



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 43 OF 2010

BOAZ ASHIONO SHISANYA..... APPELLANT

VERSUS

ANDREW IKHUNYALO RESPONDENT

JUDGMENT

This is a matter that arises from the decision of the Ikolomani Land Disputes Tribunal.

On 6th March 1999 the decision of Ikolomani Land Disputes Tribunal between in a dispute between Boaz A. Shisanya as plaintiff and Simeon Ashiono Musindi and Andrew K. Ikhunyalo as defendants, was adopted by the magistrate's court in Kakamega Senior Principal Magistrate's court Misc. Award No. 127 of 1999. The award was as follows -

“1. That the Ikolomani Land Disputes Tribunal award in respect of Land Parcel No. Idakho/Shiseso/955 be and is hereby adopted as the judgment of this honourable court, thus the disputed land measuring 2.6 Ha. be subdivided in two portions measuring 1.3 Ha. each.

2. Costs be shared by both parties.”

The above decision divided the subject land equally between the plaintiff, on one hand, and the two defendants on the other hand. The above orders were issued by R. Oganyo, DMII.

Thereafter, an application was filed through a Notice of Motion in the High Court at Kakamega in Misc. Application No. 77 of 2003 by Andrew Ikhunyalo, one of the defendants. The respondents were named as the Chairman of Ikolomani Land Disputes Tribunal Committee, Simon Ashiono Musindi and Boaz Ashiono Shisanya. The Notice of Motion sought mandamus orders to review the adoption of the award, which had already been adopted on 13th October, 1999.

In a ruling delivered on 15th April 2005, the High Court dismissed the application with costs. The High Court ruling stated as follows -

“.....there is no legal basis for the order of mandamus sought to compel the Chairman of Ikolomani Land Disputes Tribunal and/or the Chief Magistrate's Court at Kakamega to review or hear the land dispute or to strike out the proceedings in the Ikolomani Land Disputes Tribunal and/or ruling as there are no such proceedings and/or ruling pending. That the prayer for mandamus was obviously misconceived. There is no merit in the Notice of Motion and the review sought in it is misplaced and cannot be granted in the circumstances of this case.”

Not deterred however, the same Andrew Shivachi Ikhunyalo came back to the subordinate court under Miscellaneous case No. 127 of 1999 through an application dated 26th June 2007. On 16th July 2007 he appeared before B. M. Nzakyo, Resident Magistrate and an order was made on the same date as follows -

- 1. That the award from Provincial Land Disputes Appeals Committee is hereby adopted as judgment of this court.**
- 2. That the LP. No. Idakho/Shiseso/955 of 2.6 Ha. Is hereby awarded to the applicant Andrew Shivachi Ikhunyalo who is the title Deed holder.**
- 3. That the Ikolomani Land Disputes ruling is hereby revoked.**

Following the above decision of the subordinate court adopting the Provincial Appeals Committee award, an application was filed by Andrew Shivachi for the review of the orders of 16th July 2007. In a ruling dated 23rd March 2010, the Senior Resident Magistrate M.I.G. Moranga disallowed the application stating as follows -

“I can see the confusion that is likely to arise from the two orders and the implication may pose obvious challenges. Whereas I agree that there is illegality, but the material before me is not sufficient to act decisively with the two parallel awards on the file. The best step to take is for the applicant to immediately file an application at the High Court seeking a stay of execution of the orders and for the other legal issues raised to be addressed. There the court has powers to make declaratory orders after considering the proceedings before this court and the Provincial Appeals Tribunal. In the interest of justice and in exercise of my discretion, I will grant a stay of execution of both awards for 30 days only to allow the applicant file the necessary application.”

For those reasons, I disallow the application and make no order as to costs.”

Following the above decision of the subordinate court, the appellant Boaz Ashiono Shisanya has filed this appeal against Andrew Ikhunyalo through his counsel Muleshe & Co. Advocates. The grounds of appeal are seven (7), and I will reproduce them hereunder. They are as follows -

- 1. That the trial court erred in both law and fact in failing to review its own orders that had been made while the matter before it was out rightly *res-judicata*.**
- 2. That the Honourable trial court erred both in law and fact in admitting, relying on and sustaining a document to wit a further affidavit when the same had been filed out of time expressly limited by itself and rules and proceeding to consider its contents without justification and/or reasons.**
- 3. That the honourable trial court erred in both law and fact in admitting and/or adopting an erroneous, null and void decision which had irregularly been procured beyond time while there was a valid adoption order on its record.**
- 4. That the honourable trial court erred in both law and fact in subjecting itself to control by the Western Provincial appeal Committee by allowing its decision to be interfered with by the said Committee and failing to remedy the error on record by granting review orders as sought by the appellant.**
- 5. That the honourable trial court erred in both law and fact in completely disregarding the irregularly, illegality and/or fundamental error on its own record and failing to exercise its discretion to grant orders of review as sought by the appellant therein.**
- 6. That the honourable trial court erred in both law and fact in failing to take judicial notice of the fact that the tribunal procedure was exhausted upon the adoption of the Ikolomani Land Disputes tribunal decision on 13th October 1999 and that the eventual orders were susceptible to complete judicial control and process including review as sought by the appellant.**
- 7. That the honourable erred in both law and fact in failing to be guided by the law as confirmed by the superior court on *res-judicata* in the circumstances as provided and submitted by counsel for the appellant.”**

The counsel for the parties, that is, Muleshe & Co. and Amasakha & Co. respectively filed written submissions to the appeal. On the hearing date, which was 28th November 2013, only Mr. Shifwoka appeared for the appellant. No appearance was recorded for the respondent.

I have considered the appeal and submissions filed. I have also perused the record. The matter arises from the decisions of the Ikolomani Land Disputes Tribunal and the Provincial Appeals Committee, both of which decisions were adopted by the subordinate court. The appellant has come to this court on appeal challenging the adoption of the two decisions by the subordinate court. This appeal was filed after the subordinate court declined to review its decision adopting the later decision of the Provincial Appeals Committee.

The powers of the Land Disputes Tribunal, the Provincial Appeals Committee and the Subordinate Court with regard to land disputes are clearly set out in the Land Disputes Tribunal Act Cap 303A.

With regard to the Land Disputes Tribunal and the Subordinate Court, Section 7 provides as follows -

“7 (1) The chairman of the Tribunal shall cause the decision of the tribunal to be filed in the subordinate court together with any depositions or documents which have been taken or proved before the tribunal.

- 2. The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue and shall be enforced in the manner provided for under the Civil Procedure Act. “**

With regard to the Provincial Appeals Committee, Section 8 (1) provides as follows –

“8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within 30 days of the decision, appeal to the appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.”

In my view, once the award of the Tribunal has been adopted and a judgment of the court entered, the matter cannot go back to the Tribunal or the Appeals Committee for further deliberations. The Provincial Appeals Committee can only come into play before an award is adopted by the court. Once the Subordinate Court adopts an award from the Land Disputes Tribunal after the 30 days appeals window, the work of the Tribunal and that of the Provincial Appeals Committee on that account is closed.

It was wrong for the subordinate court to adopt the decision of the Land Disputes Tribunal herein, and then later purport to adopt the decision of the Provincial Appeals Committee. The action by the subordinate court was doubly wrong because the High Court had already, in the same matter, dismissed a Notice of Motion under Judicial Review proceedings filed by Andrew Ikunyalo challenging the decision earlier adopted by the court.

The only option left for Andrew Ikunyalo, after the High Court gave a ruling in the Judicial Review proceedings on 15th April 2005 was to prefer an appeal to the Court of Appeal. He could not go back to the Provincial Appeals Committee and obtain a decision on the same matter and bring it to the subordinate court for adoption.

With the adoption of the Land Disputes Tribunal's award by the subordinate court and the decision of the High court of 15th April 2005, the matter became *res-judicata*. It could not be revived again either in the Provincial Appeals Committee or in the subordinate court or in the High Court. *Res-judicata* is a principle of law that dictates that matters which have finally determined should not be revived without an end. See the case of Mulil Munyua -vs- Mutua Mutisya HCCC. No. 65A of 2005.

This matter having been *res-judicata*, the adoption of the award of the Provincial Appeals

Committee was null and void. It has no force of law. In my view the subordinate court could have reviewed its decision. It had powers to do so to correct the obvious error on the record of having adopted two conflicting land dispute awards. Even if I am wrong in that, I am of the view that this court, being a superior court of record and having jurisdiction to supervise and correct errors and decisions of subordinate courts, has powers to entertain this appeal and issue appropriate orders

Consequently, I allow the appeal and quash the adoption by the subordinate court of the award of the Provincial Appeals Committee. What remains on record therefore is the adoption by the subordinate court of the Land Disputes Tribunal's award and the subsequent ruling of the High Court. The respondent Andrew Ikhunyalo will pay the appellant's costs of the appeal.

It is so ordered.

Dated and delivered at Kakamega this 13th day of February, 2014

George Dulu

J U D G E