thereby provoking applications to join the appeals from the following:

(1) 155 applicants, represented by M/s J. A. Guserwa & Company Advocates.

(2) Cornerstone Preparatory Association, represented by Prof. Tom Ojienda & Associates Advocates.

(3) Stephen Kimama Kairu, Stanley Ng'ang'a Kairu and Solomon Kahindu Kairu.

[3] The applications came up for hearing on 12th October, 2016. The applicants represented by the firm of **M/s J. A. Guserwa & Company Advocates** ("the 155 applicants"), seek to be joined as Interested Parties allegedly to protect their interests (*hereinafter "Ereri Company"*). In the affidavit in support of the application, **Mburu Muchina**, one of the 155 applicants, deponed that they are the original shareholders of **Ereri Company** and that the company experienced numerous squabbles and wrangles over the properties of the company between 1982 and 1993 ending in many suits in court. **Mburu Muchina** further averred that in their view, the Directors of **Ereri Company** may not protect their interests in the company properties given their antecedent behaviour of, *inter alia*, secretly selling their shares in the company to other parties.

[4] The application was opposed by some of the parties already in the appeal and some of those who seek to join the appeal. The substance of the opposition was that the applicants' interests are already represented by **Ereri Company** and that as shareholders, which status was not even agreed, they have no *locus standi* to lodge the application to join the appeal in their names.

[5] The application by the firm of **M/s Prof. Tom Ojienda & Associates**, seek to join **Cornerstone Preparatory Association**, (*hereinafter "Cornerstone"*), which allegedly purchased some of the property of **Ereri Company**. The affidavit in support of the application sworn by **Mary Wanjiku Thuo**, deposed, among other things, that Cornerstone purchased **Parcel No. Longonot/Kijabe Block 1/17**, ("Longonot Land"), from **Beth Kabura Njau** for valuable consideration and was duly registered as proprietor thereof. It was further deponed that **Cornerstone** would suffer prejudice if not joined as it has a legal stake in the appeal as a purchaser.

[6] The application was opposed by **Ereri Company** and in that regard, one **David Muchiri Ndung'u**, swore a replying affidavit on its behalf. It was deponed to among other things, that the sale and transfer alleged by **Cornerstone** was under challenge in court on grounds that the alleged sale and transfer, if any, were in contravention of valid court orders and without the sanction of **Ereri Company**.

The company identified two suits between itself and **Cornerstone** pending before the High Court where according to **Ereri Company**, **Cornerstone's** complaints should be made.

[7] The application was also opposed by the 155 applicants on similar grounds as those of **Ereri Company**. In their view, **Cornerstone** holds no valid title to the property of Ereri Company and should therefore not be joined.

M/s Stephen Kimama Kairu, Stanley Ng'ang'a Kairu and Solomon Kahindi Kairu ("the Kairu's") made their application as beneficiaries of the estate of their father **Kairu Kimama, (deceased)**, who was one of the original shareholders of **Ereri Company**. In the affidavit in support of their application sworn by **Stephen Kimama Kairu**, it was deposed, among other things, that the deceased acquired ten (10) shares of the original title **L.R. 8622** in the name of **Ereri Company** and became registered as proprietor of **L.R. Longonot/Kijabe Block 1/93**, which was then transferred to them on transmission. Accordingly, the Kairu's felt that they would be greatly prejudiced if they are not joined.

[8] Although the application was originally opposed by **Ereri Company** by way of a replying affidavit sworn by **David Muchiri Ndung'u**, during the canvassing of the application, **Mr. Gakaria**, learned counsel who represented **Ereri Company** asked us to ignore the replying affidavit.

[9] We have considered all the applications the affidavits filed, the submissions of the applicants and those resisting the applications. We have also given due consideration to the authorities cited and the relevant law. We propose to first consider whether some of the applicants have the requisite *locus standi* to file the applications. We need not belabour the point that *locus standi* is the right to bring an action or challenge a decision or otherwise expressed, the right to be heard. (See Black's Law Dictionary, 9th Edition). It is a jurisdictional issue.

[10] In **Kakuta Maimai Hamisi -v- Peris Tobiko & 2 Others [2013]**, **eKLR**, we stated, *inter alia*:

"The question of a right to appeal goes to jurisdiction and is so fundamental 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) of the Constitution.

We do not consider Article 159 (2), (d) to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.... It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law. That much is clear from the plain reading of the constitutive statute of this Court, the Appellate Jurisdiction Act".

[11] The Supreme Court had occasion to consider the question of standing in **Civil Application Number 29 of 2014: Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 Others [2014]** **eKLR**. There, it was contended, so far as material, that one of the respondents lacked *locus standi* as its registration had been cancelled. At paragraph 67 of its ruling, the Court stated:

"67. It is noted that the promulgation of 2010 Constitution enlarged the scope of locus standi in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the courts contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya -v- Attorney General, Petition No. 60 of 2012; 2013 eKLR, the High Court thus expressed the principle (paragraph 4): 'the locus standi to file judicial proceedings, representative or otherwise' has been greatly enlarged by the Constitution in Article 22 and 258 of the Constitution which ensures unhindered access to justice..."

[12] The applicants have invoked **Article 159 (2) (d)** of the **Constitution** among other provisions of the Law. It is plain however that however liberal an interpretation one may give to the above Constitutional provisions, it cannot be gainsaid that persons who are deceased or persons who do not desire to be part of proceedings cannot be joined. It has been alleged that some of the 155 persons seeking to be joined are deceased. Those deceased cannot be joined unless legal representatives have been duly appointed in respect of their estates.

It has further been argued that the same list contains persons who have not authorized the filing of the application to join this appeal. In our view, no Constitutional provision can drag any one into proceedings they do not wish to participate in.

[13] In any event, there has been no allegation of contravention of the Constitution nor is there any alleged breach of the Bill of Rights. The two categories of persons cannot therefore pitch tent at **Articles 22 and 258** of the **Constitution**. In the premises, the deceased persons and persons who have not given their authority to lodge the application cannot therefore be joined and we so order.

[14] The applicants in addition to **Article 159** of the Constitution have also invoked the following provisions: **Articles 164 (3)** of the **Constitution**; **Orders 1 Rule 8; 51 Rule 1** of the **Civil Procedure Rules**; **Rules 31, 42 and 43** of the **Court of Appeal Rules** and all enabling provisions of the law. In our view, however, the principal provisions under which we shall consider the applications are **Article 159**

(2) and Rule 77 (1) of the **Court of Appeal Rules**.

Article 159 (2) (d) is in the following terms:

"2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

(a)

(b)

(c)

(d) Justice shall be administered without undue regard to procedural technicalities".

Sub-article 2 (e) of the same provision is also relevant. It reads:

"(e) the purpose and principles of this Constitution shall be protected and promoted".

[15] Notwithstanding, the time for service of notice of appeal prescribed in **Rule 77 (1)** of the **Court of Appeal Rules**, the applicants herein made their applications with the leave of the Court.

And **Rule 77 (1)** of the **Court of Appeal Rules** reads:

"77. (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal".

[16] To put these applications in proper perspective, we think a background of the litigation will suffice. **Appeal No. 72 of 2006** is from the decision of the High Court, **(Mbito, J.)**, dated 19th November, 1997. The decision was in respect of consolidated suits namely; **HCCC No. 3746 of 1988** and **HCCC No. 3200 of 1990**. The plaintiffs in the former suit sued **Ereri Company** together with others for two main reliefs namely, an injunction restraining **Ereri Company** from allocating, distributing, transferring or disposing of **L.R. No. 8022/R** and **LR No. 8022/1 Longonot** and a declaration that the register of members filed with the Registrar of Companies on 10th May, 1983 contained the names of the only lawfully registered members of **Ereri Company**.

The plaintiffs in HCCC No. 3200 of 1990 sued **Ereri Company and Others** seeking several reliefs, among them, an injunction restraining some of the defendants therein from operating Bank Accounts of **Ereri Company**; an injunction restraining the selling, leasing, allocating, charging or sub-dividing **Ereri Company Land**. The plaintiffs in both suits claimed to be shareholders of **Ereri Company**. [17] The consolidated suits were heard by Mbito, J., who on 19th November, 1997, determined that the plaintiffs

had no *locus standi* to bring the suits. In dismissing the suits, the learned Judge applied the principle in ***Foss -v- Harbottle, ER Vol. 67 pg 189*** that a limited liability company is a body corporate having a distinct and separate existence from its shareholders and therefore the only person that can sue for a wrong committed upon its property is the company itself.

The plaintiffs in the suit complained, *inter alia*, that the sharing out of land belonging to ***Ereri Company*** was not being carried out properly and they sought the intervention of the court regarding the same.

[18] ***Appeal No. 21 of 2014*** is from the decision of the High Court, (***H. Omondi, J.***), dated 6th December, 2013. The decision was in Judicial Review proceedings. The applicants therein sought judicial review orders of certiorari, mandamus and prohibition. The challenge was against the decision of the Chief Land Registrar, contained in a letter dated 15th June, 2011, declaring, as validly issued, title deeds for parcels of land allegedly excised from ***L.R. No. 8622 (Longonot), L.R. No. 2755/1 (Nanyuki), L.R. No. 2781/2 (Nanyuki), L.R. No. 2754/2 (Nanyuki)*** and ***L.R. No. 10712 (Nanyuki)***.

[19] The Judicial Review application was by ***Ereri Company*** and was heard by ***H. A. Omondi, J.***, who, on 6th December, 2013, dismissed the same on the principal ground that the reliefs sought by the company were outside the jurisdiction of the respondents: ***The Commissioner for Lands; Chief Land Registrar; and Land Registrars of Naivasha and Nanyuki***.

[20] ***Ereri Company*** is a land buying company and as ***Mbito, J.***, appreciated, its primary objective was to acquire land for allocation to its members. It acquired the suit pieces of land in Longonot and in Nanyuki and the "*elephant in the room*" is allocation of the suit parcels of land to members. Allocation has presumably to be to shareholders. Shareholding to members means land holding. ***Ereri Company*** Shareholders would appear to wear two hats: they are company shareholders and claim land from ***Ereri Company*** by virtue of their shares.

[21] The question is whether the applicants are parties directly affected by the consolidated appeals or aggrieved parties. The Supreme Court in the case of ***Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Ltd., & 2 Others, [2012] eKLR***, stated thus on who may appeal:

"an appeal against a decision of a lower court is always commenced by a party who is aggrieved by that decision".

And in the case of ***Ahn -v- Openda [1982] KLR 87***, it was held that a party who has taken no part in the lower court's proceedings may nevertheless, be a person directly affected by the appeal. That was reiterated in the case of ***Onjula Enterprises Ltd., -v- Sumaria [1986] KLR 651*** where this Court held that persons directly affected by an appeal need not be those who were parties to the proceedings.

[22] It would appear that such a party would have to demonstrate that he has been aggrieved unless he can pitch tent at ***Articles 22 and 258***, of the ***Constitution*** by demonstrating that the ***Constitution*** has been contravened, or is threatened with contravention. Such a party does not have to show that he is aggrieved. An aggrieved party is defined in ***Black's Law Dictionary, 8th Edition*** at page 205 as follows:

"Of a person or entity, having legal rights that are adversely affected having been harmed by an infringement of legal rights".

And at page 3548 of the same dictionary an aggrieved party is defined as "*A party entitled to a remedy; especially a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment*".

[23] In the case before us, all the applicants' claim an interest in the property also claimed by ***Ereri Company***. Some may be shareholders in ***Ereri Company*** but their shareholding entitles them to a share of ***Ereri Company's*** land. We have already referred to the original statements of claims in the suits from which this consolidated appeal traces its roots. In both ***HCCC No. 3746 of 1988*** and ***HCCC No. 3200 of 1990***, the plaintiffs claimed to be shareholders and made their claims as such. Their interests are therefore

similar to the interests of some herein of the applicants. They may, in our view, qualify to be described as aggrieved by the decisions appealed against in this appeal.

[24] The opposition to the applications made by the 155 applicants was primarily based on the ground that as shareholders, their interests are adequately represented by **Ereri Company**. That argument was indeed upheld by **Mbito, J.**, in the decision challenged in **Appeal No. 172 of 2006**. We cannot, in this application, definitely determine whether or not the learned Judge's decision should stand. If we did so, we would thereby have determined the appeal. The issue has to await resolution in the appeal proper.

[25] The other applicants desire to join these consolidated appeals because they claim to have purchased portions of the land claimed by **Ereri Company**. There is no gainsaying that those applicants have reason to be aggrieved. There was indeed no serious opposition to their interest. We have no hesitation in finding that they are persons affected by the consolidated appeals.

In the end, save for deceased persons and persons who have not given authority to join, the applications to join the appeals are allowed. It is so ordered.

Costs shall be in the appeal.

Dated and delivered at Nairobi this 24th day of March, 2017.

F. AZANGALALA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.