



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL 248 OF 2010
MARTIN SHIKUKU WAMALWA & OTHERS APPELLANTS
AND
REV. SIMON OBAYO RESPONDENT

[Being an appeal from the Ruling of the Senior Resident Magistrate, Hon. N. Shiundu dated 15th November, 2010 at Eldoret Chief Magistrate's Court in Award NO. 18 of 2007]

RULING

This is an application made on behalf of the respondent **Rev. Simon Obayo** expressed as having been brought under Section 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules seeking to strike out the appeal on the following grounds:-

- “(ii) **That the appellant’s appeal was filed out of time;**
- (iii) **That the appeal essentially challenges the order adopting the award;**
- (iv) **That there is however no appeal against the order adopting the appeal;**
- (v) **That the appellants did not lodge an appeal with the Provincial appeals tribunal;**
- (vi) **That the appeal is therefore an abuse of the Court process”**

The application is supported by an affidavit of the respondent/applicant. The affidavit elaborates the above grounds of appeal.

The application is opposed on the basis of an affidavit sworn by **Martin Shikuku Wamalwa**. It is deponed in the affidavit that the appellants moved the High Court when they were threatened with eviction; that the lower court adopted an incompetent award; that they sought stay of their eviction as they explored their options including lodging an appeal with the Provincial Appeals Committee or apply for judicial review; that they were ordered to vacate a nonexistent parcel of land; that they are not guilty of inordinate delay and that the decision of the lower court was wrong.

At the hearing of the application, counsel for the respondent /applicant submitted that the appeal was filed out of time without leave and is therefore incompetent. Counsel further argued that the appeal, in any event is without merit as it is against an award made by the Land Disputes Tribunal and appeals only lie with the Provincial Appeals Committee.

Mr. Martin Shikuku Wamalwa, who represented himself and the rest of the appellants, in opposing the application, submitted that they filed the appeal late because they received proceedings late as evidenced by a Certificate of Delay which the lower Court issued. With regard to the procedure they adopted, he argued that they were informed that they would either move to the High Court or the Provincial Appeals Tribunal and they opted to move to this Court by way of their appeal.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of this matter. With regard to delay, the record shows that the order appealed from was made on 15th November, 2010. The Lower Court issued to the appellant a Certificate of Delay dated 17th December, 2010. The Certificate states that the appellants applied for proceedings on 15th November, 2010 which proceedings were supplied to them on 17th November, 2010. The order itself was extracted on the same day i.e. 17th November, 2010. The appeal was then lodged on 20th December, 2010.

Section 79 G of the Civil Procedure Act reads as follows:-

“79 G. 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 to the appellant 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.”

The appellants herein applied for proceedings on the day the order appealed against was made i.e. 15th November, 2010. The proceedings were supplied on 17th November, 2010. That is also the date the order appealed against was issued. So, ordinarily the only period to be excluded from the prescribed time is between 15th and 17th November, 2010. The thirty days therefore ran from 18th November, 2010. The appeal should therefore have been filed on or before 18th December, 2010 taking into account that 17th November, 2010 is an excluded day. However, 18th and 19th December, 2010 were excluded as they were Saturday and Sunday respectively. The appeal was lodged on 20th December, 2010 which was the next working day. In the premises, this appeal was lodged within the prescribed period and no leave was required.

With regard to the challenge that an appeal to this court does not lie from an order adopting an award of a Land Disputes Tribunal, the short answer is to be found in the appellants' memorandum of appeal. Their appeal is against the order of **Hon. Nathan Shiundu** (SRM) dated 15th November, 2010. The extracted order is at page 83 of the record. The order dismissed the appellants' application dated 30th August, 2010 which application sought a stay of execution of an order of eviction which had been issued on 15th July, 2010. The eviction may have been pursuant to orders made by the Land Disputes Tribunal but that is not the order challenged. The order challenged is that of the Learned Senior Resident Magistrate dismissing the appellant's application for stay of execution of eviction. In dismissing the appellants' application, the Learned Senior Resident Magistrate held that he had no jurisdiction to inquire into the finding of a Land Disputes Tribunal and that the court's duty is merely to adopt the finding. The issue raised in this appeal is whether the court receiving an award from a Land Disputes Tribunal would merely rubber stamp the same. That issue is not, with respect, a frivolous issue. It goes to the root of the jurisdiction of the lower court with regard to awards filed from Land Disputes Tribunals. The appellants' appeal may not therefore be hopeless as the respondent/applicant contends.

In the premises, the second reason for seeking striking out of the appellants' appeal is, in my view,

misconceived.

In the end, I find no merit in the respondent's application dated 15th July, 2011 and filed on 1st August 2011. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 10TH DAY OF JULY, 2012.

F. AZANGALALA

JUDGE.

Read in the presence of:

Mr. Karani for the respondent/applicant and the appellant in person.

F. AZANGALALA

JUDGE.

10/07/2012