



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 21 OF 2015

BETWEEN

TIMBER MANUFACTURERS & DEALERS LIMITED.....APPELLANT

AND

FLORENCE WAIRIMU MBUGUA.....1ST RESPONDENT

SYLVIA MURUGI MBUGUA (Suing as the Administrator

of the Estate of JOSEPH KIARIE MBUGUA.....2ND RESPONDENT

(Being an application for enjoinder by proposed Interested Parties

in an Appeal from a Ruling and orders of the High Court

at Nairobi (Ogola, J.) delivered on 19th May 2014

in

HCCC 652 of 2014)

RULING OF THE COURT

By a Notice of Motion lodged on 11th November 2016 *the applicants, Paul Gacheru Chege and Kelvin Mwangi Muchiri*, the proposed interested parties sought to be granted leave to join and participate in the appeal between *Timber Manufacturers & Dealers Limited, the appellant and the respondents, Florence Wairimu Mbugua and Sylvia Murugi Mbugua (suing as administrators of the Estate of Joseph Kiarie Mbugua)*.

The motion is supported by an affidavit of *Paul Gacheru Chege* sworn on 28th November 2016 on behalf of Kelvin Mwangi Muchiri and on his own behalf. It was deposed that the applicants had an interest in the proceedings as sometime in June 2011, one Bruno Rosiello (*Bruno*) offered to sell them portions of the property known as L.R. No. 4894/59 situated in Garden Estate comprising 5.05 acres (*the property*) and that prior to purchasing the portions, they went to the firm of Messrs Kibatia & Company Advocates where they were informed that the firm acted for both Bruno and the appellant, the beneficial owner of

the property pursuant to a sale agreement dated 6th August 1990 made between Joseph Kiarie Mbugua (*deceased*) as the seller, and the appellant as the purchaser; that full consideration was paid for the property; that the transfer was yet to be registered as the title was mortgaged to the Consolidated Bank Limited (*the Bank*) for an outstanding loan; furthermore, that *Civil Suit No. 625 of 2006* which concerned a dispute between parties over the property had been compromised by way of a consent order dated 29th June 2011 to the effect that, the title was to be discharged in favour of the appellant, and in consideration a sum of Kshs. 47.5 million would be paid to the Bank

Paul Chege further deponed that despite the circumstances surrounding the property, they entered into sale agreements with the appellant dated 15th July 2011 and 3rd August 2011 for the purchase of one acre portions of the property for a sum of Kshs. 17,000,000 each; that since then they have awaited the completion of the transaction by the appellant. It was further deponed that it recently came to the applicants' attention that the consent order dated 29th June 2011 was partially reviewed by the Environment and Land Court on 19th May 2017 to have the property transferred to the Estate of the deceased instead of to the appellant.

The applicants stated that the firm of Kibatia & Company Advocates have since appealed against the ruling and order of the Environment and Land Court which is the appeal herein. It is their contention that they are innocent purchasers for value of the portions of the property which they have since substantially developed; and as such they ought to be granted leave to join in the appeal.

In a replying affidavit sworn on 28th January 2017 by **Florence Wairimu Mbugua** on behalf of Sylvia Murugi Mbugua, the 2nd respondent, and on her own behalf, it was deponed that, she was the widow, and the administratrix of the deceased's estate, and that Sylvia Mbugua, Grace Wanjiku Mbugua and Peter Chege Kiarie are her co administrators; that the applicants were not known to them, and that they had not at any time dealt with the applicants; that the applicants were not party to any of the suits in the court below and had not participated in *HCCC No. 625 of 2006* from which this appeal emanates, and therefore they are strangers to the proceedings.

It was further deponed that the applicants were mentioned in passing in Bruno's affidavit of 5th June 2012 filed in the court below which annexed the sale agreements between the appellant and the applicants; that the sale agreements showed that the appellant had irregularly purported to sell portions of the deceased's property to the applicants. The deponents urged us to dismiss the applicants' motion to join in the appeal.

In the written submissions dated 20th November 2016, **Mr. J. M. Njengo** learned counsel for the applicants, reiterated the contents of the applicants' affidavit and prayed for the applicants to be joined in the appeal. It was submitted that the applicants were persons with a stake in the proceedings as defined by this Court in the case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, and that their presence was necessary for a complete settlement of the issues in contention. Counsel cited ***Meme vs Republic [2004] EA page 124*** and ***King'ori vs Chege & 3 others [2002] KLR*** in support of this proposition.

On their part, both **Ms. Kimancha** learned counsel holding brief for Mr. Njuguna for the appellant and **Ms. Theuri** holding brief for Ms. J. Thongori for Grace Wanjiku Mbugua and Peter Chege Kiarie, supported the application.

Mr. L M Mbabu appearing with Ms. G Asamsule for the respondents opposed the application and submitted that the applicants did not have any interest in the matter. Counsel cited the case of ***Republic vs The Interim Independent Boundaries Review Commission & 13 others (Civil Appeal No. 64 of 2012)*** where it was stated that there must be exceptional circumstances on matters of general public interest that required to be demonstrated before a party was allowed to join an appeal. Counsel submitted that this is a court of record, and if the applicants were to be included in the appeal they ought to have been parties in the High Court. Counsel argued that at the time the applicants presented their arguments in the High Court they ought to have applied to be joined to the proceedings which they failed to do. The sale agreement as compared to registered titles, counsel submitted, did not constitute sufficient interest.

Counsel asserted that the applicants' sale agreements have exit provisions, and there was recourse available to the applicants within the provisions of the sale agreement. Counsel concluded that as the threshold requirements for joining the appeal had not been met, this Court should decline to order that the applicants be joined to the proceedings.

In reply, Mr. Njengo countered that for the purposes of the appeal, public interest was not a requirement, and all that one was required to demonstrate was that they had a stake in the proceedings. The applicants had sale agreements in respect of the portions they had purchased and had constructed their matrimonial homes on the property.

The application under review was filed on 11th November 2016 under **Articles 159 (2) and 164 (3) (a) of the Constitution, rule 77 of the Court of Appeal Rules and order 51 rule 1 of the Civil Procedure Rules**. We have considered this application together with the averments in the affidavits in support and in opposition resubmission of the learned counsel and case law cited by either side. The issue that falls for our determination is whether or not the applicants are persons directly affected by this appeal and should therefore be granted leave to be joined in the appeal, and provided with an opportunity to be heard. In other words, whether the applicants have *locus standi* to be parties in the appeal in their own right, not having been parties to the suit in the court below.

In determining whether the applicants have the requisite *locus standi* to join in the appeal, it will be necessary for us to consider their circumstances from a constitutional, statutory and evidentiary standpoint.

There is no question that under **Article 50 (i) of the Constitution** every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. **Article 159 of the Constitution** enjoins courts not to pay undue regard to procedural technicalities and to ensure that the principles and aspirations of the Constitution are promoted and protected.

In the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR**, the Supreme Court had occasion to deliberate on the scope of the rule of *locus standi* when it stated thus;

It is to be noted that the promulgation of the 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 Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."

Hence it is to be appreciated that the Constitution has significantly enlarged the bounds of the rule of *locus standi*, and as to who has the right to file and maintain judicial action before the court.

As this application is concerned with an appeal to this Court, **Article 164 (3) (a) of the Constitution** and the repealed Appellate Jurisdiction Act and as such, it should be borne in mind that the mandate of this Court is limited to hearing appeals from decisions of the High Court or other courts or tribunals prescribed by Parliament.

And in support of their claim to be persons directly affected by the appeal the applicants invoked the **rule 77 of the Court of Appeal Rules** which stipulates that;

"An intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex-parte, within seven days of lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.” [Emphasis supplied]

The rule presupposes that only persons “*directly affected by the appeal*” should be notified of an appeal, but the rules does not provide a description as to who is a party directly affected by an appeal.

In the recent case of ***Center for Rights Education and Awareness & Another vs John Harun Mwau & 6 others*** [2012] eKLR, Maraga JA, (as he then was) stated that, a “... person “*directly affected*” within the meaning of **Rule 77(1)** of the Court of Appeal Rules must be one whose property interest is affected.”

It was further stated that;

“A person aggrieved by such decision is the one who can complain by appealing. Which means then that there must be a decision on an issue or issues against which there is a complaint. An issue or plea that has not been the subject of a determination by a court or tribunal or agency, as the case may be, cannot, in my humble view, be the subject of an appeal. This is because “[A]n appellate court, in hearing an appeal, is called upon to redress error on the part of the court below. In deciding whether [or not] there was an error, the appellate court looks at the materials which were before the court below.” New issues should be determined by courts with original jurisdiction.”

We would respectfully adopt this approach for the purposes of the instant application.

The appeal as currently constituted concerns a dispute between the appellant, and the respondents Florence Wairimu Mbugua and Sylvia Murugi Mbugua, suing as the administrators of the deceased, the registered proprietor of the property. The appellant is alleged to have entered into a sale agreement with the deceased dated 6th August 1990 for the purchase of the property. As the title was mortgaged to the Bank on account of an outstanding loan, the transfer was not registered in the appellant’s name. It was alleged that pursuant to a consent entered between the parties in *HCCC No. 625 of 2006*, it was agreed that the property would be discharged in favour of the appellant. However, following the ruling of 19th May 2014, the consent was reviewed to allow the property to be transferred to the Estate of the deceased, instead of to the appellant. Aggrieved by the ruling of the court below, the appellant has appealed against that decision.

The applicants contend that despite the circumstances pervading the property, they entered into two sale agreements with the appellant in the belief that the Bank would discharge the property directly to the appellant. The applicants’ claim that the contested variation of the decree made by the Environment and Land Court would result in the transfer of the property from the Bank to the deceased’s estate, and not to the appellant, thereby possibly jeopardizing the appellant’s agreement with the applicants. To safeguard their alleged rights and interest in the property, the applicants have applied to join the appellant in the appeal.

Much as the Constitution has expanded the definition of *locus standi* to allow every person the right to have their dispute resolved by way of a fair and public hearing in court, before they can be granted leave to join an appeal, as in the instant case, they must be able to demonstrate that their personal, pecuniary or property rights or interests have been adversely affected by a court’s decree or decision.

At the outset, it will be observed that the applicants were not parties to the suit in the lower court, and therefore there is no decision that has been made directly against them, *per se*. And therefore, to join the appeal they must establish, that they had a relationship with the deceased or his estate or, that they hold a proprietary interest in the subject property, or that they are persons affected by the ruling of the court. They should also be able to show that without their participation in the appeal, any order or decree would be unenforceable by or against them.

On the basis of the material before us, we are not satisfied that the applicants have established a sufficient

basis upon which to join the appeal. They have not demonstrated a direct nexus exists between themselves and the dispute between the parties so as to be considered as persons affected by the appeal. We say this because, no sale agreement or transfer of the property has been shown to have been made between the applicants and the registered proprietor of the property. There are also no documents to show that they hold a proprietary interest in the property. To the contrary, the materials show that it is the appellant that is alleged to have entered into an agreement with the deceased, and then purported to sell portions of the property to the applicants under a separate arrangement. As no connection to the appeal has been established, we do not see what purpose would be served by granting leave to non suited persons to join the appeal as interested parties at this advanced stage of the dispute.

We would add that, no prejudice would be visited upon them in the event we declined to grant them leave to join this appeal, as, having regard to the material before us, they are not bereft of adequate opportunities to initiate proceedings against any party in order to seek redress.

In the circumstances, as the applicants have been unable to demonstrate that they are affected parties in the appeal, the Notice of Motion dated 11th November 2016 is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated and delivered at Nairobi this 10th day of November, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR