



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 12 OF 2019

PHYLIS AYOTI.....APPELLANT

VERSUS

SAMSON OPICHA.....RESPONDENT

JUDGEMENT

The appellant being dissatisfied and aggrieved by the decision of the Provincial Land Disputes Appeal Tribunal at Kakamega vide case No. 30 of 2005 and adopted vide Kakamega SRM Misc. Award No. 38 of 2004 on 27/3/2007 appeals from the whole of the said decision and puts forth the following grounds:-

1. That the appeals tribunal erred in law in giving orders which were beyond its jurisdiction.
2. That the appeals tribunal erred in law in awarding the respondent a portion which the respondent was not entitled to.
3. That the appeals tribunal erred in law in not affording the parties a chance to be heard and or visit the land before it could give its decision.
4. That the appeals tribunal was biased and had a predetermined mind against the appellant.

The appellant prays that the appeals tribunal decision be set aside and the appeal be allowed with costs and the following reliefs.

- (a) That his appeal be allowed.
- (b) That the findings of the lower court be quashed and or set aside and or reviewed.
- (c) That the respondent be condemned to pay costs.

The respondents submitted that the decree appealed was never filed by the appellant. It is not part of the Record of Appeal. It was never extracted and filed. The decision of the Provincial Land Appeal Tribunal was made on 10th March, 2006. It was necessary for the appellant to extract a decree and have it signed and certified by the Chairman of the appeals tribunal. Such a decree was then to be filed in the High Court and a copy thereof should form part of the record. A decree is defined in section 2 of the Civil Procedure Act. It must be signed and dated. A certified copy thereof should form part of the record. They relied on the case of Margaret NafunaWafula vs. Wilson KimutaiSirma& Another Kitale Civil Appeal No. 8 of 2000.

They further submitted that this appeal was filed more than 1 year after the decision of the Provincial Lands Disputes Tribunal. The award is dated 10th May, 2006. This appeal was filed on 26th April 2007. The decision of the Provincial Land Disputes Appeal Tribunal was never adopted as a judgment of court. The appellant has annexed proceedings of Kakamega CMCC Misc. Application 28 of 2004. In the said proceedings, the appellant's application to have the award adopted as a judgment of court was rejected. There are no proceedings nor certified order on 27th March, 2007. The appeal is therefore based on the proceedings not known and are unavailable to court. That Section 8 (9) of the Land Disputes Tribunal Act is mandatory. It was the duty of the appellant to comply.

This court has carefully considered the appeal and the submissions therein. On perusal of the record of appeal I find that the decision of the Provincial Land Disputes Appeal Tribunal was never adopted as a judgment of court. The appellant has annexed proceedings of Kakamega CMCC Misc. Application 28 of 2004. In the said proceedings, the appellant's application to have the award adopted as a judgment of court was rejected. The decree if any has not been attached. Order 42 Rule 2 of the Civil Procedure Rules that provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject Appeal summarily under Section 79B of Act until copy is filed.”

The importance of the order or decree being appealed from being part of the documents that must be contained in the Record of Appeal could also be discerned from Order 42 Rule 13 (4) which stipulates 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 during the hearing;**
- d. The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;**
- e. All affidavits, maps and other document whatsoever put in evidence before the magistrate;**
- f. The judgment, the order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

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).”**

In the case of Joseph KamauNdungu vs Peter NjugunaKamau (2014)eKLR the Appeal was struck out because the record of appeal did not contain the order or decree that was being appealed from. Under **section 79G** an appeal from the subordinate court to the High Court is incompetent if the order or decree appealed against is not filed together with the appeal, that section provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

It is clear from this provision that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the Environment and Land Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH SEPTEMBER 2020.

N.A. MATHEKA

JUDGE