

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Appeal 29 of 2005

JAMIN AMEYO APPELLANT

V E R S U S

HARRY OMBEVA AGAMA RESPONDENT

R U L I N G

JAMIN AMEYO, the Appellant/Applicant filed the appeal herein on 12.4.05 against the Ruling of the Senior Resident Magistrate (Mrs. Roselyn Oganyo) at Vihiga made on 15.3.2005 in Vihiga SRM Misc. Civil Application No. 88 of 2003 in which the Senior Resident Magistrate adopted as a decision or order of the Court the award of the Vihiga Land Disputes Tribunal. By an application dated 18/5/05, the Appellant/Applicant sought in the lower court an order for stay of the decision or order of the Senior Resident Magistrate dated 15.3.2005 but it was refused.

This is an application under order 41 Rule 4 of the Civil Procedure Rules for stay pending appeal. For the Appellant to succeed in the application, he must satisfy the court on the following conditions –

- (i) that there is an appeal in place against the order or decree he seeks to have stayed and***
- (ii) that there is sufficient cause for making the application for stay and***
- (iii) that substantial loss may result to him unless the order for stay is made and***
- (iv) that the application for stay was made without unreasonable delay and***
- (v) that such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given.***

The Appeal has been filed. Condition (i) is satisfied. To satisfy the Court that there is sufficient cause for the order (of stay) sought, the Appellant must show that the appeal is not a non-starter or frivolous or unarguable. I observe that the learned trial magistrate endorsed and adopted the award of the Vihiga District Land Disputes Tribunal and that the appeal challenges the decision for adopting the award on the ground that the award was, inter alia, null and void as the Tribunal had no jurisdiction. A party who is dissatisfied with an award of the Land Disputes Tribunal set up under s. 3 of the Land Disputes Tribunal Act No.18 of 1990 has a right to appeal against it to the Appeals Committee within 30 days under s. 8 (1) of the said Act. Where one fails to appeal to the Appeals Committee and the award is consequently endorsed and adopted by the Resident Magistrate Court as a decision of the Court, no appeal lies from the decision of the Resident Magistrate because the provisions of the Land Disputes Tribunals Act No.18 of 1990 do not, give any right of appeal to this Court from such act. This is so unless such appeal is intended to challenge the power of the Resident Magistrate to adopt such award as a decision of the court. It could not have been the intention of the legislature that while an appeal from the District Land Disputes Tribunal goes to the Appeals Committee as aforesaid within 30 days, a party who does not appeal can still way-lay the award in the Resident Magistrate Court and once it is adopted as a decision of the court, circumvent the provisions (of Act 18 of 1990) as to appeal by filing an appeal to this Court against the award under the guise that the appeal is against the Magistrate court decision in adopting the award, when in effect, it is an appeal to challenge the validity of the award itself. Such challenge can only be taken up in the Appeals Committee. The only plausible appeal that such a party can possibly have, as I have said, is whether the Magistrate Court had power to adopt the award or not and no more.

A perusal of the Memorandum of Appeal filed herein shows that the Magistrate Court is not being challenged on the basis that it did not have the powers to adopt the award. Rather, the memorandum challenges the invalidity of the award itself and criticizes the trial magistrate for adopting it. It is shrewdly crafted. But no appeal lies from the adoption of the award.

It is my finding that the appeal is not arguable. It is my further finding that the applicant has not satisfied the court that there is sufficient cause for the order sought not least because the appeal is not arguable. I find it unnecessary to consider the other factors. I dismiss the application with costs to the Respondent.

Dated at Kakamega this 17th day of November, 2005

G. B. M. KARIUKI

J U D G E