



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL APPEAL NO. 36 OF 2009**

**LUCAS MBARU MUNGA**

**CHARO BAYA.....APPELLANTS**

**-VERSUS-**

**PANCRAS MBARU.....RESPONDENT**

**RULING**

**LUCAS MBARU MUNGA** and **CHARO BAYA**(the appellants) have filed this appeal against **PANCRAS MBARU RONDO**(Respondent) arising from a ruling and order of the Resident Magistrate Hon. P. Kiama – delivered on 23<sup>rd</sup> June 2009 in a Land Dispute case. That ruling was made pursuant to an application dated 14/4/09 made under Order XLI rule 4 and Order L rule 1, seeking stay of execution of the Judgement pending hearing of appeal which was pending before the Provincial Land Appeals Committee.

The application was opposed on grounds that the court had no jurisdiction to stay the award of the Tribunal under the Land Disputes Act which limited the court`s powers to making entry of the Tribunal`s decision as a judgement of the Court. It was argued that appellant`s remedy to apply for stay pending appeal to the Lands Appeals Committee lay with the High Court. The Learned Magistrate made a finding that the court had Jurisdiction to entertain the application for stay of execution pending appeal because the award by the tribunal was adopted as Judgement of the court on 4/11/08 – thereby causing it to cease being a decision of the Tribunal and that there was nothing in the Land Disputes Tribunal Act specifying that such an application ought to be filed in the High Court. He then stated;-

***“The court will be guided by the conditions set out under Order 41 rule 4 Civil Procedure Rules section 3A Civil Procedure Act also gives this Court discretion to entertain their application.....I see no prejudice will be suffered by the Plaintiff`s if a stay is granted..... Further this is not a monetary Judgement so I see no need to impose conditions on the applicant other than that the appeal should be prosecuted expeditiously”***

The appellants are aggrieved by these findings on grounds that;-

1. That learned Magistrate erred in law and fact in finding that;-

(a) Order XLI is applicable to appeals to and/or pending before the Provincial Appeal Committee, established under the Land Disputes Tribunals Act of 1990.

(b) The Trial Magistrate failed to note that the only provision of the Civil Procedure Rules available to him as an executing court are Order XXI Rule 22 and not Order XLI Rule 4.

(c) The learned Magistrate erred by basing his decision on materials/facts which were not placed before him.

(d) The learned Magistrate inherent misapprehended the provisions of section 3A of the Civil Procedure Act.

(e) The learned Magistrate erred in holding that by virtue of the Land Dispute Tribunals Act of 1990, customary laws now apply to Land under the Registered Land Act (RLA) without appreciating the fact that the Act only recognizes customary law which is referred to as "a recognized customary law" which must be interpreted in the light of section 3 (2) of the Judicature Act.

(f) In granting the order of stay to the Respondent, the learned Magistrate in essence sanctioned the unlawful act of trespass by the Respondent and his family, upon appellant's land.

(g) The requirements of Order XLI Rule 4 Civil Procedure Rules were never satisfied.

On account of all these, appellants urged this court to allow the appeal by setting aside the ruling and award costs of the appeal to the appellants and costs of the application in the Land Disputes Case No. 36 of 2008.

The appeal was disposed of, by way of written submissions by the respective counsel for the parties. The appellant's counsel Mr Odongo submitted that Order XLI rule 4 CPR only governs appeal to the High Court but not appeal, to the Provincial Appeals Committee or any other statutory tribunal. This is because the wording of the provision is,

***"XLI (1) – Every appeal to the High Court shall be in the of a memorandum of appeal signed in the same manner as a pleading"***

Further that the Civil Procedure Rule is only applicable to proceedings before the High court and subject to the Magistrate's Court Act, when applying to matters in the subordinate courts because section 1 (2) of the Civil Procedure Rules reads;-

***"This Act appears to proceedings on the High Court and subject to the Magistrate's Court Act, to proceedings in subordinate courts"***

It is argued that the Land Disputes Tribunal Act is both a substantive and procedural statute and section 8 of the same provides the procedure of handling the appeals before the Provincial Appeals Committee, so where an Act of Parliament provides for a procedure of conducting a particular matter, then that is the

procedure to be followed except where it expressly permits application of Civil Procedure Rule, so the remedy under Order XLI was not available to the Respondent.

In response, Mr Kenga on behalf of the Respondent submits that under section 7 (2) of the Land Disputes Tribunal Act, the court is empowered to adopt the decision of the Tribunal as judgement of the court and subsequently issue a decree which is enforceable like any other decree, and so order XLI Rule 4 applies in the present case. It is his contention that the Provincial Land Appeals Committee does not have powers to issue stay orders nor does the Land Disputes Tribunal have those powers. It is Mr Kenga`s contention that the Land Disputes Tribunal Act, having empowered the court to issue decree upon adoption of the Tribunal`s decision as judgement of the court, does provide the manner in which execution should take place and that is the same manner in which other decrees are executed – so there can be nothing wrong with invoking the provisions of order XLI rule 4 of the Civil Procedure Rule, and in any event, the case lies within provisions of Order L rule 12 of the Civil Procedure Rule, as such error or omission is not fatal and/or incurable, and that Order VI rule 12 fortifies this position section 7 (2) of the Land Disputes Tribunal Act provides as follows;-

***“The court shall enter judgement in accordance with the decision of the tribunal and upon judgement being entered; a decree shall issue and shall be enforceable in the manner provided under the Civil Procedure Act”***

On the other hand, Order L rule 12 provides;-

***“Every order, rule or either statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule” This is fortified by order VI rule 12 which states;-***

***“No technical objection may be raised to any pleading on the ground of any want of form”***

My understanding of section 7 (2) is this, the decision of the Land Disputes Tribunal, once adopted becomes a judgement of the court and is enforceable in the same manner that any other decree issued by the court is ordinarily realized. Which in effect translates to this that whereas the application of the Civil Procedure Act is shut out at the initial stages when the matter is being heard by the tribunal, the minute a decision is made and adopted by the Magistrate court, then it is a longer foreign – it is infact the adopted child of the court with all the rights for realization like any other “product” of the court.

As for Order L rule 12 and order VI rule 12 – my view is that the two provisions address the nature or form of the application whereas Mr Odongo`s concern is not the form, but the process. The substance is not the issue – he is not saying that stay of execution should not be granted, or that the manner in which the application was drafted is faulty – what he is saying is that if respondents wished to obtain stay orders, then they ought to have used procedures under the Land Disputes Act, and not the Civil Procedure Rules which seem to focus on matter pending before the courts and not tribunals or other statutory bodies. My finding on this limb is twofold;-

**a) Section 7 (2) is intended to cloth the decision of the Tribunal with a cloak known as Judgment. This then now gives it the status of enforceability as a decree of the court using provisions of the Civil Procedure Act.**

**b) The Magistrate`s Court only adopts the finding of the tribunal, the court has not been clothed with the power to reject the decision even if it appears wrong or irrational.**

If the Magistrate`s court were to order for the stay of the decision by the tribunal, then the effect of the adoption as judgment of the court would be compromised and I doubt that any single decision by the tribunal would ever progress – infact what would then happen is that there would be stagnation and delay of Justice. What is available to the respondents to file for orders of stay either before the High court or the Provincial Land Appeals Committee.

Section 159 (3) d of the Constitution indeed provides that justice shall be administered without undue regard to procedural technicalities. That does not in any way mean that where there are clear legal provisions then those should be ignored otherwise it would be useless to have the legislature passing laws. I think even Order L Rule 12 cannot be imported in this situation, as it does not suggest that such application can be presented before any court – that provision is very clear – it is with regard to citing of a legal provision under which an application is being made, and I think it contemplates a situation where for instance one cites the wrong provision in the title of the application or fails to cite the provision at all, yet the body of the application contains appropriate prayers, then such application shall not be refused merely on that ground. It does not mean that a party can elect to go before any forum and obtain orders sought even where such forum is not clothed with the powers to grant the orders sought. I am persuaded that section 7 which empowers the Magistrate`s Court to adopt the decision of the Tribunal as the judgment, permits the application of Cap 21 in such matters only in the execution process.

I think all the other issues raised by Mr Odongo find their landing ground on what I have observed above – which is to the effect that Magistrate`s Court is only clothed with power under the Land District Tribunal Act to adopt the decision of the Tribunal and nothing more. Where parties wish for the orders of the tribunal to be stayed, then the same cannot be entertained in the Magistrate`s Court. My finding is that the application is merited and is allowed with costs to the Appellant.

**Delivered and dated this 8th day of July 2011**

**H A OMONDI  
JUDGE**

Mr Jumbali holding brief for Odongo for Applicant  
No appearance for Respondent