REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 49 of 2002

JOSEPH A. OTERA & 2 OTHERS …..……. APPELLANTS

VRS

BENSON A. AKOYO ….……...……. RESPONDENT

JUDGEMENT

The appellants have brought this appeal to challenge the ruling which was delivered on 23rd April, 2002. According to the appellant, the said ruling was made in respect of the application dated 15th January, 2002.

However, the respondent contends that there is no ruling dated 23rd April, 2002. If I understood the respondent correctly, he is not saying that the trial court did not give a ruling on that date; his position is that the record of appeal does not contain a copy of the ruling dated 23rd April, 2002.

As far as the respondent was concerned, a ruling is a primary document, which must therefore be incorporated into the record of appeal. Therefore, if it was not included in the record of appeal, the respondent submits that that renders the appeal incompetent.

The respondent invoked the provisions of Order 41 rule 8B (4) of the Civil Procedure rules, as the foundation of his submission. That rule provides as follows;

" ***Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say –***

(a) The memorandum of appeal;

(b) The pleadings;

(c) The notes of the Trial magistrate made of the hearing;

(d) The transcript of any official shorthand or palantypist notes made at the hearing;

(e) All affidavits, maps and other documents whatsoever put in evidence before the Magistrate;

(f) The judgement,order or decree appealed from, and where appropriate, the order(if any) giving leave to appeal;

(g) Where the appeal is from a decision of a subordinate court given in the exercise of its appellate jurisdiction, the documents corresponding to those specified in paragraphs (a) to (f) inclusive so far as they relate to the appeal to such subordinate court:

Provided that –

i. A translation into English shall be provided of any document not in that language;

ii. The Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

I have deemed it necessary to set out the rule in extensio because it is clear therefrom that there is no specific requirement that the RULING being appealed against be incorporated into the record of appeal. However, I must hasten to say, that in my understanding the word “Judgement”, as used in rule 8B (4) (f) must be deemed to encompass a “ruling”. I say so because, in my considered view, if the decision which is being challenged by an appellant is not incorporated into the record of appeal, the appellate court would be unable to appreciate the submissions made in respect to the decision being challenged.

However, it is equally true that that rule does not bestow any obligation upon the appellant. The rule actually tells the Judge about what he is required to ensure that is included into the record of appeal. If the said documents or any of them is not included in the record of appeal, the Judge may bar the appeal from proceeding to hearing.

In effect, the Judge would be saying that it was premature to have the appeal listed for hearing.

In this appeal, the ruling dated 23rd April, 2002 was not included in the record of appeal. The question that arises from that fact is whether or not that omission renders the appeal incompetent.

The answer to that question is to be found in Order 41 rule 8 B (4), which requires the Judge to be satisfied;

“***That the following documents are on the court record …”***

In other words, it is not mandatory that all the said documents must be in the record of appeal. It is sufficient if the said documents are on the court record.

Having perused the court file herein, I have verified that there is on record, a ruling dated 23rd April, 2002. In the event, I find and hold that the appeal is not incompetent.

Moving now onto the merits of the appeal, I note that the appellant submitted that there are currently on record, two contradictory orders, in respect to the same subject matter. The first of those orders was made by the Lurambi Land Disputes Tribunal. The award of that Tribunal was adopted by the Magistrate’s court.

Following the adoption of the award, the respondent moved the Trial Court, for the execution of the Judgement. Meanwhile, the appellant applied to the court for stay of execution.

The appellant also lodged an appeal; to the Provincial Appeals Committee, Western Province.

Having heard the appeal, the committee ordered that there be a variation to the award of the tribunal. Whereas the tribunal had ordered that the respondent be given 1.5 acres, and also that the remaining 1.5

acres should be given to the appellants herein; the Provincial Appeals Committee ordered that the appellants should get 2.0 acres, and the respondent should get 1.0 acre.

The decision of the Appeals Committee is dated 15th May, 2001. Its existence is not challenged by the respondents. Instead, the respondent submits that the appeal had been overtaken by events because the Executive Officer of the Kakamega Law Courts had already executed the transfer documents, which would give effect to the award of the Tribunal (as adopted by the Magistrate's court).

Whilst it is true that the Executive Officer has indeed executed the transfer documents, it is also equally true that the said documents have not yet been registered against the title.

On 7th November, 2002, this court issued an order of inhibition against **L.R. No. BUSOTSO/SHIRERE/1946** until this appeal is heard and determined. Those orders were issued by Hon. Mr. Justice Hatari Waweru.

Thereafter, Hon. Mr. Justice Mutitu issued an order, on 20th June, 2003, barring the Mumias Sugar Company Limited from making payments to the respondent, until the appeal was heard and determined. The Mumias Sugar Company Limited was ordered to deposit in court, the proceeds realized from the sale of cane grown on the land that is the subject matter of this appeal.

In the light of the orders made by this court, I have come to the conclusion that the appeal has not been overtaken by events. It is still very current.

As matters stand, the decision of the Land Disputes Tribunal was adopted by the Magistrate's Court. However, the said decision stands varied by the Provincial Appeal's Committee. To me, that illustrates the fact that when the appellants sought review of the decision of the learned Magistrate pending the hearing and determination of the appeal which was then before the Provincial Appeal's Committee, the learned Magistrate ought to have reviewed her orders of execution. Instead, she made a finding that there was no pending appeal, whilst there was indeed an appeal before the Provincial Appeals Committee. That decision was based on an error apparent on the face of the record. It therefore calls for correction.

In the event, I do now hereby allow the appeal, set aside the order made on 23rd April,2002, and in its place, I now order that the application dated 15th Janury,2002 be allowed with costs to the appellants. The appellants are also awarded the costs of this appeal.

Meanwhile, as the order for stay of execution was subsequently granted by this court pending the determination of this appeal, there is really no need for it now.

But, in its place, and in order to give efficacy to the judgment herein, I order that the award of the Lurambi Land Disputes Tribunal be set aside. In its place, there shall now be the decision of the Provincial Appeals Committee, dated 15th May, 2001. It is so ordered.

Dated, signed and delivered at Kakamega this 27th day of April, 2009.

FRED A. OCHIENG'

JUDGE