



**IN THE COURT OF APPEAL
AT NYERI
(CORAM: BOSIRE, WAKI & VISRAM J.J.A.)
CIVIL APPEAL NO. 93 OF 2010
BETWEEN**

**ELIUD MURAGE WAMBU..... APPELLANT
AND
1. JOSEPH MURIITHI STANLEY
2. JOHN K.J. MWAI RESPONDENTS**

**(Appeal from the judgment and order of the High Court of Kenya at Nyeri (Makhandia, J.) dated
23rd November 2009
in
H.C.C.C. NO.113 OF 2002)

RULING OF THE COURT

By his amended plaint dated 18th October, 2006 and filed in the High Court at Nyeri on 3rd July 2002, **Eliud Murage Wambu**, the respondent in the motion dated 12th May 2010 and filed in court on 18th May 2010, was, on the main, seeking judgment nullifying the transfer of land known as L.R. No. 1/KAMONDO/969 to Joseph Muriithi Stanley and John K.J. Mwai. The two were named as the 1st and 3rd defendants in the aforesaid amended plaint. John K.J. Mwai, is the applicant in the aforesaid motion.

By a judgment dated and delivered at Nyeri on 26th November, 2007, Makhandia, J. dismissed that suit and condemned the respondent herein to pay the costs of the suit. By his application dated 15th June, 2009, expressed to be brought under O.XLIV Rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the respondent sought an order of review of the aforesaid judgment. The grounds for that application, are not material in the application before us as that application was not heard. The application came for hearing on 23rd November 2009, and when it was called up, the record shows that Makhandia, J. who was seised of it made the following remark:

“COURT: The application is hopelessly incompetent. The reasons advanced in support of the application should have formed grounds of appeal.”

Whereupon Mr. Muchira for the named respondents in that motion stated:

“I have stated so in my replying affidavit.”

The respondent appears to have been persuaded that his application would not avail him much, and is recorded as having made the following statement:

“APPLICANT: In which event I will withdraw the application and pursue an appeal.”

The court then made the following order:

“COURT: The application dated 15/6/09 is marked as withdrawn with no order as to costs.”

Following that order the respondent filed a notice of appeal on 26th November, 2009, the body of which

reads as follows:

“TAKE NOTICE that ELIUD MURAGE WAMBU of Post Office Box 62 Kerugoya being dissatisfied with ruling/judgment of this Honourable Court before Justice M.S.A. MAKHANDIA judge delivered on 23rd November, 2009, I intend to appeal to the Court of Appeal of Kenya at Nyeri against the whole of the said RULING/JUDGMENT”

Pursuant to that notice, the respondent lodged a record of appeal in the Court on 21st April 2010, and the memorandum of appeal includes as one of the 14 grounds the following ground:

“1. The Learned Judge erred in Law and in fact in refusing to Review this Court’s judgment dated 26th November, 2007 whereas there was enough evidence to show the court that there was vital and important matters to warrant review of the said judgment.”

The other grounds appear to challenge the decision of the High Court given on 26th November, 2007. We note that the memorandum of appeal is home made and that will perhaps, explain why there is a mix-up as to which decision(s) the respondent is complaining against in the appeal.

The respondent’s appeal is intitled as being ***“An Appeal from the Judgment and/or Order/Ruling of the High Court of Kenya at Nyeri (Mr. Justice M.S.A. Makhandia) dated 23rd November, 2009, in Civil Case No. 113 of 2002 Nyeri.”*** and was assigned a number, to wit **Civil Appeal No. 93 of 2010**. It is this appeal, which John K.J. Mwai, the applicant in the aforesaid motion wants struck out. Four grounds were proffered for the motion but some of those grounds were spent by the time the motion came for hearing, and for that reason only two remain, namely:

“(1) No appeal lies as the appellant has no right of appeal against the order of the superior court made on 23rd November, 2009.

(2) That the memorandum of appeal seeks to challenge the decision of the superior court delivered on 26th November, 2007 from which no appeal lies.”

When the aforesaid motion was called up for hearing we gratuitously advised the respondent to seek legal advise as we realized that he filed the appeal without proper legal guidance. We tried to explain to the respondent the variance that we noticed existed between the notice of appeal and the intituling of the appeal on the one hand, and several of the grounds of appeal contained in the memorandum of appeal, but he did not seem to be persuaded that what we were telling him was crucial. We therefore made a note in our record to the effect that despite being advised to seek legal assistance, the respondent was adamant that the motion be heard and a ruling be given. We obliged and heard both Mr. Muchira for the applicant and the respondent.

The order of the superior court dated 23rd November, 2009 was made at the request of the respondent who was the applicant in the withdrawn motion. He is not complaining that the withdrawal order was improperly made, but that the High Court declined to order review of its judgment. The respondent’s motion was not heard. It would appear to us that the respondent did not understand the full import of what the impugned order. The respondent’s situation is an example of the dilemma the courts face when dealing with unrepresented parties who, notwithstanding the guidance those courts offer, insist in doing things their way. The court cannot and ought not proceed against the wish of an unrepresented party as doing so may be misconstrued as an improper and mischievous attempt to aid one party against the other.

Under O.43, of the Civil Procedure Rules (formerly O.42), the Order of 23rd November 2009, cannot possibly be placed under any of the listed provisions. It was not made pursuant to O.XLV formerly O.XLIV of the Civil Procedure Rules as the respondent’s motion was not heard. Besides, the order appealed from was made in favour of the respondent and it would militate against common sense to challenge such an order.

In the foregoing circumstances, it is clear that this appeal is hopelessly incompetent and no proper

purpose would be served if it is sustained.

In the result, we allow the application dated 12th May 2010, strike out **Civil Appeal No.93 of 2010**, with costs of the struck out appeal and the aforesaid motion to the applicant, John K.J. Mwai.

Dated and delivered at Nyeri this 2nd day of December, 2011.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR