REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Suit 44 of 2008

PAUL OMASO :: PLAINTIFF

V E R S U S

MICHAEL ATSULU SHISOKA :::::::::::::::::::::::::::: DEFENDANT

R U L I N G

The plaintiff seeks an order for the stay of execution in KAKAMEGA MISC. AWARD NO.14/1998, until this suit is heard and determined.

It is his contention that the judgement which that court entered, and which was thereafter extracted in the form of the decree whose execution he wishes to have stayed, arose from an award made by a tribunal which had no jurisdiction. The award was made by the Butere Land Disputes Tribunal in Case No.15 of 1996.

The said tribunal ordered that the plaintiff be evicted from L. R. NO. MARAMA/LUNZA/285 *"(the suit land)"*, and that the land be given to the defendant herein. In effect, the tribunal is understood to have cancelled the title of the plaintiff to the suit land. It is for that reason that the plaintiff now submits that the tribunal did not have jurisdiction to make such orders.

In order to ensure that he was not evicted from the suit land before this case was determined, the plaintiff asked for a stay of execution of the decree in the case before the magistrate's court. He says that if no stay was granted, the suit herein would become no more than an academic exercise, if he had been evicted.

In answer to the application, the defendant says that the issue of the jurisdiction of the tribunal was already canvassed before the magistrate's court.

It is common ground that when the award from the Butere Land Disputes Tribunal was filed before the Chief Magistrate's Court, Kakamega, the plaintiff herein raised an objection to the adoption thereof, as a judgement of the court. It is also common ground that the learned Resident Magistrate, Mrs. R. A. Oganyo, held that the issue regarding the tribunal's alleged lack of jurisdiction could only be raised in the High Court. In her considered view, the issue could have been raised either by way of an appeal or by way of review.

In effect, the learned magistrate did not adjudicate on the said issue. Therefore, the doctrine of re judicata cannot have arisen from her decision.

That notwithstanding, the defendant asserts that the plaintiff had been indolent for so long that he did not deserve the discretionary remedy of stay. The defendant submitted that the plaintiff had soiled his hands by failing to exercise his rights within the period of time allowed by law.

In the defendant's understanding, the plaintiff could have lodged an appeal against the tribunal's decision, if he was aggrieved. Such an Appeal could have been filed before the Provincial Land Disputes Appeals Committee for Western Province. Therefore, because no such appeal was filed, the defendant submitted that the plaintiff must be taken to have been satisfied by the tribunal's decision.

The only other lawful avenue available to the plaintiff in challenging the tribunal's award would have been through Judicial Review. However, such a step would have had to be taken within a period of six (6) months from the date of the award, so as to comply with section 8 of the Law Reform Act.

In reply to those submissions, the plaintiff's advocate, Mr. Anziya, said that even though those avenues were available to the plaintiff, that could not deprive the plaintiff of his right to bring this suit. In his view, those rights were only in addition to the plaintiff's right to file a declaratory suit, as he has done herein.

The plaintiff submitted that pursuant to Order 2 rule 7 of the Civil Procedure Rules, the High Court is empowered to make declaratory judgements. Furthermore, it is his understanding that pursuant to section 7 of the Civil Procedure Act, the competence of any court shall be determined irrespective of any appeal, from a decision of that court.

Therefore, the plaintiff argued that this suit was properly before the court, and was not res judicata because all other applications which had been previously determined, arose from the decision which the tribunal made without jurisdiction.

Upon perusing the annexetures to the defendant's replying affidavit, it became evident to me that the plaintiff did exercise his right of appeal. He did so by filing "Appeal Case No.82/98", before the Appeals Committee, Western Province.

After the Appeals' Committee had heard the appeal, it gave its decision on 7th September 1999; and it dismissed the appeal.

It is interesting to note that the plaintiff herein did not take up the issue of the tribunal's alleged lack of jurisdiction, when he presented his appeal. He only contended that the tribunal's award was only signed by one member of the tribunal, who was a friend of the defendant's family.

The appeals Committee got the other members of the Tribunal to sign the award, and it was then said to have been validated.

As the plaintiff was aggrieved with the decision of the appeals' Committee, he filed an appeal before the High Court at Kakamega. The said appeal was No.62 of 2000. The said appeal was struck out with costs. The plaintiff then filed a Notice of Motion seeking to stay execution of the order striking out the appeal.

After hearing that application, Hon. G. B. M. Kariuki J. observed that the plaintiff's application was only seeking to stop the defendant herein from recovering his costs of the appeal that had been struck out. As the appeal was one against the decision made by Hon. Mrs. R. A. Oganyo R.M., when she overruled the plaintiff's objection, the learned judge held that an order for stay of execution was not in the interest of justice, as it could not stop the execution of the decree.

In the result, the learned judge dismissed the application because the plaintiff had failed to show sufficient cause as to why stay should have been granted. That order was made on 3rd November 2005.

As the appeal which was struck out, arose from the ruling of Hon. Mrs. R. A. Oganyo R.M., I presume

that it must have been in relation to the issues of the tribunal's jurisdiction or lack thereof.

At any rate, the plaintiff has not demonstrated to me that it was on any other issue other than that of the tribunal's jurisdiction.

And if that appeal did not raise the issue of the tribunal's jurisdiction, the plaintiff could still have needed to satisfy me that the said issue could not have been raised in that appeal. I say so because if the issue could have been raised in the said appeal, but was not, the plaintiff herein may nonetheless be barred from raising it afresh. I say so because there is evidence on record, that the plaintiff herein did file PAUL OMASO Vs MICHAEL ATSULU SHISOKA, CIVIL APPLICATION NO. NAI. 261 OF 2006. The evidence is in the form of a letter from Mr. T. S. Luvuga, the learned Deputy Registrar of the Court of Appeal, to the Deputy Registrar of that court, at Kisumu.

In that letter, Mr. Luvuga made reference to Civil Appeal No.55/06, which the plaintiff herein had filed against the defendant, at Kisumu. Apparently, there was an application within that appeal, which was sent to Nairobi, for hearing.

Regrettably, neither the plaintiff nor the defendant provided this court with any more information on the appeal or on the application before the Court of Appeal. However, it must be emphasized that it was the plaintiff's responsibility to make a full disclosure.

In the circumstances, I am unable to ascertain the relief sought by the plaintiff herein, in the matters which he filed before the Court of Appeal. But I can presume, as I hereby do, that the issues must have arisen from the decision of the Butere Land Disputes Tribunal, which was registered as a judgement of the court in Kakamega Misc. application No.14 of 1998.

If that be the case, the plaintiff must be told that he cannot pursue an issue or issues upto the highest court in the land, then thereafter re-open the same issue by bringing a new case. But if the issue was not raised by the plaintiff in his previous applications or appeals, the plaintiff would still need to satisfy this court as to why he did not do so. At the moment, the plaintiff has not discharged that onus.

I do agree with Mr. Amasakha, advocate for the defendant, that the issues sought to be raised by the plaintiff are pertinent. It is a very serious issue of law. But whereas the plaintiff appears to have been very keen to have it determined conclusively, it would appear, on a prima facie basis, that the plaintiff went about the process in such manner as has not enabled the court to determine the said issue substantively. He must bear the responsibility for having done so.

Although it may be painful to the plaintiff, I find no reason, in law, to justify the grant of an order staying execution of the decree in Kakamega Misc. No. 14 of 1998. The application dated 8th July 2008 is therefore dismissed with costs.

Dated, Signed and Delivered and Kakamega, this 22nd day of January 2009

FRED A. OCHIENG

J U D G E