



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 206 OF 2011

MUTA CHOKWE DISHI APPLICANT

VERSUS

JAMES JUNGO (a representative in the Estate of STEPHEN JUNGO TSAKA

(DECEASED) RESPONDENT

(Being an Appeal against the decision of Provincial Land Appeals Tribunal – Mombasa delivered on the 13th July, 2011 in Provincial Land Appeal

Case No. 33 of 2007)

RULING

- 1) By a Notice of Motion dated 11th October 2011, the Applicant seeks the following principal orders:
 - a) That the Honourable Court be pleased to enlarge time for the Applicant to file in the appeal against the decision of the Provincial Land Appeal Tribunal – Mombasa delivered on the 13th July 2011 in terms of the draft annexed appeal.
 - b) That the Honourable Court be pleased to stay the orders of the Provincial Land Appeal Tribunal – Mombasa pending the hearing and determination of the appeal.
 - c) That the draft of Memorandum of Appeal annexed hereto be deemed duly filed upon payment of the requisite fees.
- 2) The parties have filed their respective supporting affidavits and affidavits in reply as well as written submissions supported by case law authorities. I have considered the matter and I find that two issues arise for determination, namely:
 - a) Whether an order for the enlargement of time to file the appeal will be made and
 - b) Whether a stay of execution of the order of the Provincial Land Appeal Tribunal will be made pending the hearing and determination of the appeal.

The order for the deeming of the draft appeal as filed upon payment of requisite fees is a consequential order following from (a) above.

3) For the Applicant, it was urged that the delay in filing the appeal was occasioned by lack of funds and that the intended appeal has prospects of success in that the Tribunal erred on a point of law as it had no jurisdiction to determine an issue of ownership of land. For the Respondent, it was contended principally that the Applicant had proceeded to file the appeal before obtaining leave to file out of time; that the delay was inordinate and, as regards the application for stay of execution, that the applicable principles for the grant of stay of execution pending appeal had not been satisfied.

4) The findings and decision of the Provincial Land Appeals Tribunal sought to be appealed for is as follows:

“Findings/Discussions and Reasons

The Provincial Appeals Committee considered all the evidence produced by both parties. The dispute is over an unregistered land which both parties claim to be theirs. The Appellant is represented by James Jungo Tsaka. The two families were related to each other and their fathers lived in harmony. The Respondent claims that the land belongs to his grandfather. A site visit was made on 24th February 2011 to establish the truth of the matter. During the site visit both parties were present. It was established that Tsaka’s wife was inherited by Dishu and that Tsaka and Dishu are first cousins. The two families are closely related.

Decision/Determination of the Appeals Committee

After a careful consideration on the facts and in accordance to customary law this Appeal Committee has made the following decision:

That, the decision of District Land Tribunal, Kaloleni is set aside. Each family to use its side of the land as per the boundary shown to the panel by the Appellant but the homestead to remain where it is and a common boundary to be respected by both parties from thereafter. Any member of either side who wishes to develop should do so on their respective portion of land.”

5) The Appellant had 60 days from the 13th July 2011 to file this appeal to the High Court but was only able to do so on the 17th October 2011, a delay of about one month. The court has under sections 95 of the Civil Procedure Act the power to extend time, which power by virtue of section 89 thereof applies to proceedings in respect of appeals from the Provincial Appeals Committee, being “**proceedings of civil jurisdiction**” within the meaning of that section.

I am persuaded that the intended appeal, has raised an arguable appeal on the question whether the Provincial Appeals Committee has jurisdiction to determine an issue of ownership of land. Section 3 of the Land Disputes Tribunal Act, 1990 Cap. 303A grants jurisdiction to the Tribunal and the Appeal Committee on “**a dispute as to**

- a) the division of, or the determination of boundaries to land, including land held in common;**
- b) a claim to occupy or work land; or**
- c) trespass to land.”**

I consider it a point of law whether the decision of the Provincial Appeals Committee set out above makes a determination of an issue of ownership in which it has no jurisdiction or an issue of “**division of, or the determination of boundaries to land, including land held in common**”, which is within its jurisdiction. Accordingly, I would certify the appeal as raising a point of law other than customary law pursuant to section 8 (9) of the Land Disputes Tribunal Act, 1990. Following the repeal of the Act by the Environment and Land Court Act No. 19 of 2011, such certificate is not necessary before a second appeal

to the High Court is admitted to hearing.

6) I do not find it material the objection by the Respondent that the intended Appellant had already filed the Appeal which was already registered before the court. As is clear from the Notice of Motion of 11th October 2011, the Applicant filed the appeal documents only as Drafts to be admitted upon leave of court and payment of requisite fees. Moreover, the analogy of section 28 (3) of the Limitation of Actions Act permits such course of action.

7) In respect to application for stay of execution pending appeal, I agree with the Respondents that an application for stay must demonstrate sufficient cause, diligent application, substantial loss and furnish security for the due performance of the decree of the trial court or tribunal. In consideration of this matter, I have found that the applicant has established sufficient case for the order for stay in view of the arguable point of law relating to the jurisdiction of the Tribunal. Should it be found to have acted without jurisdiction, the Tribunal's order would be incapable of lawfully authorizing the actions permitted in its order of 13th July 2011 and these should therefore be stayed pending the determination of the intended appeal. The Applicant has demonstrated substantial loss when at paragraphs 12 and 13 of the further affidavit of 11th November 2011 he depones: -

“12. That I have satisfied the conditions of application for stay contrary to the allegations of the Respondent as he now continues to build and cultivate the land to my detriment.

13. I am advised by Advocates on record that the decision of the Tribunal is null and void ab initio for declaring that the status quo to be maintained when the Respondent does not belong to the family members who deserved to use and enjoy the land.”

Should the Respondent continue with the developments on the suit land, the same may change the character of the land of which the Applicant claims ownership and thereby affect the Applicant's enjoyment thereof even after he is declared the rightful owner upon successful appeal. The loss of user and ownership of immovable property has consistently been held by courts to be substantial loss irreparable by compensation in damages. (See for example **Russell Co. Ltd v. CBA & Another (1986) KLR 633** and **Mbuthia v. Jimba Credit Finance Corporation & Another (1988) KLR 1**. Moreover, the High Court as an appellate court has jurisdiction to grant an injunction pending appeal under Order 42 (6) (6) of the Civil Procedure Rules in these terms: -

“Notwithstanding anything contained in sub-rule 1 of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure of instituting an appeal from a subordinate court or tribunal has been complied with.”

8) In the circumstances of this case, I find the delay of just over 30 days in filing the appeal as not being inordinate having regard to the explanation by the Applicant that he had to obtain proceedings from the Provincial Appeal Tribunal and thereafter instruct his advocates **“verbally and financially”** to prepare the pleadings for filing in court.

9) I consider that the court may order security in such form including an order restraining the Applicant from any acts that would interfere with the status quo on the land and its registration status, if any, pending the determination of the appeal, as may be necessary in the circumstances of the case.

10) Accordingly, for the reasons set out above, I grant the Applicant's Notice of Motion dated 11th October 2011 in terms of prayers Nos. 2, 4 and 5 with costs in the cause. As a security for the due performance of any eventual decree against him the Applicant is restrained from interfering with the Respondent's possession and occupation of the portion of the suit property which he occupies as at the date of this ruling.

Dated and delivered this 4th day of October 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Shimaka for the Applicant

Mr. Jungo in person