



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 13 OF 2014

BARNET LUTEA MUHATI APPELLANT

VERSUS

NICHOLAS MUKOYONGO MUSAMALIRESPONDENT

JUDGEMENT

The appellant herein being aggrieved by the order of Hon. J.M. Githaiga Principal Magistrate made on 15th June 2010 in Kakamega Chief Magistrate Court Misc. Application No. 5 of 2002 now appeals to this court on the following grounds:

1. The learned trial magistrate erred in failing to give the appellant leave to appeal against his orders made on 25th May 2010.
2. The learned trial magistrate improperly exercised his discretion in failure to entertain an oral application for leave to appeal.
3. The learned trial magistrate misdirected himself in law in casually dismissing the appellant's formal application dated 26th May 2010 in the absence of any submissions by the advocates on record.
4. The learned trial magistrate erred in law in blocking the avenue for appeal against his orders to the prejudice of the appellant.

The appellant prays that, this appeal be allowed with costs. That the orders of the trial court dismissing the appellant's application for leave be set aside with costs. That, the appellant be granted leave to appeal against the orders of the trial court made on 25th May 2010.

The appellant filed an application dated 13th April 2010 seeking a declaration that the verdict of the Shinyalu Land disputes Tribunal as adopted was in capable of enforcement. The application dated 13th April 2010 was dismissed by Hon. J.M. Githaiga on 25th May 2010. Upon dismissal of the application dated 13th April 2010 the trial magistrate rejected an oral application to appeal against the order dismissing that application. The appellant undeterred by the conduct of the trial magistrate, filed a formal application dated 26th May 2010 on 26th May 2010 seeking leave to appeal against the order and or ruling of the Hon. J.M. Githaiga delivered on 25th May 2010.

The appellant filed this appeal alongside an application dated 17th September 2010 and an order of stay of execution of the orders of Hon. J.M. Githaiga was granted. The appellants appeal is based on four

grounds argued as follows:-

Ground 1; the order of trial court made on 25th May 2010 dismissed the appellant's application dated 13th April 2010. The application dated 13th April 2010 sought a declaration that the verdict of the Shinyalu Land Disputes Tribunal adopted as a decision of the court on 10th March 2006 was incapable of execution or enforcement. The order was as a result of an award from the Land Disputes Tribunal which upon adoption the same could not be enforced. All that the appellant wanted was clarity since a court of law cannot issue orders in vain. The appellant's intended appeal raised fundamental issues and ordinarily leave for such appeals should be allowed.

In the case of **Euro Bank Limited (in Liquidation) vs. Shah Munge & Partners Ltd (2012) eKLR** the court observed that:-

“The conclusion to all the above is that, I find the plaintiff's application dated 29th February, 2012 properly before the court. Further and in my opinion, I think that the proposed appeal will raise fundamental issues in relation to this court's powers to dismiss A suit for want of prosecution for a step not taken, not only in a case where a hearing date was fixed less than a year prior to the dismissal as envisaged under Order 17 Rule 2 bit also generally. Such appeal will also be useful so far as the defining the rule of the court in driving the litigation process going forward. For these reasons, I allow the plaintiff's application dated 29th February, 2012 and grant leave to appeal as against the court's order of 17th February, 2012”.

Ground 2 and 3; The learned trial magistrate improperly exercised his discretion in failure to entertain an oral application for leave to appeal.

Order 43 Rule 1 (2) of the CPR 2010 provides that, an appeal shall lie with the leave of the court from any other order made under the Section Rules.

Order 43 Rule 2 (3) of the CPR 2010 provides that – An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within fourteen days from the date of such order.

Upon the dismissal of the appellant's application dated 13th April 2010 the appellant made an oral application for leave to appeal as provided under order 43 Rule 1 (3) above but that oral application was rejected. Being dissatisfied the appellant still pursued the provisions of order 43 Rule 1 (3) and filed the formal application dated 25th May 2010 but the application was dismissed summarily and leave denied. By making the oral application for leave to appeal against the order of the trial court the appellant was properly within the provisions of order 43 Rule 1 (3) which provides for the same.

The trial court only had two options, either to allow the oral application or direct that the appellant files a formal application. The trial court rejected the oral application and never directed the appellant to file the formal application. The failure to allow the oral application and or order the appellant to file the formal application for leave without giving reasons amounts to a failure by the trial magistrate to exercise his discretion judicially. Discretion has to be applied judicially and in accordance with the law.

On the other hand the remedy for the appellant still lied in the formal application dated 26th May 2010 which was also dismissed summarily on 15th June 2010. In dismissing this application the trial court stated the following at page 16 of the Record of Appeal.

“The court has perused the application dated 26/5/2010 and the circumstances leading to the filling of the present application. The application seems to be circumventing the clear provisions of the Land Disputes Tribunal and the High Court. This court will not assist such a party. Leave to appeal is not granted. It may be applied from the court the intended appeal is to be filed.”

The trial court casually and summarily dismissed the appellant's formal application dated 26th May 2010. They say so because of the following reasons.

- i. On the material day being 15th June 2010 when the application dated 26th May 2010 was to be heard the court never gave an opportunity to the appellant and his counsel to prosecute his application neither did the respondent argue their grounds of opposition.
- ii. . The trial court on its own motion proceeded to purport to peruse the application and dismissed it without even submissions from the appellant and his counsel who were all present.
- iii. There is no summary procedure to any court to dismiss an application *suo moto* without hearing the parties.
- iv. The appellant had filed his formal application within fourteen days from the date of the orders of the trial court as per order 43 rule 1 (3) of the CPR and the trial court had no reason for dismissing that application.

In the case of **Euro Bank Limited (in Liquidation) vs. Shah Munge & Partners Ltd (2012) eKLR** the court held that however this application for leave as before court was made on 29th February, 2012 within 14 days of the date of Kimondo J's order and within the time prescribed by order 43 rule 1 (3).

Ground 4; the learned trial magistrate erred in law in blocking the avenue for appeal against his order to the prejudice of the appellant. The arrangement of the court system is such that when a party is aggrieved with a decision of a lower court, such a party has an opportunity to seek a different finding in a superior court on the land.

The right to appeal against the decision of the court is either automatic or a party has to seek leave. In this particular instance it was necessary that the appellant seeks leave which he sought orally and through the application dated 26th May 2010.

The appellant was aggrieved by the orders of the trial court in which the respondent wanted to claim unspecified part of the appellant's land. Given the sensitive nature of the dispute between the appellant and the respondent it was in the interest of justice that the appellant be allowed to appeal against the orders of the court to his satisfaction and allow the judicial process to take place. The refusal to grant the appellant the right to appeal without valid reasons was an affront to the right to a fair hearing which has no place in justice.

The respondent submitted that, the appellant in his application dated 13th April 2010 sought for orders that there be an order staying the decision of the Shinyalu Division Land disputes Tribunal. The appellant further sought for orders that there be a declaratory order that the said award by the said tribunal was incapable of being executed. This application was argued by the parties on 11th May 2010. In the ruling read on 25th May 2010 in the presence of both counsel for the parties the application was dismissed with costs.

In an application dated 26th May 2010, filed under certificate of urgency the appellant filed another application under certificate of urgency seeking for the court's leave to appeal against the decision in respect of which the ruling had been read on 25th May 2010. When this application came up for hearing on 8th June 2010, parties agreed to argue it on 15th June 2010. The court also made an order that parties would file any other affidavits the parties would wish to rely upon. On 15th June 2010 the counsels for the appellant/applicant was present and the application dated 26th May 2010 was argued. It was dismissed. It is as a result of dismissal order made on 15th June 2010 of the application dated 26th May 2010 that this appeal arises.

The appellant's principal ground of this appeal is that the trial court improperly exercised its discretion in failing to entertain the appellant's oral application to apply for leave to appeal out of time. A perusal of the record of the proceedings taken on 25th May 2010 however, does not show that counsel for the applicant ever made an attempt to orally apply for leave to appeal against the ruling that had just been delivered. It is also clear from the record that, indeed, counsel for the appellant/applicant and the appellant/applicant himself were both in court on 25th May 2010 when the ruling that is being sought to be appealed against was read to the parties.

Further, the appellant/applicant filed an application dated 25th May 2010 under certificate of urgency. This application was supported by affidavit sworn by counsel for the appellant/applicant. In this supporting affidavit the counsel for the appellant/applicant never deposed that he made or attempted to make an oral application for leave to appeal when the ruling was delivered on 25th May 2010 and the trial court failed to record it. On this basis ground two (2) of the memorandum of appeal ought to fail.

According to the ruling delivered on 15th June 2010 the trial court observed that it has perused the application and the grounds of opposition and observed that the same would be dismissed since the appellant/applicant was trying to go around the provisions of the Land disputes Tribunal Act. Counsel for the appellant/applicant was in court on 15th June 2010 but he never insisted on orally arguing the application. This means, therefore, that counsel for the appellant/applicant elected that the trial court looks at the application and its supporting affidavit and the list of grounds of opposition and proceed to do a ruling. Indeed, this is what the trial court exactly did. Needless to add that in the affidavit sworn by counsel for the appellant/applicant dated and filed on 26th May 2010 counsel for the appellant/applicant never deposed that he had wanted to argue by submitting in court on 15th June 2010 and that the court had declined to take that route. Ground 3 of the memorandum of appeal is, therefore, an afterthought. The afore going are pointers, further that the trial court did not block any avenue of appeal against his decision and to that extent ground 4 of the appeal ought to fail as well.

Finally the respondent submitted that, it is important to understand the kind of order/award that the appellant/applicant is seeking to appeal against. The appellant/applicant is seeking to appeal against the award/decision made by the Shinyalu Division Land Disputes Tribunal. The provisions of the Land Dispute Tribunal Act No. 18 of 1990 were very clear that any party in the proceedings dissatisfied with the decision/award of the Division Land disputes Tribunal would only appeal to the Provincial Tribunal Appeals Committee. The appellant did not elect to take advantage of this provision. The appellant, if dissatisfied, would also have the option of proceeding by way of judicial review in the event that the tribunal exceeded its jurisdiction. The appellant did not take this option either. They submit that this is important since in deciding on this matter the court would consider the merit of would be appeal. In the instant case they would be absolutely no merit in the appeal. It is on the foregoing grounds that they submit that this appeal lacks merit and the same ought to be dismissed with cost.

I have carefully considered both the appellant's and the respondent's submissions in this appeal. I have also perused the record of appeal, in particular pages 3 to 16 on the proceedings in Kakamaga Misc Application No. 5 of 2002. In an application dated 26th May 2010, filed under certificate of urgency the appellant filed another application under certificate of urgency seeking for the court's leave to appeal against the decision in respect of which the ruling had been read on 25th May 2010. When this application came up for hearing on 8th June 2010, parties agreed to argue it on 15th June 2010. The court also made an order that parties would file any other affidavits the parties would wish to rely upon. However, from the proceedings on record I do not see any attempt by the appellant's counsel to make an oral application for leave to appeal and this ground must fail.

On 15th June 2010 the counsel for the appellant/applicant was present. There is no indication that the application dated 26th May 2010 was argued. It was dismissed. It is as a result of dismissal order made on 15th June 2010 of the application dated 26th May 2010 that this appeal arises.

In dismissing this application the trial court stated the following at page 16 of the record of appeal that;

“The court has perused the application dated 26/5/2010 and the circumstances leading to the filling of the present application. The application seems to be circumventing the clear provisions of the Land Disputes Tribunal and the High Court. This court will not assist such a party. Leave to appeal is not granted. It may be applied from the court the intended appeal is to be filed.”

The trial court summarily dismissed the appellant’s formal application dated 26th May 2010. On the material day being 15th June 2010 when the application dated 26th May 2010 was to be heard the court never gave an opportunity to the appellant and his counsel to prosecute his application neither did the respondent argue their grounds of opposition. The trial court on its own motion proceeded to purport to peruse the application and dismissed it without even submissions from the appellant and his counsel who were all present.

I disagree with the respondent’s submission that, Counsel for the appellant/applicant was in court on 15th June 2010 but he never insisted on orally arguing the application. That his failure to insist meant, therefore, that counsel for the appellant/applicant elected that the trial court looks at the application and its supporting affidavit and the list of grounds of opposition and proceed to do a ruling. Land matters are sensitive nature it was in the interest of justice that the appellant’s application be heard on merit and the appellant be accorded the right to fair hearing. This was not done. I find this appeal is merited and I order that the orders of the trial court dismissing the appellant’s application for leave be set aside with costs. That, the appellant be granted leave to appeal against the orders of the trial court made on 25th May 2010. Costs of this appeal to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE