



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

(CORAM: ONYANGO OTIENO, VISRAM & KOOME, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 39 OF 2012

BETWEEN

- 1. PETER MACHARIA MWANGI**
- 2. JOSEPH KARANJA**
- 3. GRACE NYAMBURA NDEGWA**
- 4. MOSES MAINA THUKU**
- 5. KURIA NGWARE.....APPLICANTS/RESPONDENTS**

AND

- 1. MARTHA NJERI WANYOIKE**
- 2. GEORGE MBEKENYA**
- 3. JOHN KARANJA WANYOIKE.....RESPONDENTS/APPELLANTS**

(An application to strike out notice of appeal and record of appeal against the judgment and decree of the High Court of Kenya

at Nakuru (Maraga, J.) dated 28th October, 2011 and delivered 3rd November, 2012

in

H.C.C.S. No. 241 of 1998)

RULING OF THE COURT

In a plaint dated 19th June, 1998, the appellants in *Civil Appeal No. 39 of 2012*, who are the respondents in this Notice of Motion dated 4th April, 2012, sued the respondents in that appeal who are the applicants in this Notice of Motion seeking that the respondents by themselves, their agents, servants, employees or others be restrained from occupying, subdividing, breaking, developing, or dealing in any way with the suit property *Land Reference No. 782*; that the respondents do vacate the suit property forthwith; that Order for eviction do issue; that general damages be ordered against the respondents and costs be ordered against them. The respondents in that appeal filed statements of defence and counterclaim. After various procedural requirements were surmounted, and the pleadings closed, the suit was placed before *Maraga J. (as he then was)* who, after full hearing found that the appellants claim was hinged on lack of consent of the Land Control Board, which lack of consent was as a result of their obstructing the respondents from obtaining the same consent. The learned Judge found that:-

“In the circumstances, the defendants’ claim for adverse possession brought by way of counterclaim in this case is competent and properly before the court.”

And ended his judgment thus:-

“Consequently I grant the defendants the declarations they have sought in the counterclaim and direct that the plaintiffs do within 30 days of the date hereof apply for consent of the defendants’ transactions and thereafter appear before the area Land Control Board for consideration. If they fail to do so, the defendants are at liberty to get the Deputy Registrar of this court to execute the applications for consent forms and this judgment shall serve as authority to the area Land Control Board to consider the defendants’ applications in the absence of the plaintiffs. Thereafter the Deputy Registrar shall also execute all other documents on behalf of the plaintiffs to effect the transfers of the defendants’ portions to them. I also grant the defendants the perpetual injunction they sought to restrain the plaintiffs, their family members, servants and or agents from evicting the defendants from or in any way interfering with their occupation and use of their respective portions of the suit piece of land. Given the background of this case I order that each party bears its own costs of this suit.”

The appellants in the appeal felt aggrieved. They filed Notice of Appeal and eventually filed record of appeal on 1st March, 2012.

On being served with the record of appeal, the respondents in the appeal took out this Notice of Motion filed on 5th April, 2012 in which they sought for orders:-

“(1) That Notice of Appeal and Record of Appeal lodged on 1st March 2012 in Civil Appeal No. 39 of 2012 be struck out on the basis that they do not lie.

(2) That the cost be provided for.”

The application is brought on six grounds which are:

“(a) That the appeal is against judgment and decree of Honourable D.K. Maraga dated 28th October 2011 and delivered on 3rd November 2011 at Nakuru High Court Civil Suit No. 241 of 1998.

(b) That in the judgment and decree the Honourable Court extended time for the plaintiffs and defendants within which to obtain consent of Land Control Board for sale of land as provided under section 8 of the Land Control Act Chapter 302 Laws of Kenya.

(c) That the orders so given by Honourable Court are not provided for under Order 43 Civil Procedure Rules (2010) and accordingly leave of this Honourable Court must be sought before filing the appeal.

(d) That the appellants have not demonstrated in the body of the appeal that such leave was applied for and obtained.

(e) That the Notice of Appeal and Record of Appeal are incompetent, fatally and incurably defective.

(f) That the Notice of Appeal and Record of Appeal are incompetent, fatally and incurably defective.

(f) That in any event the Record of Appeal is defective and or incomplete as certain exhibits have been left out.”

In response to the application, the respondents who are the appellants, through the second respondent in a replying affidavit at paragraph 4 thereof stated:

“4. That I am advised by my advocates on record which advice I verily believe to be true that we, as appellants/applicants did not need leave of the court to appeal against the judgment in HCCC No. 241 of 1998 in which we were plaintiffs as we are entitled to appeal as of right.”

Before us *Mr. Ribathi*, the learned counsel for the applicants in this Notice of Motion urged us to strike out the appeal as in his view, leave was required before the appeal could be lodged against *Maraga J’s* judgment on grounds that the judgment was not conclusive as the Judge exercised his discretion on the matter. He felt that even though this was a matter of procedure and thus a matter of technicalities, nonetheless, he was of the view that as procedure is the vehicle through which justice is conveyed and thus if proper procedure is not followed, justice cannot be done. *Ms. Omwenyo*, the learned counsel for the respondents on the other hand, was of the view, that there was no need for leave as the appeal in respect of *Maraga J’s* judgment was as of right since the judgment concluded all the matters that were before the court and was not an interlocutory judgment in any way.

We have anxiously considered the application, the pleadings that were before the High Court, the judgment from which original decree was drawn. We have also considered the able submissions by both counsel, and the law. In our view the judgment pronounced by *Maraga J (as he then was)* was not an interlocutory judgment. There was nothing that was left to be decided by the court later and was, for all intents and purposes, a final decision of the court for which an appeal could proceed and has proceeded as of right. We have set out the salient part of that judgment above, and nowhere in that judgment is the learned Judge saying that there was need to have it finalized later. In our view, the learned Judge, in that judgment rejected the appellants/respondents plaint and accepted to an extent the respondents/applicants counterclaim and allowed them to seek consent of the Land Control Board. He also granted perpetual injunction to restrain the appellants/respondents by themselves, family members, agents and servants from evicting or in any way interfering with the respondents/applicants in their possession and occupation of their respective parcels of land. That is a final order of the court which could only be given at the final judgment of the court.

Thus, in our view, the main ground relied on by the applicants for seeking striking out of ***Civil Appeal No. 39 of 2012***, cannot stand as we are of the view that the appeal could be filed as of right and there was no need for leave to file it. As the other ground set out in the Notice of Motion, namely that certain exhibits have been left out was not canvassed before us, we have no ground to grant the application.

In short, the Notice of Motion lacks merit and is dismissed with costs to the appellants/respondents in any event.

Dated and delivered at Nakuru this 9th day of AUGUST, 2012.

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

M. K. KOOME

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR