



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 21 OF 2011

*(An appeal from the Ruling of Honourable P. O. OOKO, RM in Kakamega Chief Magistrate's Court
Misc. Award No. 197 of 2006 dated 7th March 2011)*

ANJELINE ANG'ANG'A APPELLANT

VERSUS

ISAAC MAKOKHA HAMISI RESPONDENT

JUDGMENT

This appeal arises from a decision of the subordinate court in proceedings under the Land Disputes Tribunals Act. The subordinate court adopted the decision of the Provincial Land Disputes Appeals Committee, in the following terms -

1. ***That in respect of LR. No. N/Wanga/Mayoni/268, the applicant herein (Anjeline Ng'ang'a) to get two acres of land after subdivision. Enforced by the Land Registrar and the Government surveyor.***
2. ***The Government Surveyor be invited to curve out the two acres for the claimant.***
3. ***That the Executive Officer of the court do sign transfer documents on behalf of the respondent.***
4. ***Costs are provided for.***

Given under the Hand and the Seal of this court this 23rd August 2010.”

Following the above decision adopting the award of the Land Disputes Appeals Committee, no challenge was filed against the award. However, on 28th October 2010, Anjeline Ng'ang'a (the applicant/claimant), who is the appellant herein filed a Chamber Summons in the same subordinate court asking for the following orders.

1. ***That this honourable court be pleased to vary the orders given on 23th August 2010 and in place issue similar orders in respect of L/P. No. North Wanga/Mayoni/2138.***
2. ***The Government Surveyor be invited to curve out the two acres for the applicants.***
3. ***The Executive Officer of this court do sign transfer documents on behalf of the respondents.***
4. ***Costs in the cause.”***

In the grounds on the face of the application, the appellant stated that title No. N/Wanga/Mayoni/268 had been sub-divided by the respondent as the litigation was in progress. As a consequent, the land that the appellant would have been entitled to now was North Wanga/Mayoni/1238. She stated that it was not possible now to execute the order on N/Wanga/Mayoni/268 which did not exist anymore.

It was with regard to the above application that the court on 2nd February 2011 ordered as follows -

“This court has adopted the award from Matungu LDT as the final judgment of this court in respect of land parcel No. N/Wanga/Matungu/268 is functus officio of this matter. Any verification in respect of the said title can only be challenged through an appeal and/or the matter being referred back to the said tribunal. In the premises, the application dated 28th October, 2010 stands dismissed with no order as to costs.”

It is noteworthy that the application by the appellant was not opposed, though the record shows that it was served.

The appellant has now appealed challenging the decision of the magistrate's court dismissing her application.

Though the magistrate stated that the court did not have jurisdiction to do anything after adopting the decision of the Land Disputes Tribunal, that is not the legal position. Section 7 of the Land Disputes Tribunal Act confers powers on the subordinate courts to enforce the adopted award as a judgment as provided for under the Civil Procedure Act (Cap. 21). Section 7 of the Land Disputes Tribunals Act provides as follows -

“7 (1) The Chairman of the Tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved at 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 a manner provided for in the Civil Procedure Act.”

In my view, the learned magistrate erred in dismissing the application of the appellant summarily, and in deciding that the matter should have gone back to the Land Disputes Tribunal or be made subject of an appeal.

The Tribunal was already *functus officio*, after the award was adopted by the court. An appeal is not the forum for enforcement of a judgment. One can only go on appeal to challenge a decision. The learned magistrate in my view, should have considered whether if the property in issue had changed its identity, execution could be effected through the new identity or a sub-division of the same and make a decision, considering the provisions of the Civil Procedure Act (Cap. 21). In my view, the learned magistrate erred in deciding that the subordinate court was *functus officio*, as the application was an attempt to execute the judgment.

I find that this appeal has merits. I allow the appeal. I order the reinstatement of the application of the appellant. The same will be heard and determined by the subordinate court, taking into account the provisions that execution of judgments under the Civil Procedure Act (Cap. 21) and Rules made thereunder. I make no order as to costs.

Dated and delivered at Kakamega this 5th day of June, 2014

George Dulu

J U D G E