REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 18 of 1985

KIVANDI MUKUSYA…….....…….APPELLANT

VERSUS

MUTUNGA MATHEKA……..…….....……..RESPONDENT

(From Original Civil Appeal L. 115 of 1978 o Senior Resident Magistrate at Machakos)

Coram: J. W. Mwera J.

Mr. Muendo for applicant Mrs. Nzei for respondent Court Clerk Muli

RULING

Two notices of motion were filed and argued together. One was brought by the appellant in this appeal file. It was dated 6th March 1996 and brought under 044 and S.3A Civil Procedure Rules and Civil Procedure Act respectively. The appellant prayed for orders that:

1. The order referring this appeal to Land Disputes Tribunal dated 17.7.95 be reviewed and set aside;

2. That the court considers the 2.that the court considers the submissions filed in respect of the appeal and other additional submissions as a basis of hearing the appeal on merit.

3. Costs.

An affidavit in support accompanied the application.

Another notice of motion filed by the Respondent under 044 r. 1 Civil Procedure Rules, S. 13(2) of Act No. 18/90, and S. 3A Civil Procedure Act sought orders to the effect that:

1. This court's orders dated 17.7.95 terminating the appellant's appeal and referring the matter for arbitration under Act No. 18 of 1990 be reviewed and set aside.

2. The appellant's appeal be ordered to stand dismissed and the same to be marked as finalized.

3. Costs.This application too was supported by an affidavit.

On 21.6.96 Mr. Muendo argued the appellant's application, the first application, while Mrs. Nzei argued the Respondent's application, the second application. Both counsel also invited the court to peruse the file

as it were, to acquaint itself with the history of the whole matter. It is actually contained in Justice Osiemo's ruling of 17.7.95 which each side desires reviewed for different reasons.

In 1974 the Respondent filed a suit against the (present) appellant and another. The suit came up for hearing before a District Magistrate III. The appellant raised a preliminary objection that the suit was time - barred. This was upheld and the suit dismissed. The respondent appealed to the Senior Resident Magistrate's court. The appeal was allowed and a retrial was ordered. The appellant then appealed to the High Court. On hearing day 19.5.94, Mr. Muthusi appeared for Dr. Mutunga and applied for an adjournment. This was refused on grounds recorded, and the appeal was dismissed.

So the ruling of Osiemo Judge on 17.7.95 was to review the order of 19.5.94 where the adjournment application was rejected and the appeal was dismissed. The order of 17.7.95 went on:

'This case involves a dispute in land and therefore it has been caught up by Act 18 of 1990 which took away the jurisdiction of courts. Therefore even if I review my order of 19th May 1994 and allow the applicant to argue this appeal it will not serve any purpose. This application is disallowed and the proceedings in this suit terminated and the dispute referred to the Tribunal for arbitration under Act 18 of 1990".

To begin with the first application (by the appellant) seeks this court's review of the ruling of 17.7.95 which sprung from a review application. A review was refused. So O 14 r.7 should ordinarily apply i.e. no further application for review should be entertained where one had once been refused. But Mr. Muendo appeared to argue that this ruling of 17.7.95 contained an error in law when the learned judge directed that the dispute be now referred to a Land Disputes Tribunal. To him, the judge did not disallow the review application on any other ground than that the Act No. 18 of 1990 had taken over such land disputes. Mr. Muendo added that this was in error because S. 13 (2) of that Act preserved land disputes cases which were subject of appeal as this one is. Reading the S.13 (2) does not appear to say just that:

'S.13 (2) where the court has at the commencement of this Act, heard the case and pronounced judgment thereon, any appeal therefrom shall proceed as if this Act had not been enacted."

From the history given above this case was never heard in the lower court and a judgement pronounced on merits. It was dismissed in the first instance on a preliminary point of being time -barred. So the proposal that this case or appeal is saved by S. 13(2) of Act 18 of 1990 is misconceived totally. Appeals and yet other appeals arose from a point of technicality and applications upon applications for review started. It should be repeated that if any hearing has to go at all, it will mean hearing on merits beginning in the subordinate court where the case was filed. But that is what, in this court's view Osiemo Judge appeared to be saying in his ruling above. Subordinate courts do not have jurisdiction to hear land disputes falling under Act 18 at all. Statutory Land Dispute Tribunals have been set up to do those. It is no derogation from judicial principles at all. For *instance* Rent Restriction Tribunal, Business Premises Rent Tribunal, the Industrial Court are all specialised tribunals, and Act 18/90 does something similar.

So, to this court it does not appear right for the appellant to seek orders that the ruling of 17.7.95 be reviewed for an apparent error of law on the face of the record. This court as constituted had equal and concurrent jurisdiction with the court Osiemo Judge presided over leading to the ruling under attack. It may not be quite clear from the current state and form of O 44 on reviews, but would orders sought from this court not be as good as rulings on/of appeals from a court of similar and equal jurisdiction? When and where can it be said in the current application that orders sought are confined to review only and are not in substance tantamount to appeal rulings/judgments Yet a court cannot sit on appeal over its own decisions. Be that as it may, even if this court was to be minded to consider that it was being asked and was only going to pronounce review orders, there is no argument worthy of such orders.

This court adds that it was equally misconceived and misdirected on the part of the first application to consider that the background material given by M/s Waki and company for the Respondent and by Dr. Mutunga also, were submissions to be considered in determining the appeal herein. On 18.2.88 Torgbor Judge said:

"..... this matter is stood over generally. When it is fixed for hearing it would be desirable to have the full background to this case for court to decide whether to hear the appeal on technical points or res judicata and prescription or whether to refer it to a full trial by the court of the District Magistrate or the adjudication section."

Thus it cannot be said that any 'submissions (were) filed in respect of the appeal," for hearing of the same on merit. If that be what prayer 2 in the first application intended then it has no merit.

As for the second application (by the respondent) and from what has been stated above, if Osiemo Judge dismissed the appeal herein on 19.5.94 on a technicality, and the appellant wishes to argue that, Mr. Muthusi who applied for an adjournment which was refused and along with it, the appeal dismissed, the appeal can be reinstated by reviewing that order, two matters stand out which can better be addressed in the Court of Appeal. First, Osiemo Judge on 17.7.95 declined to review his orders of 19.5.94. Secondly only the Court of Appeal is competent to hear and determine whether or not 10 Osiemo Judge was right procedurally and/or otherwise to decline an adjournment and then dismiss the matter before him. If the appellant desires to pursue that line then it will not be in order for this court to say once again that this appeal is dismissed and should be marked finalised.

To that end, this court is similarly not in a position to say that the order or any part of Osiemo Judge's ruling of 17.7.95 terminating the appeal and referring the matter to the Land Disputes Tribunal should be reviewed. What this court is comfortable to say now is that in its view there was no appeal before Osiemo Judge as provided for under S.13(2) of Act 18 of 1990 and that if he dismissed any matter before him, it was in contravention of that law. The case had not been heard and judgement delivered on the merits thereof to constitute an appeal under S. 13(2) which could be preserved to go on even with Act No. 18 in force.

For the foregoing both applications are dismissed. Each party to bear his costs. Suppose anyway, that the parties took cause to have their dispute dealt with by the Land Dispute Tribunal or an adjudication officer if he is still where the land is situate, could that not save them time and expenses? Well that is only an observation.

Orders accordingly.

Delivered on 16th July 1996.

J. W. MWERA

JUDGE