



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 380 OF 2000

MARGARET WAIRIMU WAWERUAPPELLANT

VERSUS

LIVINGSTONE NGUGI GIKURIRESPONDENT

JUDGMENT

This appeal arises from the ruling of the Resident Magistrate (M.A. Mlanga (Mrs) in Kiambu Civil Case No. 58 of 1999 delivered on 8th May 2000.

The parties to this appeal were engaged in a dispute over L.R. No. Gatamaiyu/Kamburu/288 which was arbitrated upon by the Lari Land Disputes Tribunal and the award made on 29th November, 1999.

On 6th January 2000 the respondent made an application for the confirmation, of this awarded at the Resident Magistrate's court in accordance with the provisions of the Land Disputes Act, No. 18 of 1990, see Section 3 of the Act.

The application was fixed for hearing on 21st February 2000 and in the course there-of, the appellant raised a preliminary objection on the basis that this matter had been deliberated upon in previous cases.

The learned magistrate accepted the preliminary objection and dismissed the application for confirmation of the award and this is the course of the appeal in this court in a memorandum of appeal dated 24th and filed on 28th July 2000. It had 5 grounds of appeal.

These grounds faulted the learned magistrate with making her decision without justification; not appreciating certain provision of the Land Disputes Tribunal Act; lacking jurisdiction to make the disputed decision; failing to evaluate the appellant's evidence and/or submissions, thus making an erroneous ruling and applying the doctrine of res judicata in the case which was not applicable.

The appeal was urged and/or opposed in this court on 29th January 2003 wherein counsel for the appellant repeated in his submission what had been stipulated in the memorandum of appeal, saying that since the relevant provisions of the Land Disputes Tribunal Act were mandatory, the magistrate should have confirmed the elders award.

And that any aggrieved party with her decision then should have appealed to the Provincial Land Appeal's Committee.

That she had no jurisdiction to entertain the preliminary objection and that instead of the respondent moving the court by way of a preliminary objection he should have moved up the ladder, to the Provincial Land Disputes Appeal's Committee.

He prayed that this appeal be allowed with costs. Counsel for the respondent opposed the appeal and

submitted that the learned magistrate addressed herself to the relevant law in making her ruling that the issues before her were res judicata after considering decisions in Land Case Number 27 of 1986 and 565 of 1990.

That she found that the appellant and/or her relatives were trying to get the suit through tactics by using different members of the same family.

He prayed that the appeal be dismissed with costs. The learned magistrate decision on the application to confirm the award was as a result of a preliminary objection. And perusing through the Civil Procedure Rules – see Order XLII, to my mind, leave of the court would be required for any appeal to be lodged. No such leave was sought and/or obtained before the present appeal was filed.

If this be the case, and I am convinced it is, then this appeal is not competently before this court.

Secondly, the judgment in the case subject to this appeal was delivered on 9th May 2000 and the appeal filed on 28th July 2000.

Though there is a certificate of delay signed by one P.N. Gitu, an Executive Officer at Kiambu Magistrate's Court, and I do not know whether an Executive Officer can sign a certificate of delay, I do not see an application for and a court order granting leave to the appellant to file this appeal out of time though it was clearly filed out of time.

This being the case too, this appeal is not competently before this court.

Otherwise Section 8 of the Land Disputes Tribunal Act provides for what should happen after the Divisional Land Tribunal has deliberated over the dispute and read its decision to the parties. The aggrieved party is allowed to file an appeal to the Provincial Land Disputes Appeals Committee within 30 days of making the decision.

In the case subject to this appeal, the elders decision was made on 29th November 1999. And up to the time the appellant made the application to have the award made the judgment of the court, no appeal had been lodged as required by Section 8 of the Act. Then when the application is fixed for hearing the preliminary objection is raised which ploughs into the merits of the main suit or what would have been raised if the appeal had been lodged at the stage of the Provincial Committee or to the High Court if the dispute went that far.

And being a serious matter of law raised, I would have expected notice thereof to be given to the appellant by the respondent but there is no record that this was done, so as it were the appellant was ambushed by this preliminary objection.

Moreover, I am not certain the principle of res judicata was properly applied to the case subject to this appeal in view of the parties involved in the previous cited cases.

These observation are all a plus for the appellant, but in view of the appellant's failure to seek leave from the lower court to lodge this appeal or before seeking leave of this court to lodge it out of time, the plus does not help the appellant.

The appeal be and is hereby struck out for being incompetent. I will, however, not order the appellant to pay costs of the appeal to the respondent as he had a good appeal save for the technicalities.

Delivered this 18th day of February, 2003.

D.K.S. AGANYANYA

JUDGE