

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 27 of 2010

HENRY MATAKWA OMUNYOKHO.....APPELLANT

V E R S U S

CHARLES PIUS ONDAKO.....RESPONDENT

R U L I N G

The appellant/applicant filed the application dated 3.7.2012 seeking stay of proceedings in Kakamega Misc. Award no. 80 of 2009 pending the determination of this application. The applicant is also seeking a review or variation of the judgment delivered on 7.6.2012. The applicant contends that there is new evidence emerging from the judgment of the court in that the misdirected itself while interpreting section 8(5) of the Land Disputes Act, section 3(2) and 4 of the Act and that the court misdirected itself when it found that the suit property BUTSOTSO/SHIKOTI/2310 belong to the applicant and respondent's father yet the evidence before the Western Provincial Appeal Tribunal is to the contrary. The application is supported by the applicant's affidavit which expounds on the grounds on the face of the application.

The respondent in his replying affidavit sworn on the 20.9.2012 opposes the application. He states that the appeal by the appellant was dismissed. The dispute between the parties was a boundary dispute and that the appellant has filed several suits in an attempt to defeat the decision of the court. The respondent has itemized nine different suits as part of the applicant's attempt to derail the decision of the court. The respondent further maintains that the applicant was declared a vexatious litigant and has been filing the suit through proxies.

The main issue is whether there is new evidence. The contentions by the applicant regarding misdirection of the court can be pursued through an appeal. The only issue worth mentioning is that the judgment of Justice Kimaru delivered on 7.6.2012 referred to section 4(b) of the Land Disputes Tribunal Act No.18 of 1990 which deals with the composition of the Land Disputes Tribunal when hearing disputes. I believe the appellant herein was referring to composition of the Appeals Tribunal which is provided for under section 8(5) of the Act whereby the composition shall consist of three members. The decision of the Western Provincial Tribunal was deliberated upon by five members and that does not make that decision to be bad in law. A panel of Tribunal can be constituted so long as the number is not even. There is no evidence that the constitution of the Tribunal led to a miscarriage of justice. This was a simple dispute whereby the land in dispute was divided into two. The appellant has his own plot while the respondent has his and the Tribunal was only dealing with a boundary dispute. The judgment of the court captured all the issues and upheld the decision of the two tribunals. The appellant is at liberty to pursue an appeal.

It is clear that there is nothing new and the application dated 3.7.2012 lacks merit and is hereby dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

SAID J. CHITEMBWE
J U D G E