



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CIVIL APPEAL NO. 73 OF 2011

GEORGE LYOKO LYOKO APPELLANT

VERSUS

ANN MACHIO RESPONDENT

RULING

1. The appeal arises from the ruling of the lower court (E.H. KEAGO SRM) delivered on 1/9/2011. The lower court ruling related to an application dated 4/1/2011. That application was a summons in chambers seeking, *inter alia*, registration of mutation forms in respect of LR No. BUKHAYO/MUNDIKA/2164 by the Land Registrar notwithstanding non-availability, or lack of surrender, of its title deed. The prayer in the application was not couched in exactly these terms but its import, meaning, and purport can be gleaned from the grounds on the face of the application.

2. In order to keep up to speed on what the appeal is all about, it is pertinent to get a snapshot of the history, background and/or antecedents surrounding the matter. It all started with a dispute between the parties before the now defunct Land Disputes Tribunal, Busia Municipality. The Respondent in this appeal – **ANNA MACHIO** – had complained that part of her land had wrongly or mistakenly been registered as part of Land parcel No. L.R. BUKHAYO/MUNDIKA/2164 owned by the Appellant – **GEORGE LYOKO LYOKO**. The tribunal found in favour of the Respondent and ordered, *inter alia*, that the portion so registered should revert to the Respondent. The District Surveyor was to be assisted by the tribunal to make this happen. The Appellant was enjoined to co-operate.

3. As was the requirement of law at the time, the decision of the tribunal was adopted as judgement of court on 27/11/2009. From that point on, what remained was the execution process and by dint of section 7(2) of the now repealed Land Dispute's Tribunals Act, it was upon the lower court to ensure successful execution in the manner provided for under the Civil procedure Act (cap 21).

4. As pointed out earlier, the Appellant was supposed to co-operate but when the process of execution started, he balked. This then forced the Respondent to invoke the enforcement and coercive powers of the court to ensure success of the process. In this regard, an application was filed requiring the court executive officer to sign the necessary documents in place of the Appellant to ensure successful execution. That application was allowed. Among the documents signed by the court executive officer were mutation forms which then required registration by the Land Registrar in order to move the process forward.

5. It appears clear that when the mutation forms were taken to the Land Registrar for registration he declined to do so, citing non-surrender of title by the Applicant as the reason for refusal. This forced the Respondent to have recourse to the court again. She filed the application dated 4/1/2011 seeking to compel registration of the forms. The application was heard and by a ruling delivered on 1/9/2011, it was allowed. That ruling provoked this appeal. And here we are.

6. The thrust of the appeal is three-pronged. First, the court was said to have been *functus officio*. Second, the submissions of the Respondent were said not to support her application. Finally, and thirdly, the law and submissions were said to be in support of the Appellant.

7. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 18/4/2018. It was submitted, *inter alia*, that the Respondent was making a claim in respect of land owned by her deceased husband yet she had no letters of administration. Then the decision of the tribunal was stated, and a submission was thereafter made, that though illegal owing to lack of jurisdiction, it was nevertheless adopted as judgment of the court.

8. Further, the issue of mutation forms as raised in the lower court came under focus. It was submitted that the tribunal never ordered the Appellant to surrender his title deed. It was pointed out that the tribunal ordered that the surveyor visit the site and such visit had not been made. In the Appellant's view, the mutation forms ordered to be registered were outside the terms of the judgment. He submitted that they were an illegality. It also seemed to be the Appellant's position that the Respondent had an eye on his entire land, not just what the tribunal

ordered to revert to her. This court was urged to allow the appeal.

9. The Respondent's submissions were filed on 11/12/2017. The Respondent gave an overview of the case and then proceeded to address the grounds of appeal. On ground one, it was submitted, *inter alia*, that the court was not *functus-officio*, the lower court having entertained it as part of the execution process that it was mandated to undertake by law. And the law was stated to be Section 7(2) of the now repealed Land Disputes Tribunal's Act, Section 34 and 98 of the Civil Procedure Act and Order 22 Rules 28(5) and 29(1) of the Civil Procedure Rules. It was pointed out that the court had similarly handled an earlier application and allowed it and no appeal was preferred.

10. Grounds two and three were handled together. The Respondent pointed out that the decision of the tribunal was not appealed against and there was also no judicial review proceedings filed in the High Court to challenge the decision. What this in effect means is that the tribunal's decision still stands. Arguments as to lack of jurisdiction or the merits of the decision cannot therefore be urged via this application. The court was urged to look at the substance of the application and the related proceedings. It was submitted that it is clear that it would be wrong to say the respondent's submissions did not support her claim.

11. Further, it was submitted that it is wrong to assert that the order made by the court was outside the tribunal's award. What the court did, the respondent submitted, was within its mandate to undertake execution and arose from frustrations visited on the Respondent by the Appellant in the process of execution. The court, it was submitted, had the mandate to issue further orders to ensure successful execution since the obstacles encountered pose the risk of rendering the judgment nugatory.

12. I have considered the appeal as filed and the rival submissions by both learned counsel on record. Ashioya for the Applicant did not address the grounds of appeal. His submissions, for instance, do not show how the lower court was *functus-officio*. Instead, he started on the wrong trajectory when he raised jurisdictional issues yet what is before the court is neither an appeal against the tribunal's decision nor proceedings for judicial review.

13. The other arguments in the submissions are also wrong. It is wrong for instance to argue that the tribunal did not mention mutation forms or order the Appellant to surrender his title deed. The truth is that it was not necessary for the tribunal to do that. These are simple requirements of procedure in the execution process and the tribunal did not have to spell out every single detail of the execution process. It is also wrong to say the Respondent wants the whole land.

14. Besides, the tribunal was not the executing body. It is the court that adopted the tribunal's decision as its judgment that had the mandate to ensure execution. And that mandate was both broad and specific. In matters of execution the courts approach is supposed to be liberal, focussed, purposeful and, if need be, even outright forceful. And it has to be so because those who loose cases will not play joyously along as their nemesis seek to reap the fruits of their victory.

15. The substance of the Appellants submissions is largely of questionable relevance for the issue at hand. And the thrust and focus is at variance with the grounds of appeal. This contrasts sharply with the submissions of the Respondent. The submissions show a clear grasp of facts and it is interspersed with commendable articulation of the applicable law. In comparative terms, the Appellants submissions seem like vision-obstructing fog while the Respondent submission come across like a beam of shining light, providing clarity where darkness would otherwise prevail. Not a single ground of appeal is proved. The handling of the appeal by the Appellant was a rather jumbled affair. Ultimately therefore, the appeal herein is without merits and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 15th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Appellant: Absent

Respondent: Absent

Counsel for the Appellant: Present

Counsel for the Respondent: Present

Court Assistant: Nelson Odame