



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 23 of 2009

BENJAMIN AMUSUZU 1ST APPELLANT

WILSON M. AMUSUZU 2ND APPELLANT

VRS

PHILIP N. AMUSUZU RESPONDENT

RULING

The application before me is for stay of execution, and also for stay of further proceedings until the appeal arising from Hamisi RM Misc. Application No. 4/2009 is heard and determined.

The Resident Magistrate's Court at Hamisi delivered its decision on 26th February, 2009. By the said decision, the court adopted as its judgement, the award of the Tiriki East Land Disputes Tribunal, in the Tribunal Case No. 5 of 2008.

The applicants had opposed the application which sought to have the Tribunal's award adopted as a judgement of the court. However, after giving due consideration to the application, the learned Magistrate ordered that the award be adopted.

Following the adoption of the award as a judgement of the court, the applicants lodged an appeal to the High Court. The said appeal is Civil Appeal No. 23 of 2009.

Having now filed an appeal, the applicants wish to obtain an order to stay execution of the judgement against which he is appealing. They say that if the execution is not stayed they will suffer substantial loss.

It is the applicant's submission that their appeal is arguable because the Tribunal lacked jurisdiction to entertain the matter which was before it. Their argument is that the Tribunal could only have derived its jurisdiction from an order of the court, through which the dispute was referred to the tribunal for hearing and determination.

In this case, the dispute was heard and determined by the tribunal before any case had been filed in court. In other words, there was no court order, through which the tribunal could have derived its jurisdiction.

The applicants submitted that the entire process of the proceedings was therefore flawed. To support that submission, the applicants relied upon the authority of KHAYADI V AGANDA [1988] KLR 204.

In that case, the court of Appeal expressed itself thus, at page 208;

“If the reference was under the Magistrate’s Court Act No. 10 then the suit should have been filed in the court first and then the Magistrate would refer the dispute to the panel of elders under the provisions of the Act.”

Gachuhi J.A went on to state as follows at page 209;

“But as the reference was referred to the elders before coming to court, and without the court order, the panel of elders had no jurisdiction to hear and determine the matter.”

Although there is no dispute about the accuracy of the pronouncements by the Court of Appeal, it must be emphasized that the statute which they were making reference to, is no longer in force. The Magistrate’s Courts Act was amended by the Magistrates’ Jurisdiction (Amendment) Act No. 14 of 1981.

Subsequently, the Magistrates’ Jurisdiction (Amendment) Act was repealed by the Land Disputes Tribunals Act, No. 18 of 1990. Therefore, decisions which interpreted the provisions of the repealed statute have no application to the Land Disputes Tribunals Act.

Does that mean that the applicants appeal has no chances of success, as submitted by the respondent?

Is the appeal incompetent because there is no provision for appealing to the High Court against the adoption, by the Magistrate’s Court, of an award by the Land Disputes Tribunal, as a judgement of the court?

Would the applicant have been obliged to first seek leave of the High Court before lodging a valid appeal against the adoption of the Tribunal’s award?

The respondent’s position is that there was no valid appeal. His further position is that even if the appeal herein was valid, it could not succeed because the 1st applicant had already transferred the suit land to the 2nd applicant. Therefore, the 1st applicant has no land over which he can litigate.

As regards the competence of the appeal, I hold the view that the issue can only be determined either after the appeal is argued substantively, or if the respondent were to bring an application to have it struck out. For now, the grounds upon which the respondent has based his submissions of the alleged incompetence of the appeal, are matters which ought to be raised as a sword to attack the appeal, rather than as a shield to oppose the orders for stay of execution.

A perusal of the award of the Tribunal reveals that the suit land was awarded to the claimant, Philip Ngaira Amusuzu. The said claimant is the son to Benjamin Amusuzu Mwingisi. The claimant is also a brother to Wilson Mwingisi Amusuzu.

It was the claimant’s case that their father had given all the land to Wilson, thus depriving the claimant of his inheritance.

Interestingly, the claim for inheritance was being made whilst the claimant’s father was still alive. In other words, the claimant was insisting that his father should give him his share of land, as a matter of right.

I find that scenario interesting because, ordinarily, a parent who is still alive cannot be compelled by his children to divide his land amongst them. He may allow them to work on specified parts of the land, with a view to growing food crops. He would even show the sons where they can build their respective houses. But the land would normally remain in his name, unless he chooses to transfer portions thereof to his children.

Upon the death of the parent, the children would, as a matter of law, become entitled to lay claim to the

land, by way of inheritance.

But, when the parent is still alive, his children cannot inherit his property. It is in that context that I find that the children cannot use legal compulsion to obtain their respective shares of their parent's property, during the lifetime of the parents. However, I do nonetheless appreciate the fact that there are circumstances which may be so unique, that they call for special considerations. For instance, when a father was selling – off all the family land, without due regard to the future welfare of the family, there may be need for the family to intervene, with a view to safeguarding the property.

In this case, it would appear that the intervention by the claimant went beyond the preservation of the property. He actually sought, and was granted as a share of the family land.

In my considered opinion, if the decision of the Tribunal is given effect, the 1st applicant herein would be left without any property. The applicants are challenging, inter alia, the jurisdiction of the Tribunal, to issue orders which would take land from them, and compel them to transfer it to the claimant. Whilst the appeal is still pending, I find and hold that it is in the interest of justice to preserve the subject-matter of the appeal.

I therefore order that there shall issue forthwith a stay of execution in Misc. No. 4 of 2009, until the appeal arising therefrom is heard and determined. The costs of the application shall abide the outcome of the appeal. If the appeal succeeds, the applicants herein shall also be awarded the costs of this application. But if the appeal should fail, the costs of this application shall be awarded to the respondent herein.

Finally, it is ordered that the applicants will not transfer, dispose of, sell or in any other manner whatsoever encumber the title of L.R No. TIRIKI/ SEREM/1041 until the appeal is heard and determined. This order has been made at the instance of the court, so as to ensure that the subject matter of the pending appeal is preserved.

Dated, signed and delivered at Kakamega this 30th day of April, 2009.

FRED A. OCHIENG'

JUDGE