



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.27 OF 2010

HENRY MATAKWA

OMUNYOKHO.....APPELLANT

V E R S U S

CHARLES PIUS ONDAKO.....RESPONDENT

R U L I N G

- 1.** The Chamber Summons dated 23.8.2010 is premised on Order XL1 Rule 4 of the Civil Procedure Rules and the Appellant/Applicant seeks orders that the proceedings in Kakamega CMCC Award no. 80 of 2009 be stayed pending the hearing and determination of the Appeal.
- 2.** From the Affidavit in support of sworn on 23.8.2010, the Applicant depones that the subordinate court adopted the decision of the Lurambi Land Disputes Tribunal as its judgment and he is apprehensive that in the absence of an order of stay, the Respondent may proceed to exercise the decree to his prejudice and yet his Appeal has high chances of success and may otherwise be rendered nugatory.
- 3.** The Respondent filed grounds of opposition on 8.11.2010 and in submissions on his behalf, the answer to the Application is that no prejudice would be caused to the Applicant if the decree is executed because the Award was to the effect that the District Surveyor should “conduct and carry out a survey exercise on the two titles to establish where the original boundary was and put it backand ascertain the acreage of each.” Further, that the whole Appeal is a sham and should not be allowed to stand.
- 4.** To put matters into perspective, I note that on 14.10.2009, the Lurambi Land Disputes Tribunal rendered a Ruling in its case no. 119/2009 and the contents are as follows;

“RULING

The District Land Dispute Tribunal sitting in Lurambi Division and having listened to both parties and witnesses to this dispute and also having gone on site to see for itself what the position on ground is, has the following in its ruling:-

Since it is an unchallenged fact that the two parties to this dispute were given land by their late father, each of them has a right to own, manage and occupy the land given to him. This right of ownership should be honoured and respected by both.

That since both of them have title deeds each, of them should settle and occupy the land to which he owns a title deed.

It is saddening to note that the objector Henry Matakwa Munyokho has tampered with the common boundary that separated their two portions and has put the two pieces of land under his ownership and management leaving the claimant with only the space on which his houses stand, with no farming land. The claimant is not able to raise food for his family for the simple reasons (sic) that his brother Henry Matakwa Munyokho has cunningly and stubbornly rendered him landless.

The Tribunal on its site visiting (sic) on the disputed land gave an opportunity to both parties to show where their lands lay. The claimant took the tribunal panel around the land he claims to be his. The objector did not show the tribunal where the claimant's land is. This in itself proves that the portion shown to the tribunal by the claimant is truly his since the objector did not challenge him in any way by showing otherwise.

Since both titles Butsotso/Shikoti/7164 for Henry Matakwa Munyokho and Butsotso/Shikoti/7165 for Charles Pius Ondago do exist, but with their original boundary marks destroyed by the objector Henry Matakwa Munyokho, the tribunal rules and recommends that the District Lands Registrar and the District Land Surveyor conduct and carry out a survey exercise on the two titles to establish where the original boundary was and put it back in its original position, also to ascertain the acreage of each title as follows;

Butsotso/Shikoti/7164 comprising 2.31 ha.

Butsotso/Shikoti/7165 comprising 2.13 ha.

After this has been established, the objector to move his property to land title Butsotso/Shikoti/7164 and leave the claimant on Butsotso/Shikoti/7165.

The tribunal further reminds the objector of the claimant's rights to own property, right of protection to himself, his family and his property from any harassment, destruction, threats, intimidation and damage by him (Henry Matakwa) or his agents and warns him of dire consequences should he engage himself in these criminal acts.

This ruling is made and gives room for any dissatisfied party to it, to appeal to the Provincial Land Disputes Tribunal within a period of 30 days from the date of pronouncement.

Ruling made this 14th day of October 2009

Tribunal Panel

1. ***George . Nabwayo – signed - Chairman***
2. ***Erastus A. Etemesi - signed - Member***
3. ***Zadock B. Esokoni - signed - Member***
4. ***Noah M. Shilabile - signed - Member***
5. ***Florence Panyako - signed - Member***

Given under my hand - signed - Chairman

Date 14th October”

5. The present Appellant was dissatisfied and filed Appeal no.100/2009 before the Western Provincial Appeals Committee which dismissed the Appeal. That latter decision is the basis for the appeal before this court and I note that the Memorandum of Appeal dated 8.3.2010 is indeed premised on the decision delivered by the Provincial Appeals Committee on 7.1.2010. From the record before me I do not see any proceedings relating to Kakamega CMCC Award no. 80 of 2009 in which the decision of the Land Disputes Tribunal was being executed but I am certain that the Applicant has made out a case that the execution be stayed (pending hearing of the Appeal) for reasons, firstly, that the decision of the Tribunal and Provincial Appeals Committee, if effected would cause substantial loss to the Appellant who has a title deed to his land. Any attempt at interfering with registered land is always prejudicial to the registered owner.

6. Secondly, no prejudice would be caused to the Respondent if the Appeal which will be final as regards the dispute is heard and determined on the merits. He is a brother of the Applicant and shares a boundary with each occupying and using his land and have done so since registration of their parcels.

7. Lastly, the wider interests of justice would demand that the Application dated 23.8.2010 be granted as I hereby do. Costs will abide the Appeal.

8. Orders accordingly.

Delivered, dated and signed at Kakamega this 10th day of February 2011

ISAAC LENAOLA

J U D G E