



IN THE COURT OF APPEAL
AT NYERI

(CORAM: WAKI, J.A (IN CHAMBERS))
CIVIL APPEAL NO. 121 OF 2010

BETWEEN

PHILIP MUCHIRI MUGOAPPELLANT

AND

MBEU KATHAKWADEFENDANT

(An appeal from a ruling of the High Court of Kenya at Nyeri (Makhandia, J.) dated 26th February, 2009

in

H.C.C.C. NO. 111 OF 1990)

R U L I N G

The motion dated 5th May, 2011 was filed by **Philip Muchiri Mugo** (Muchiri) who appears in person and he cited **rule 89** of the Court of Appeal Rules as the basis for it. That Rule, however, has now been renumbered as **92** in the new **Court of Appeal Rules 2010** which became operative in December, 2010. The rule relates to the “*Preparation and service of supplementary record of appeal by a respondent or an appellant*”. The supplementary record intended to be filed is stated to be:

“.....proceedings and the grant of the Letters of Administration ad Litem issued on the 28th day of October, 2009 in Nairobi High Court P & A Cause No. 639 of 2009 to Philip Mugo Muchiri”.

The background to the application as far as I can gather from the material before me is as follows:

On 22nd August, 1990, **HCCC No. 111/1990** was commenced by plaint in the High Court in Nyeri by **Mugo Kithakwa** against the respondent herein who was his step brother. Mugo Kithakwa was the father of Muchiri and claimed eviction of the respondent from **Land Parcel No. Inoi/Kerugoya/769** measuring 0.95 hectares which he alleged had been trespassed on by the respondent in 1982. The respondent denied that claim and asserted that Mugo Kithakwa had never been in occupation of the parcel of land and therefore the suit was misconceived. It would appear that the suit was referred to arbitration by a panel of elders, with the consent of the parties in June, 1991 and the award was subsequently adopted as the judgment of the court in September, 1995 by consent of the parties. By that judgment the land Inoi/Kerugoya/769 appears to have been awarded to the respondent. Execution proceedings commenced thereafter but in the process Mugo Kithakwa died on 18th May, 2006.

The respondent, applied to substitute Muchiri, one of the sons of the deceased who had a Power of Attorney, but Muchiri said he had not been appointed as the legal representative of the estate of the deceased and the Power of Attorney had expired upon his father’s death. That was in November, 2007. The court agreed with him and rejected the application for substitution in January, 2008.

There would also appear to have been other skirmishes in various courts relating to the burial of the deceased on the disputed land and applications challenging the decision made in 1995 which remained

unexecuted. Muchiri was involved in all those skirmishes. Ultimately an order was issued on 21st October, 2008 by Makhandia, J. that the disputed land be transferred to the respondent and the Title Deed was issued to him on 25th November, 2008. In the meantime, the respondent continued to pursue Muchiri in execution for costs and at some point had him committed to civil jail. All that was happening despite insistence by Muchiri that he had not obtained Letters of Administration for his late father's estate and his persistence that he was appealing to this Court. Ultimately Makhandia, J. considered an application by Muchiri for setting aside the orders granted on 17th October, 2008 in the absence of the deceased or anyone else for the estate, for transfer of the disputed land to the respondent. Muchiri had filed documents to show that the decree purported to be enforced had been set aside by Ang'awa, J. on 15th May, 1995. Makhandia, J. delivered his ruling on 16th February, 2009 dismissing that application after making a finding that Muchiri was aware of the hearing of the application as he had been served with a hearing notice but failed to attend. In the Judge's finding, the orders issued on 17th October, 2008 had also been enforced and therefore the court would not issue orders for setting aside in vain as the litigation had conclusively come to an end. The court also found that Muchiri had no *locus standi* in the suit, as he had persistently pleaded, and for that reason it found his application an abuse of court process.

That is the ruling which Muchiri was dissatisfied with and filed a notice of appeal to challenge. He subsequently filed the appeal on 31st May, 2010. In the meantime, he returned to the High Court and applied for grant of Letters of Administration in the estate of his deceased father and a limited grant was issued on 28th October, 2009. The application and the limited grant are the documents he wishes to introduce through the supplementary record of appeal.

The motion by Muchiri is opposed by the respondent through learned counsel Mr. Kahiga Mungai. Mr. Mungai submitted that the application was bad in law since Muchiri was not a party to the appeal and had no *locus standi*; both in the suit before the High Court and in this appeal. He submitted that the respondent sought to substitute him in the High Court suit but Muchiri rejected the substitution and he cannot now be heard to seek his inclusion in the suit at this late stage. The application in his view was frivolous and ought to be rejected.

I have considered the application which on the face of it was fairly straightforward. The purpose was simply to introduce documents which would show that Muchiri was the lawful administrator of the estate of his late father who was involved in litigation with the respondent. Whether such document has any validity or relevance to the appeal would be upon the appellate court to consider if objections are raised. For my part I think, the applicant was sufficiently involved in litigation before the High Court, whether rightly or wrongly, where orders, including orders for his committal to civil jail, were issued for and against him. In those circumstances he would in my view, be entitled to challenge such orders in his own right. The proceedings before the High Court and other courts in relation to the disputed land are not easy to decipher as they appear complex, but the appellate court must be able to unravel them and issue decisive orders to meet the ends of justice. In all the circumstances, I would not begrudge the applicant the prayer he makes and I allow the application as prayed. The supplementary record shall be filed and served within 14 days of this ruling and costs of the application shall abide the result of the appeal.

Dated and delivered at Nyeri this 1st day of December, 2011.

P.N. WAKI
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR