



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 246 OF 2011

JAMES KALUKO KYALO APPELLANT

- V E R S U S -

JULIUS MWANGANGI MULU RESPONDENT

RULING

[1] The Applicant filed this application claiming that the Respondent was granted an award in No. 53 of 1997 despite the pendency of Mombasa High Court Appeal No. 3 of 2000 relating to the same parties and same subject matter.

He avers that, that act was detrimental on his interest of the ownership and occupation of the land in question. Further that if the order of Hon. Wewa the Senior Resident Magistrate at Kaloleni were to be left undisturbed, he argues that he will suffer irreparable loss.

He argues that it is in the interests of justice that the execution of the order appealed from be stayed pending determination of the appeal that has been lodged in this Court that raising serious issues of law.

The respondent opposes this application. The Respondent argues that when Land Dispute no. 53 of 1997 between the parties, came for reading of the elders award before the Kaloleni Senior Resident Magistrate's Court, the applicant told the court that there was another case namely High Court Miscellaneous Civil Case no. 5 of 2000 over the same subject matter and therefore requested the court to stay reading the award pending the determination of that High Court case. The Court did infact stay the case aforesaid. The respondent states that he later discovered that HCCC.NO. 5 of 2000 had nothing to do with Kaloleni Land award No. 53 of 1987 but was seeking to quash Kaloleni Land Award No. 48 of 1999 between the applicant and one Katana Kituku Kachule. That land award no. 53 was not the subject matter of the appeal. The respondent argued that as it may, that judicial review in the High Court deals with the decision making process and not the merits of the decision. That the applicant seems to attack the merits of the decision and not the decision making process in his alleged appeal no. 5 of 2000.

The respondent argues that the said appeal no. 30 of 2000 is an exercise in futility as the same has been dealt within High Court Miscellaneous application no. 592 of 2003

[3] I have perused the Court file and I have noted the following

1. That High Court Miscellaneous application. 5 of 2000 the title
reads

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA DISTRICT REGISTRY

CIVIL APPLICATION NO. 6 OF 2000

IN THE MATTER OF: AN APPLICATION BY MR. THALI NGALA FOR AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE LAND DISPUTES TRIBUNALS ACT 1990 NO. 18 OF 1990

AND

IN THE MATTER OF: THE DISTRICT MAGISTRATES COURT, KALOLENI, CIVIL CASE NO. 48 OF 1999 - JAMES KALUKO KYALO -VS- KATANA KITUKU KACHECHE

REPUBLIC NORMINAL APPLICANT

VERSUS

THE DISTRICT MAGISTRATE'S COURT, KALOLENI RESPONDENT

AND

1. JAMES KALUKO KYALO

2. KATANA KITUKU KACHECHE INTERESTED PARTY

EX-PARTE

THALI NGALA HINZANO EX-PARTE APPLICANT

RULING

A perusal of the above quoted application, one will notice that

- a] The respondent herein is not a party to Miscellaneous Application no. 5 of 2000.
- b] That Land Award No. 53 of 1997 was not subject to any review in Miscellaneous Application No. 5 of 2000. The Award for which leave was given to file an application of certiorari and prohibition was Kaloleni Civil Case No. 48 of 1999 James Kaluko Kyalo -vs Katana Kituku Kacheche.
- c] That the respondent filed High Court Civil Appeal No. 3 of 2000 to quash the order of the Kaloleni Senior Resident Magistrate - The appeal has never been presented.
- d] The applicant also filed High Court Miscellaneous case NO. 592 of 2003 seeking how to quash the elders decision of Land Award No. 53 of 1997.
- e] That this Miscellaneous Case No. 53 of 1997 was dismissed by Sergon J on 24/8/2007. No Notice of Appeal or Appeal apparently was filed against the ruling of Sergon J.

It is therefore quite clear to me that there is no appeal pending in the High Court attacking the decision

in Land Award No. 53 of 1997. The Applicant unfortunately lives under the illusion that he has filed an appeal against the award in question while indeed he has not. His attempt to impeach award No. 53 of 1997 through High Court Miscellaneous Case No. 592 of 2003 was unsuccessful. The Respondent noting the dismissal of the application in HCCC. no. 592 of 2003 also conveniently abandoned his appeal no. 30 of 2000. In his words he says that doing so would have been an academic exercise with no legal benefit to him as his appeal had been overtaken by events.

The Notice of Motion dated 20th December 2011, seeking stay of the orders of the ruling delivered on 6th December 2011 pending the determination of the appeal in High Court Miscellaneous No. 5 of 2000 must be dismissed since I have already found that there is no appeal against the award in Land Case No. 53 of 1997.

The application is dismissed with costs to the Respondent.

Dated and delivered in open Court at Mombasa this 14th day of February, 2014.

S.N. MUKUNYA

JUDGE

14.2.2014

In the presence of:

Asige Advocate holding brief for Adhoch advocate for the Plaintiff.

Ogola Advocate holding brief for Wafula advocate for the defendant