



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC APPEAL NO. 10 OF 2015

JOSPHAT MWANIKI MWANGI APPELLANT

VERSUS

ZACHARIAH MWANIKI MWANGI & ANO. RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Notice of Motion dated **13th April, 2015**. In that application the appellant seeks the following orders:-

- 1) That the application be certified urgent and heard *ex parte* in the first instance.
- 2) That a temporary order of stay of execution of the decree given in land award case No. 30 of 2010 Nyeri be issued of in the alternative a preservation order in respect of Nyeri/Waraza/36 pending the hearing and determination of the application.
- 3) That an order preserving the status quo regarding Nyeri/waraza/36 be granted pending the hearing and determination of the appeal herein and the appeal subsisting in Central Province Appeals Committee No.4 of 2010.
- 4) That an order or direction regarding the appellant's appeal in Central Province Appeals Committee No. 4 of 2010 filed under the Land Disputes Tribunals Act be issued.

2. The application is premised on the grounds on its face and supported by the affidavit of the applicant sworn on **13th April, 2015** in which the grounds thereon are reiterated.

3. In the affidavit sworn in support of the application, the appellant gives the genesis of the dispute between himself and the respondent. In this regard, the appellant points out that the respondent and another claimant obtained an award in their favour vide Kieni East Land Disputes Tribunal; that the award was adopted vide Nyeri Chief Magistrate's award case No. 30 of 2010; that dissatisfied with the award, he dutifully and procedurally filed an appeal against the award to the Central Appeal Committee being appeal No. 4 of 2010.

4. On the basis of the appeal, the appellant applied for and obtained orders for stay of execution of the decree pending the hearing and determination of the appeal. He explains that following repeal of the Land Disputes Tribunals Act, he was unable to prosecute the appeal as he has been waiting for directions on how to proceed. In the meantime, the respondent applied for lifting of the order of stay of execution on the basis that no appeal existed. The trial magistrate (TM) agreed and vacated the order of stay on, among other grounds that:-

- a) The appeal lapsed upon repeal of the Land Disputes Tribunals' Act, which established the Provincial Appeals Committees;
- b) That the parties had to move the court again appropriately and
- c) That there was no evidence of any pending appeal.

5. Aggrieved by the aforementioned determination of the TM the appellant preferred the current appeal on the grounds that:-

- a) The learned TM erred in law in arriving at the Conclusion that there was no pending appeal to warrant the existence of the orders of stay of execution.
- b) That the learned TM erred in finding that the repeal of the Land Disputes Tribunals' Act was tantamount to demise of the appellant's subsisting appeal in appeals Committee.
- c) That the learned TM erred in law in making a finding that the appellant needed to move the court again appropriately whereas the existing cases before various tribunals had been taken up by the Environment and land Court and
- d) That the learned TM erred in allowing the application which in effect was tantamount to dismissing the appellant's subsisting appeal when he had no jurisdiction to do so.

6. In the memorandum of appeal, the appellant prays that the orders of stay subsisting to remain in force pending the hearing and determination of the appeal pending in the defunct appeals committee.

7. The appellant contends that surmises that the appeal is dead merely because the Land Disputes Tribunals Act was repealed are legally unfounded since there is no provision in the repealing statute to that effect.

8. Pointing out that he is ready to pursue the appeal to its logical conclusion, the appellant contends that unless the orders sought are granted the appeal pending before the defunct Provincial Appeal's tribunal may be rendered nugatory.

9. The application is opposed through the replying affidavit of the respondent sworn on 9th May, 2015. In that affidavit, the respondent has, *inter alia*, deposed that the applicant was notified of his right of appeal by the Kieni East Lands Disputes Tribunal but failed to file the appeal within the time stipulated in law; that there being no appeal against the award filed within the time stipulated in law, the Nyeri Chief Magistrate's court in line with the law read and adopted the award of the tribunal as its judgment and proceeded to issue a decree in respect thereof.

10. Contending that the appellant was estopped by the judgment of the lower court from filing an appeal before the appeals committee and that he furnished no evidence that such an appeal existed, the respondent has maintained that the trial magistrate was right in lifting the orders of stay issued in favour of the appellant. In view of the foregoing, the respondent prays that the application be dismissed with costs to him.

Analysis and determination

11. The Application herein being for stay of execution pending appeal, the conditions that the court considers are found in **Order 42 Rule 6(1) and (2)** of the Civil Procedure Rules which provide as follows:-

“(1) No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order.....”

(2) No order for stay of execution shall be made under sub rule (1) unless-

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by applicant. ”

12. According to the documents relied on in this application, the award appealed from was adopted as an order of the court on 10th August, 2010. It appears that after the award had been adopted as an order of the Court, the appellant filed an appeal at the defunct Land Disputes Appeals Tribunal. Although it is not clear when the Appeal was filed, it is safe to assume that the appeal, if any, was filed after the award dated 14th June, 2010 was read. This is so because when the award was adopted as an order of court, the Appellant was in court and did not inform the court that he had appealed against the award.

13. Under the Repealed Land Disputes Tribunals Act, any person aggrieved by the decision of the Tribunal had a right to, within 30 days of the decision to appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated. In this regard see **Section 8(1)** of the Act which provides as follows:-

“(8) (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”

Sub-Section (2) thereof provides:-

“The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3...”

Subsection (4) of Section 3 referred to above provides:-

“(4) Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply.”

14. I have endeavored to reproduce the above provisions of the law because the issues raised in the appeal herein and the appeal allegedly filed in the defunct Land Disputes Appeals' Tribunal, including the current application will turn on the question as to whether there is a legally recognisable appeal on which the orders sought in the current application can hinge.

15. In determining whether there is a proper appeal against the award read in favour of the respondents, I reiterate my observation that from the evidence on record, it appears that the appeal if any, was filed after the award had been adopted as a judgment of the lower Court. The evidence on record shows that the award was adopted way after the appellant's right of appeal had expired (that is nearly two months after the decision of the tribunal was made). If it is true that an appeal was filed, which fact the appellant has not sufficiently proved, unless there is evidence that the same was filed within the time stipulated in **Section 8(1)** of the repealed Land Disputes Tribunal Act, it follows that the same is unsustainable. This is

so because, unlike the Civil Procedure Act, which provides for extension of time, the Land Disputes Tribunals Act does not have a provision for extension of time within which the Appeal is to be preferred.

16. For the orders sought to issue in favour of the Appellant, the appellant must satisfy this court that indeed there is a valid appeal pending before this court or any other court.

17. What the Appellant relied on in the Court below and now before this court is a letter dated 25th August, 2015. That letter only makes reference to filing of an appeal but does not indicate when the appeal was filed. The appellant and his advocate, through his supporting affidavit and the further affidavit of his advocate, has not indicated when he filed the appeal and/or whether he served it on the respondent as required of him under **Section 3(4)** of the repealed Land Disputes Tribunals Act.

18. That being the case, like the lower court, I entertain doubt whether there exists a legally sustainable appeal on which the orders sought can hinge. Be that as it may, noting that the fourth prayer is for direction on the alleged existing appeal, I direct the appellant to, within fourteen (14) days following the delivery of this ruling to forward the appeal allegedly pending before the defunct Provincial Appeals' Tribunal to this Court for further directions, failing which the application herein shall automatically stand dismissed with costs to the respondent.

19. In the meantime, the existing orders of stay are extended until then.

Dated, signed and delivered at Nyeri this 22nd day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Machira h/b for Mr. Wamahiu for the response

N/A for the appellant

Court assistant - Lydia