



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & AZANGALALA, J.J.A.)

CIVIL APPLICATION NO. NAI. 115 OF 2016 (UR 92/2016)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPLICANT

NYAKINA WYCLIFF GISEBE.....2ND APPLICANT

AND

AFRISON EXPORT IMPORT LIMITED.....1ST RESPONDENT

HUELANDS LIMITED.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF FINANCE.....4TH INTENDED PARTY

THE NATIONAL LAND COMMISSION.....5TH INTENDED PARTY

THE CABINET SECRETARY, MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....6TH INTENDED PARTY

TELCOM KENYA.....7TH INTENDED PARTY

CONTINENTAL CREDIT & FINANCE LIMITED

(IN LIQUIDATION).....8TH INTENDED PARTY

OFFICIAL RECEIVER & INTERIM

LIQUIDATION.....9TH INTENDED PARTY

(Being an application for (a) permission allowing the applicants who were not parties in the High Court to file an intended appeal in the public interest; (b) extension of time to file and serve a Notice of Appeal, a Memorandum and a Record of Appeal out of time in the intended appeal; and (c) stay of the partly executed decree, pending the lodging, hearing and determination of an intended

Appeal from the Judgment, Orders and Decree of the High Court of Kenya (Mabeya, J.) dated 12th February, 2013

in

H. C.C.C. No. 617 of 2012)

RULING OF THE COURT

[1] By their omnibus Notice of Motion dated 6th May, 2016, the applicants,

Okiya Omtatah Okoiti, (the 1st applicant) and **Nyakina Wycliffe Gisebe**, (the 2nd applicant), seek a raft of orders from this court, among them, permission to file an intended appeal from the decision of the High Court (**Mabeya, J.**), dated 12th

February, 2013 in **Civil Case No. 617 of 2012** where they were not parties; extension of time to file and serve a Notice of Appeal, a Memorandum and a Record of Appeal and a stay of execution of the decree in the said case pending the lodgment, hearing and determination of the intended appeal.

[2] The suit before the High Court was between **African Export Limited** (the plaintiff now the 1st respondent), **Huelands Limited** (the 2nd Plaintiff now the 2nd respondent) against **Continental Credit Finance Limited** (in liquidation) the 1st defendant now the 8th respondent, the **Official Receiver & Interim Liquidator**, (the 2nd defendant now the 9th respondent and the **Attorney General**, the 3rd defendant sued on behalf of the **Office of the President** now the 3rd respondent). Also joined in this application are the **Cabinet Secretary Ministry of Finance** (the 4th respondent); the **National Land Commission** (5th Respondent) the **Cabinet Secretary Ministry of Lands Housing and Urban Development**, (the 6th respondent) and **Telcom Kenya** (the 7th respondent).

[3] The applicants have invoked the following provisions of the **Constitution**:

Articles 20, 22, 23, 40 (b), 50 (1), 159, 162 (2), (b), 164 (3), 165 (5), (b), 258 and 259 (1). They have also invoked **sections 3(2) 3A and 3B of the Appellate Jurisdiction Act, Rules 1(2), 4, 42, 43 (1) and 77 of the Court of Appeal Rules**.

The applicants claim to be pursuing their application in the public interest.

[4] The motion on notice is omnibus because it seeks among other orders extension of time, which is a single Judge application and a stay of further execution of the decree of the High Court which may only be canvassed before a full bench of this Court after the requisite leave has been granted. We appreciate the applicants predicament they are acting in person.

[5] A background of the litigation will suffice. The 1st and 2nd respondents filed the said suit by way of Originating Summons dated 24th September, 2012 claiming that they were the registered proprietors of **Land Parcel No. LR 7879/24** which was part of **Land Parcel No. 7879/4** situated in Nairobi and that from September, 1988, the **General Service Unit**, which is under the **Office of the President**, had been trespassing thereon thereby denying the applicants enjoyment of their property rights.

[6] The applicants then entered into negotiations with the **Office of the President** with a view to selling the said parcel of land to the latter. They also sought to be compensated for the period they had not been using the property. In a valuation report dated 11th May, 2012, **Camp Valuers (Property Consultants and Valuers)**, valued the property at Kshs.6,450,000,000/= and put rent loss at Kshs.1,670,270,000/=.

[7] The parent title (**LR 7879/4**) was then charged to the 8th respondent for Kshs.100,000,000/=. The 8th respondent expressed its willingness to discharge the said charge over the parent title on payment of Kshs.100,000,000/= plus legal fees of Kshs.50,000,000/=. On 23rd January, 2013, the suit against the 8th respondent was withdrawn but the suit against the **Attorney General** on behalf of the **Office of the President** remained intact.

[8] It would appear from the record that the Attorney General did not respond to the Originating Summons and the applicants sought judgment in default. Before the same was entered the **Attorney General** filed a Notice of Motion dated 30th November, 2012, seeking to arrest the delivery of judgment. Notwithstanding that application, on 5th February, 2013, the Attorney General consented to the following order:

"(a) The court does take the mean of average (sic) of the valuation of Camp Valuers, Clay Town Valuers and Llyord Masika Valuers on record.

(b) Upon ascertaining the said mean average judgment for the same be entered for the plaintiff[s] against the 3rd defendant only.

(c) Each party to bear its own costs of the suit.

(d) This consent does not bind the 1st and 2nd defendants".

[9] On 12th February, 2013, judgment was entered in favour of the 1st and 2nd respondents as follows: -

"The mean of 12,260,050,000 is Kshs.4,086,683,330/= which I will consider to be the fair value of the suit property. Accordingly, I enter judgment for the plaintiffs against the 3rd defendant for the said sum of Kshs.4,086,683,330/=. I also award the costs of the suit to the plaintiffs".

[10] That judgment was varied by a consent dated 2nd April, 2013 which was endorsed by the court on 8th April, 2013 in the following terms:-

"Upon reading the consent dated 2nd April, 2013 and signed by counsel for the respective parties the same is hereby adopted by the court and by consent, the judgment made herein on 12th March, 2013 for Kshs.4,086,683,330/= is hereby varied and reduced to Kshs.2,400,000,000/= as the agreed purchase price. Each party shall bear its own costs of the suit".

[11] The applicants were not parties to the proceedings before the High Court and could therefore not seek to challenge the said judgment until they became aware of the same. They claim they became aware of the judgment on 18th April, 2016 while reviewing the report of the Auditor - General for the year 2013/2014 (*the report*). Their review revealed that 17 acres of land had been fraudulently claimed by the 1st and 2nd respondents who had also been fraudulently awarded the said sum of Kshs. 2. 4 billion. The applicants allege that the fraudulent actions involved, the 1st and 2nd respondents, officers in the **Office of the Attorney General** and the High Court. As a result, according to the applicants, Kshs. 1.8 billion of public money had wrongfully been paid to the 1st and 2nd respondents and that a further payment of Kshs.600 Million was due to be paid any time now.

[12] The applicants have advanced various reasons why they believe the 1st and 2nd respondents, officers in the **Office of the President** and those at the **Attorney General's** office are executing a scheme to steal public money using our court system. They implicate the Court because the subject matter fell within the jurisdiction of the Environment and Land Court yet the matter was determined by a Judge of the Commercial Division of the High Court.

They allege that the parent title was at the material time charged to the 8th respondent and was not

available for sale to the Government. They claim that as the 1st and 2nd respondents had defaulted in their obligations to the 8th respondent, they had no property in the parent title to pass to the Government. They argue that part of the suit property had previously been sold to the 7th respondent and could not once more be sold to the Government. They make reference to some of the beneficiaries of proceeds of the alleged sale who have no nexus with the 1st and 2nd respondents. They further make reference to a valuation of the suit property made by a Government Valuer which valuation was far below any of the valuations applied by the parties and the High Court.

In those premises, the applicants believe that the People of Kenya stand to suffer irreparable loss unless the orders they seek are granted as their intended appeal is not without reasonable possibility of success and will be rendered nugatory unless their application is allowed.

[13] The application is opposed by the 1st and 2nd respondents who have filed an affidavit in opposition sworn by one **Francis Mburu Mungai** the director of both the 1st and 2nd respondents. They challenge the *locus standi* of the applicants to lodge the application and the intended appeal since, according to them, they have no interest in the subject matter and have not been affected by the judgment of the High Court.

[14] According to the 1st and 2nd respondents, their ownership of the suit property was clear and the acquisition of the same by the Government was also not in doubt. They claim that their interest had been acknowledged by the Government and the Legislature and both had approved compensation in their favour which crystalized in the judgment impugned which judgment had partly been implemented.

[15] The 1st and 2nd respondents discredited the Auditor's Report relied upon by the applicants and countered that the Public Accounts Committee had in the end approved the compensation to them which proceedings were not challenged by the applicants. In their view, the applicants have not demonstrated that they deserve any of the orders they seek which orders, if granted, will be prejudicial to the 1st and 2nd respondents.

[16] In their submissions in opposition to the application, the 3rd, 4th, 6th and 9th respondents raised four (4) issues namely: the *locus standi* of the applicants, failure to demonstrate that even if they had locus, they deserve the orders sought; that the dispute was a private dispute and conservatory orders are not available to the applicants; that at the material time, the High Court had jurisdiction to determine the dispute between the parties before it who were not in any event complaining.

[17] We have considered the application, the affidavits filed, the submissions of the applicants and those of learned counsel for the respondents. We have also given due consideration to the authorities cited and the relevant law. We propose to first consider whether the applicants have the requisite *locus standi* to file this application. It should be elementary that *locus standi* is the right to bring an action or challenge a decision or differently put the right to be heard. (See the Oxford Dictionary of Law, 5th Edition and Black's Law Dictionary 9th Edition). It is a jurisdictional issue. In **Kakuta Maimai Hamisi -v- Peris Pesi Tobiko & 2 Others [2013] eKLR**, we stated:

"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 a plain reading of the constitutive statute of this Court, the Appellate Jurisdiction Act, Cap 9".

[18] 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...'"

[19] The applicants herein claim no personal interest in the subject matter but have moved the court in the public interest. In this regard, they have invoked, among others, **Article 258** of the **Constitution** which is in the following terms:

"258 (1) Every person has the right to institute court proceedings claiming that this Constitution has, been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -

(a) a person acting on behalf of another person who cannot act in their own name.

(b) a person acting as a member of, or in the interest of a group or class of persons;

(c) a person acting in the public interest;

(d) an association acting in the interest of one or more of its members".

20. The applicants claim that the 1st and 2nd respondents in consort with officers in the **Office of the President** and the **Attorney General** with a complacent court are involved in scheme to steal public funds. If they demonstrate that scheme they will, in our view, be acting in the public interest and under **Article 258(1)** and **2 (c)** of the **Constitution** they would have standing to move the Court to protect the public interest.

[21] The Supreme Court in the same ***Mumo Matemu case*** (supra) further stated, at paragraph 81:

"81

Articles 22 and 258 of the current Constitution opened doors for such litigants to lodge causes on constitutional matters. In order to avoid frivolous suits Courts in cases such as *John Wekesa Khaoya - v- Attorney General*, High Court. Pet. No. 60 of 2012 have set our parameters to guide the filing of causes in the public interest. These include (paragraphs 18 to 20): (i) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant".

[22] The applicants have, in our view, satisfied those parameters: their application is in the public interest and they seek no personal gain. Further, absence of good faith has not been demonstrated.

We are also alive to the provisions of **rule 75(1)** of this **Court's Rules** which read:

"75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court".

Given the claims made by the applicants there is no gain saying that they would have been entitled to challenge the judgment of the court below under the above provisions.

[23] After considering the provisions of **Article 258(1), (2 (c))** of the **Constitution rule 75(1)** of this **Court's Rules**, we have come to the conclusion that the applicants have *locus standi* to move the court as they have done.

[24] There is however, a long line of authorities stating that this Court's jurisdiction under **rule 5(2) (b)** of the **Court's Rules** may only be invoked where a notice of appeal or appeal itself has been lodged. See for instance, **Civil Application No. NAI. 90 of 2013: Nguruman Limited -v- Shompole Group Ranch & Another [2014] eKLR** which was a five (5) Judge bench of this Court. There, an earlier, ruling of the Court came up for review. The earlier decision had, *inter alia*, granted an order of stay of proceedings under **rule 5(2) (b)** of this **Court's Rules** even though no Notice of Appeal or record of appeal had been lodged. The Court, in allowing the review application, stated, as per **Musinga**,

J.A.:

"Under rule 2 of the Court of Appeal Rules, an appeal includes an intended appeal which, by virtue of rule 75

(1) is manifested by filing of a notice of appeal. Rule 75 states as follows:

'Any person who desires to appeal to the court shall give a notice in writing, which shall be lodged in duplicate with the registrar of the superior court'.

It is therefore crystal clear that before an appeal is filed, a notice of appeal must be lodged. Without an appeal or a notice of appeal, the Court lacks jurisdiction to grant any orders.

The power of this Court under rule 5(2) (b) to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a notice of appeal has been lodged in accordance with rule 75 of this Court's Rules".

[25] The applicants have not filed a notice of appeal. Indeed, it is one of the orders they seek in this application. In the absence of a notice of appeal, we cannot consider the prayers for stay of execution sought in this application.

[26] With regard to the prayer for extension of time to lodge a notice of appeal, we have already observed that the same should at first instance be considered by a single Judge of this Court and may only come before a full bench of the Court on a reference from the decision of the single Judge. (See **rule 53(1)** of this **Court's Rules**).

[27] In view of our above findings and observations, we have restrained ourselves from considering in detail the merits or demerits of the applicant's Notice of Motion as the same will fall for proper consideration should the applicants decide to pursue extension of time to file notice of appeal and record of appeal before a single Judge and if successful a stay of execution before a full bench of the Court.

[28] The applicants have sought, among other reliefs, an order permitting them

"to file an intended appeal in the public interest". We understand them to be seeking our leave to move this Court even though they were not parties before the High Court. Having found that the applicants claim to be acting in the public interest to protect public funds from being stolen, we have come to the conclusion that the applicants qualify as persons who, in the public interest, desire to appeal to this Court's under our **Rule 75(1)**. Being of that view, the order which commends itself to us for now is to allow the applicants who were not parties before the High Court, to seek extension of time to file a Notice of Appeal before a single Judge of this Court. If they succeed, they will be at liberty to seek reliefs in terms of the other prayers of the Notice of Motion. We so order.

[29] Costs shall be in the Notice of Motion.

Dated and delivered at Nairobi this 30th day of September, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR