



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC. CIVIL APPLICATION NO. 44 OF 2011

JACOB NYIKULI MUKARAMOJA APPLICANT

VERSUS

PAUL NDALUSIA SASALA RESPONDENT

RULING

Before me is an application brought by way of Chamber Summons dated 18th August, 2011. It was brought under Order 42 rule 22 and 52 of the Civil Procedure Rules 2010. The prayers sought are as follows -

1. That pending the hearing and determination of this application, there be stay of execution of the award of the Western Province Appeals Committee in Case No. 55 of 2006.
2. That this Honourable court be pleased to enlarge time in which to file an appeal against the decision of the Western Province Appeals Committee sitting in case No. 55 of 2006.
3. That costs of this application be provided for.

The application is supported by an affidavit sworn by the applicant on 18th August, 2011. The affidavit annexes a number of documents including a ruling by **Kimaru, J.** in Kakamega High Court Civil Appeal No. 77 of 2008 between the same parties. That ruling relates to land Ref. **S/Kabras/Chemuche/917**. The supporting affidavit in the present application actually refers to both the above parcel of land and parcel **No. S/Kabras/ Malava/917**.

The application was opposed by the respondent who filed a replying affidavit dated 4th December, 2012. It was deponed in the replying affidavit that both the Land Disputes Tribunal award and the Western Provincial Appeals Committee decision had already been adopted as judgments of the court. Therefore the application should be dismissed.

The applicant through counsel, Elungata & Company filed submissions in May 2013. It was emphasized that the delay in bringing this application was occasioned by the time it took to determine High court appeal No. 77 of 2008. It was also stated that the lower court failed to adopt the decisions of the

tribunal and the Appeals Committee.

The respondent through his advocates M/S Momanyi, Manyoni & Co. advocates also filed written submissions stating that the award of the Tribunal and the Western Provincial Appeals Committee had already been executed. Therefore there was nothing that could either be stayed or be subject of an appeal. In addition, the applicant had not shown that he had an arguable appeal.

I have considered the application, documents filed and submissions from both sides. Prayer 1 has been undertaken by events. It is a prayer for stay pending determination of the application. I will not deal with it.

Under the Land Disputes Tribunals Act Cap 203A, appeals lie to the High Court only from decisions of the Provincial Appeals Committee. This is provided under Section 8 (1) of the Act, which states -

“8 (1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within 30 days of the decision appeal to the appeals committee constituted to the province in which the land which is the subject matter of the dispute is situated.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High court on a point of law within 60 days from the date of the decision complained of. Provided that no appeal shall be admitted to hearing by the high court unless a judge of that court has satisfied that an issue of law (other than customary law) is involved.

(10) A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”

None of the parties has annexed herein the proceedings and decision of the subordinate court in adopting the tribunal's award, though Justice Kimaru on 23rd June 2011 had ordered that -

“The decision of the senior Resident Magistrate made on 4th September, 2008 dismissing the application in which the appellant (Paulo Ndalusia Sasala) had sought to adopt the award made by the Kabras Land Disputes Tribunal and which was confirmed by the Western Provincial Land Disputes land Committee is hereby set aside. The appellant shall be at liberty to appear before the same court so that the award may be adopted as judgment of the court as provided under Section 7 (2) of the land Dispute Act. The appellant shall have the costs of this appeal.”

From the facts and documents placed before me, it has not been disclosed that the above order was complied with by the Magistrate's court. My understanding is that once the subordinate court adopts the tribunal's decision, then there is no avenue for appeal to the High Court. In that event, the only avenue available to an aggrieved party is to invoke judicial proceedings procedure.

Since I have not been given any written evidence that the award was adopted, and in the interests of substantive justice as envisaged under **Article 159** of the Constitution of Kenya 2010, I will exercise this court's discretion to grant leave to appeal out of time, even though no draft petition of appeal has been filed. However, the applicant will have to demonstrate in that appeal that the law allows him to appeal in this particular case.

Consequently, I allow the application and grant the applicant 20 days within which to file an inappeal. In default, the right to appeal will lapse. The applicant will also pay the respondent's costs of this application.

It is so ordered.

Dated and delivered at Kakamega this 17th day of October, 2013

George Dulu

JUDGE