



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.APPEAL NO.1 OF 2017

MATHU NGANGA.....APPELLANT/APPLICANT

-VERSUS-

JANE WACUKA NGANGA.....RESPONDENT

RULING

The matter for determination is the ***Appellant's Notice of Motion*** dated ***28th March 2017***, which is premised under Order 10, Rule 11 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of law.

The Applicant/Appellant has sought for the following orders:-

- 1) That Francis Nganga Mathu be granted leave to substitute the Appellant/Applicant herein-Mathu Nganga, as semi-deafness has taken toll on the Applicant.***
- 2) That a temporary injunction order be granted restraining the Respondent, her servants or agents in any dealings upon the suit premises LR. No.Githunguri/Gathangari 3718, until this Appeal is heard and determined inter-parties.***
- 3) That both the District Surveyor, Kiambu and Land Registrar, Kiambu be restrained from any form of engagement upon the suit premises LR.No.Githunguri/Gathangari 3718, pending the final determination of the Appeal.***
- 4) That costs of this suit be provided for.***

The application is premised upon the ***affidavit*** of the ***Appellant*** herein ***Mathu Nganga***, who has averred that ***Francis Nganga Mathu***, is his paternal Uncle and is conversant with the case herein and he therefore qualifies to be his mouthpiece as the Appellant's hearing ability is failing. It was his averment that the matter has been ***determined twice*** at the ***Subordinate Court at Kiambu*** in favour of the Respondent. He contended that he filed ***Kiambu CMCC No.5 of 1994*** which was decided in favour of the Respondent and due to the said decision, he has suffered woes and he thus seeks for the instant orders.

The application is ***opposed*** by the Respondent, ***Jane Wacuka Nganga*** who swore a ***Replying Affidavit*** dated ***24th May 2017***, and averred that the Applicant has not produced any medical evidence to proof that he has hearing problem and not attached any ***Power of Attorney*** for the said ***Francis Nganga Mathu***. She also alleged that the instant application is ***fatally defective*** and ***an abuse of the court's process***. It

was her allegation that the Memorandum of Appeal was filed out of time since the **appealed Judgment** was delivered on **25th May 1995**, and the **Ruling** on **25th January 2016**. The Appellant/Applicant did not obtain an order extending time to file the Appeal out of time. She averred that the Applicant subdivided the suit land contrary to the Order of the Court with intention of disinheriting her. The Respondent therefore urged the Court to disallow the instant application.

The said **Notice of Motion** was **canvassed** by way of **Written Submissions** which the Court has carefully considered. The Court has also considered the annexures thereto and the Court makes the following findings;

There is no doubt that the **Appellant** herein **filed CMCC No.5 of 1994**, in which the Court entered **Judgement** on **22nd November 1995**, in which the Court directed that the confirmed **Grant** issued on **10th July 1995**, be **amended** to the effect that the deceased estate (**Mathu Nganga**), particularly land parcel **No.Githunguri/Gathangari/232**, be **registered** in the names **of Francis Nganga Mathu, Mathu Nganga, Amos Kariuki Mathu, Mathu Nganga Mathu and Jane Wacuka (her husband's share) all in equal shares.** There is no doubt that the said suit was filed by the Appellant herein and after the said Judgement, there was no appeal lodged.

There is no doubt that on **25th January 2016**, the Defendant/Respondent filed an application seeking for various orders among them that the **District Surveyor, Kiambu** be ordered to **subdivide** land parcel **No.Githunguri/**

Gathangari 3718 into **two equal** portions. It is not clear what is the fate or outcome of the said application. However, the Court has noted that the **Lower Court** vide a **Ruling** dated **7th March 2016**, **discharged orders** which were allegedly issued on **14th March 2016**. However, that is not possible because the **Ruling** is dated **7th March 2016**. However, the Magistrate noted that there was a **Judgement** dated **22nd November 1995**, on record and which had not been appealed against. The said Judgement is therefore in force.

After the said Ruling, the Appellant filed the instant **Appeal** and **Notice of Motion**. It is clear that the Judgement being appealed against was delivered on **22nd November 1995** which is more than **20 years ago**. There was **no Appeal filed** within the **stipulated period** of **30 days** from the date of Decree or Order that was being appealed against. Section 79G of the Civil Procedure Act provides as follows:

“Every Appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the Decree or Order appealed against”

The proviso to the said Section provides that:-

“....an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time”.

The Appellant herein did not file an application in Court seeking for his appeal to be admitted out of time. Therefore his **Memorandum of Appeal** and **Petition of Appeal** are **fatally defective** and therefore **incompetent**.

Having found that the Appellant's alleged **appeal** is **defective** and **incompetent**, then the Court finds that no interlocutory application can attach to it.

The Applicant has brought his application under Order 10 Rule 11 which

provides that the Court may set aside or vary such Judgement and any consequential decree or order upon such terms as are just. However, this provision should be read together with the whole of Order 10 which provides for consequences of non-appearance and default of Defence.

However, in the Judgement or Decree referred to by the Applicant, it was a Judgement issued after matter had been heard interparties. If the Appellant/Applicant was dissatisfied, then he ought to have appealed against the said Judgement. He did not do so and he has not applied to file his appeal out of time as provided by proviso to Section 79G of the Civil Procedure Act. Therefore, the ***Applicant's application*** dated ***28th March 2017***, is ***incompetent***.

The Applicant has also sought for an order that one ***Francis Nganga Mathu*** be allowed to appear for the Appellant and be ***substituted*** as the Appellant herein. The Applicant alleges that his hearing ability is failing and thus the instant application. Applicant did not attach any medical documents to that effect in his application. I have however seen some medical reports attached to the Written Submissions by the Appellant. The said reports do not show that Applicant has impaired hearing ability.

Order 9 Rule 2 provides that a recognized agent may appear for a party but;

“subject to approval by the Court in any particular suit, persons holding

Power of Attorney authorizing them to make such appearance and applications and do such acts on behalf of parties”.

Though the Applicant wishes to be substituted with ***Francis Nganga Mathu***, the said ***Francis Nganga Mathu*** does ***not*** have ***Powers of Attorney*** authorizing him to appear for the Appellant/Applicant. Therefore this Court cannot allow the said prayer as it is contrary to the rule of procedure.

Further even if the application is premised under Sections 1A, 1B and 3A of the Civil Procedure Act which deals with the overriding objective of the Act and the inherent power of the Court to make such orders that are necessary for ensuring that end of justice is met and prevention of abuse of the court process, the Court finds that the circumstances of this matter would not warrant issuance of such orders. The overriding objective of the Civil Procedure Act as provided by Sections 1A and 1B is to ensure that there is expeditious disposal of the matters before Court. By filing an appeal ***after 20 years*** is not one way of assisting the Court in meeting the objective of the Act as provided by Sections 1A and 1B. Further, the Court cannot exercise its discretion herein to allow the instant application because the ***application*** in itself, is ***an abuse of the Court process*** which Section 3A abhors.

Having now carefully considered the instant ***Notice of Motion*** dated ***28th March 2017***, the Court finds it ***not merited*** and the said application is ***disallowed wholly*** with ***costs*** to the ***Respondent***.

Further the ***Memorandum of Appeal*** and ***Petition of Appeal*** were filed without leave of the Court to file out of time and therefore the said Appeal ***is incompetent*** and ***is consequently rejected summarily*** as is provided by Section 78B of the Civil Procedure Act.

It is so ordered.

Dated, signed and delivered at THIKA this 31st day of July, 2017.

L. GACHERU

JUDGE

31/7/2017

In the presence of

Mathu Nganga in person for Appellant/Applicant (present)

No appearance for Respondent(though date was taken in Court)

Timothy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the Appellant but absence of the Respondent.

L. GACHERU

JUDGE

31/7/2017