



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL APPEAL NO. 3 OF 2018

JOHN IMOTELI ALIAS BARASA IMOTELI.....APPELLANT

- VERSUS -

MICHAEL ALLUKU BARASA.....RESPONDENT

J U D G E M E N T

1. The appellant John Imoteli alias Aluku Barasa being dissatisfied with the ruling of Hon. W. Chepseba CM in BSA CM Misc. Application No. 33 of 2018 delivered on 2/11/2018 preferred this appeal. He raised the following three (3) grounds for the court's determination;

- 1. That the Learned Trial Magistrate erred in law and in fact in executing a judgement which was over 12 years.**
- 2. That the Learned Trial Magistrate erred in law and in fact by failing to review his order that had been issued ex parte which order was alienating the Appellant's land, and hence the Appellant had not been his constitutional right to be heard.**
- 3. That the Learned Trial Magistrate erred in law in fact in citing lack of jurisdiction as the reason for refusing to set aside his own order, when by hearing the application by the Respondent herein ex parte, he acted as though he had jurisdiction to hear and deliver a Ruling.**

2. The parties agreed to argue the appeal by filing of written submissions. The appellant submitted that the judgement that was being executed was more than 12 years old therefore the execution was done in breach of the provisions of the Civil Procedure Rules. The Appellant further submitted that the orders granted ex parte was made in breach of article 48(1) of the Constitution which provides thus;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

3. Finally, the Appellant submitted that the trial magistrate erred in law and fact in citing lack of jurisdiction to review / and or set aside his orders yet while hearing the respondent ex parte he acted as though he had jurisdiction. The appellant cited the holding in the following cases in support of his arguments.

a. M'Ikiara M'Rinkanya & another Vs Gilbert Kabeere M'Mbijiwe, Civil Appeal 124 of 2003 (2007) eKLR.

“From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years' limitation period stipulated in Section 7 of the Act. If the judgement is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the Judgement Debtor acquires possessory title by Adverse Possession which he can enforce in appropriate proceedings.”

b. Kenya Human Rights Commission & Another Vs Non-Government Organisations Co-ordination Board & Another (2018) eKLR.

“The Constitution is the SUPREME LAW of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provision in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, it is a constitutional control over administrative bodies to ensure that they do not abuse their powers and that individuals concerned received fair treatment when actions are taken against them. Failure to observe this

Constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of the Constitution which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies ...”

4. The Respondent in his submission stated that the Appellant was seeking substantive orders through a miscellaneous application which would have deprived the respondent of his land. That such orders can only be granted on merit. That the grounds of appeal filed do not directly address the order of dismissal which is appealed from. That the appellant raised issues which are not grounded on the proceedings. The Respondent urged the court to dismiss the appeal for want of merit with costs to him.

5. A brief history of this case as presented in the record of appeal is that the case had been commenced before the Amukura Land Disputes Tribunal. The respondent had sued his father (the appellant) to get a share in the land L.R No. S. Teso/Apokor/1005. The tribunal after listening to the parties concluded thus; **“If the defendant John Barasa Imotiri is willing to give land to his other two sons and refusing the elder son is contrary to TESO customs. We strongly recommend that since land is over 24 acres, the plaintiff MICHAEL ALUKU BARASA get nine acres and the remaining be shared by the three namely BENARD OTWANI, MARTIN OKWARE and JOHN BARASA OMOTIRI.”**

6. The proceedings were filed in Court under Busia Land dispute case No. 26 of 2001 for the reading of the award which was done on 4th September 2001. After the award was read, parties went to slumber until 7th June 2018 when the respondent moved the court vide his application dated 7th June 2018 seeking the following orders.

1. That this application is urgent and the same should be heard exparte and on priority basis.

2. That the honourable court to empower court executive officer, Busia Law Courts to sign all the relevant documents pertaining land on behalf of MICHAEL ALUKU BARASA to effect transfer of (9) acres of land from land parcel No. SOUH TESO/APOKOR/1005 upon the adoption of Amukura Land Dispute Tribunal award as the judgement dated 14th day of November 2001.

3. That the Land Registrar is hereby directed to rescind and revert all unnecessary documents that may be drawn without orders from this honourable court.

4. That the County Administration police at Busia to accompany the County Surveyors during the surveying exercise to ensure their security.

5. That the cost of this application be in the cause.

7. This application proceeded exparte on 14/6/2018 after it was indicated that the appellant was served and the orders duly granted. It is the orders granted pursuant to the above application which vexed the appellant to file the application dated 16/10/2018. The appellant sought the following orders;

1. That this application be certified urgent, be heard on priority basis and exparte in the 1st instance.

2. That the Honourable court do issue a Temporary Order of stay of the Order issued by this court on 16/6/2018 pending the hearing and determination of this application interpartes.

3. That this Honourable court do vary, review and or set aside the Exparte Order issued on the 16/6/2018, and revert title to the Applicant (JOHN IMOTERI alias OBARASA IMOTELE).

4. That the County Land Registrar Busia and the County Surveyor Busia do comply.

5. That inter partes hearing be on the ... of ... 2018.

6. That the costs of this application be in the cause.

8. The Appellant's application was dismissed for lack of merit. The respondent argued that the appellant was seeking substantive orders through a miscellaneous application which orders could only be issued after hearing the case on merits. While the respondent is accusing the appellant of seeking substantive orders through miscellaneous application, that is exactly what the respondent did.

9. In his ruling, the trial magistrate while dismissing the appellant's application stated thus;

“The application is not opposed. However, looking closely at the application, the court has no jurisdiction to revert the title to the applicant within a miscellaneous application. The applicant has not advanced any good reasons to warrant this court to review or set aside the orders dated 16/6/2018. I therefore find the application dated 16/10/2018 without merit and is hereby dismissed.”

10. As stated above, the trial magistrate is the one who granted the respondent orders through a miscellaneous application which ostensibly the respondent used to obtain a title deed. Under section 80 Civil Procedure Act and order 45 of the Civil Procedure Rules, an aggrieved party has a right to move the court which made the order to have the order reviewed and or set aside where sufficient cause has been shown.

The appellant having moved the said court had a right to be heard. The trial magistrate failed to give reasons why he had jurisdiction to issue the respondent with substantive orders filed through a miscellaneous application then later turn around to say he now had no jurisdiction to review those orders. In my opinion the trial court erred in law in failing to consider the application on merits for want of merits.

11. The trial court went on to state that the appellant did not give any good reason to warrant the court to review or set aside the orders of 16/6/2018. During the hearing of the application on 1/11/2018, the respondent was absent and he had not filed any pleadings in opposition to the prayers sought. Prayer 2 of his application sought orders of temporary stay of execution of the orders of 16/6/2018 pending inter parties hearing. The orders of 16/6/2018 sought to be stayed essentially allowed the respondent to carve out 9 acres out of the appellant's land. The orders were issued without hearing the appellant. Although granting of stay of execution is a discretionary exercise. The trial magistrate did not give reasons why he held the view that the appellant did not deserve his discretion in a scenario where the application had been made without undue delay.

12. The Appellant sought to have the orders of 16/6/2018 varied and or set aside which was a discretionary order. This is a first appeal so the Court is allowed to determine whether the trial magistrate exercised his discretion judicially and or whether he was right or wrong. In the case of *Pithon Waweru Maina Vs Thuka Mugira (1983) eKLR* the Court of Appeal listed the principles governing the exercise of discretion to include, **"Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel [1966] EA 547, 555 F"**.

13. On ground (c) of the dismissed application, the Appellant had pleaded thus; *"there is no lawful order to adopt given that the LDT award and the lower court order of adoption of the same that Respondent seeks to implement have been rendered obsolete after the expiry of 12 years from the day it was issued i.e. on the 14/11/2001."* This ground read together with the findings of the Amukura Land Disputes *visa vi* the prayers sought in the motion dated 7/6/2018 it's evident that the appellant's motion for review raised a good ground. The findings of the Amukura Land Disputes Tribunal paraphrased earlier were not conclusive. They were more of a recommendation that the respondent should get 9 acres out of the suit land. The Tribunal went on to advise the Respondent to file a civil suit. My interpretation of the Tribunal's finding is that there was no award as is not capable of being executed.

14. However, assuming the recommendations of the Amukura Land Disputes Tribunal was treated as an award, the prayers sought in the Respondent's motion dated 7/6/2018 did not form part of the award given by the Tribunal. By the trial court proceeding to grant the application as prayed, he exceeded his powers in making orders not premised on the proceedings on record before him. As a consequence, he erred in law and fact when he declined to set aside/vary the said orders. On this account I do agree with the appellant that his right to fair administrative action under Article 47 (1) of the Constitution was breached.

15. In any event, the fact that the Appellant was not heard, the trial court ought to have given an opportunity to be heard. I have said enough on the errors committed by the trial magistrate. I will therefore not deal with the issue of the age of the judgment submitted as more than 12 years. Flowing from the above analysis, I am persuaded to find merit in the appeal and hereby allow it. Accordingly, I enter judgement for the appellant in the following terms:

- a. The exparte orders of the trial magistrate made on 14/6/2018 and issued on 16/6/2018 be and is hereby set aside.**
- b. The Respondent's application dated 7/6/2018 shall be heard afresh and interpartes before the magistrate's court gazetted to handle land matters.**
- c. Costs of this appeal awarded to the appellant.**

Dated and signed at BUSIA this 10th day of February, 2021.

A. OMOLLO

JUDGE