



**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 340 OF 2002**

**JULIA KABURIA ..... APPLICANT/APPELLANT**

**AND**

**MANENE KABEERE ..... 1<sup>ST</sup> RESPONDENT**

**OBED GUANTAI ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**METHODIST CHURCH OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal from judgment and decree of the High Court of Kenya at Meru (Kasanga, J) dated 1<sup>st</sup> August, 2002*

**In**

**H.C. Cr. A No. 93 of 1998)**

**\*\*\*\*\***

**RULING**

The applicant seeks leave under **Rules 85 (2A)** and **89(3)** of the Court of Appeal Rules (Rules) to include in a supplementary record of appeal several documents namely, notice of motion dated 15<sup>th</sup> May, 2002, replying affidavit, grounds of opposition, ruling of Kasanga Mulwa, J and a decree given on 7<sup>th</sup> March, 2003.

The purpose of the application is to include in the supplementary record of appeal the post judgment proceedings and order of the superior court relating to the correction of errors in the judgment of the superior court under appeal delivered on 1<sup>st</sup> August, 2002.

The applicant is the appellant in the pending appeal in this Court. The first respondent MANENE KABEERE died some time in 1999 (deceased). The second respondent OBED GUANTAI is the son of the first respondent.

The history dispute is briefly as follows:-

Sometime in 1994 the deceased filed Civil suit No. 556 of 1994 in the Chief Magistrates Court at Meru - **Manene Kabeere v. Julia Kaburia** – 1<sup>st</sup> defendant, **District Land Adjudication Settlement Officer Meru – 2<sup>n</sup> defendant** and The Attorney General – 3<sup>rd</sup> defendant . The basis of his claim was that after the Julia Kaburia - his daughter in-law had filed an objection, the second defendant distributed the deceased's five parcels of land, Nos. 760, 761, 906, 911 and 946 situated at Mweru II Adjudication section as pleaded in paragraph 6 of the plaint and in a manner which was against the deceased's wishes as pleaded in paragraph 7 of the plaint. The main reliefs sought in the plaint were, a declaration that the mode of subdivision of the land by the second defendant was unlawful; an order that the deceased be allowed to sub-divide his pieces of land according to his wishes as indicated in paragraph 7 of the plaint and rectification of the Register. The plaint was subsequently amended by addition of paragraphs 7(a) which gave the particulars of paragraph 6 of the plaint showing the new parcel numbers and the mode of alleged unlawful distribution. In March 1995. Obed Guantai, the second respondent, made a formal application in the subordinate court for orders that he be substituted for the plaintiff or alternatively that he should be added as a co-plaintiff on ground that the plaintiff who is his father was aged over 90 years and was persistently incoherent and confused. The alternative prayer was allowed on 20<sup>th</sup> June, 1995 and the second respondent was joined as a co-plaintiff. The suit was ultimately dismissed by the subordinate court on 15<sup>th</sup> September, 1998. The plaintiffs appealed to the superior court sometime in October, 1998 vide Civil Appeal No. 93 of 1998. The first appellant Manene Kabeere died before the appeal was heard and by an application dated 12<sup>th</sup> June, 2001 the second respondent sought for orders, inter alia, that, he be appointed a legal representative of his deceased father. That application was allowed by the superior court on 8<sup>th</sup> October, 2001.

The superior court (Kasanga Mulwa, J) ultimately allowed the appeal on 1<sup>st</sup> August, 2002 in the following terms.”

***“I therefore allow this appeal and set aside the trial court's orders of 15<sup>th</sup> September, 1998 with the result that the 2<sup>nd</sup> appellant sub-divides the respective parcels of land as per paragraph 7(a) of the amended plaint dated 4<sup>th</sup> October, 1994. The 1<sup>st</sup> respondent shall bear costs of this appeal and those of the court.”***

The Deputy Registrar of the superior court issued a decree on 16<sup>th</sup> September, 2002 which decree apparently corresponds with the judgment of superior court. On 30<sup>th</sup> September, 2002, Julia Kaburia filed the present appeal incorporating the decree issued on 16<sup>th</sup> September, 2002 in the Record of Appeal.

By an application dated 15<sup>th</sup> August, 2002 Obed Guantai, the decree holder asked the superior court to correct two errors in the judgment under the Slip Rule. The first error pointed out and corrected, is immaterial as it does not affect the decree. The second error pointed out is the reference in the judgment to paragraph “7 (a)” instead of paragraph “7” in the concluding portion of the judgment of the superior court quoted above. The superior court allowed the amendment the effect being that Obed Guantai was required to sub-divide the disputed parcels of land as per paragraph 7 of the amended plaint and not as per paragraph 7(a) of the plaint as earlier decreed.

The date of the Ruling of the superior court allowing the amendment is not indicated in the typed ruling but it is clear that a second decree “GIVEN” on 7<sup>th</sup> March, 2003 was issued. The applicant intends to include in the supplementary record, the application for amendment, supporting affidavit, grounds of opposition, the ruling and the second decree.

The application is opposed by the Obed Guantai on the ground that documents sought to be added include pleadings and a decree which are primary documents and which cannot be introduced by a supplementary record. Mr. Ariithi, learned counsel for the second respondent, in particular contended, that, the notice of motion, supporting affidavit and grounds of opposition are pleadings which should have

been included in the original record under **Rule 85 (1)**; that the ruling of Mulwa, J is a primary document under **rule 85 (1) (g)** and lastly, that, the decree issued on 7<sup>th</sup> March, 2003 is a primary document under **rule 85 (1) (h)**.

I have already observed that the purpose of the application is to include in the supplementary record of appeal the post judgment proceedings and subsequent ruling of the superior court relating to the correction of errors in the judgment of the superior court. The applicant has already lodged an appeal against the substantive judgment of the superior court in its appellate jurisdiction delivered on 1<sup>st</sup> August, 2002. By **Rule 85 (2)** the appellant is required to include in the record of appeal documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in **Rule 85 (1)** and in addition, inter alia, the memorandum of appeal, the record of proceedings, the judgment or order appealed from the decree or order and the notice of appeal. The appellant has apparently complied with that **Rule 85(2)**. Since the appeal relates to the judgment of the superior court in its appellate jurisdiction, as opposed to an appeal from its original jurisdiction, it is with respect, erroneous to invoke **Rule 85 (1)** and equate the post judgment notice of motion for correction of errors in the judgment, the accompanying affidavit, the grounds of opposition, the replying affidavit as pleadings or even to equate the ruling of the superior court allowing the correction of errors to a decree. Moreover, the appeal already filed is not against the ruling or order allowing the motion for the correction of errors under the Slip Rule. I would therefore respectfully agree with Mr. Kariuki, learned counsel for the applicant that the documents relating to the post judgment proceedings of the superior court in its appellate jurisdiction do not fall under the ambit of **Rule 85** unless the decision therefrom is itself the subject matter of the appeal.

Nonetheless, the court in my view has inherent jurisdiction to allow the documents to be included in a supplementary record of appeal if they are required for proper determination of the appeal.

I have no doubt that those proceedings, particularly, the amended decree which ensued, although not indicated as an amended decree, are necessary for the proper determination of the appeal. The second respondent Obed Guantai should have included them in a supplementary record under **Rule 89 (1)** but he failed to do so. In the circumstances, I allow the application dated 5<sup>th</sup> March, 2005 and filed on 6<sup>th</sup> May, 2005 with costs to the appellant to be paid by second respondent Obed Guantai.

The supplementary record filed on 6<sup>th</sup> May, 2005 is deemed as properly filed.

Dated and delivered at Nyeri this 16<sup>th</sup> day of May, 2007.

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR.**