



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 484 OF 2017

FORMERLY NAROK HCA NO.4 OF 2017

MARY LANGAS.....PLAINTIFF

-VERSUS-

HANIF AYUB SULEIMAN.....DEFENDANT

JUDGMENT

This is an Appeal arising from a Ruling delivered by the Hon. W.J. Njage being Narok CMC Misc. Civil Application No. 8 of 2007. The Appellant in his appeal has raised various grounds of Appeal namely the Respondent who were not properly on record appeared in the matter contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

The Appellant further stated that the learned magistrate exhibited bias towards the Appellant to the extent that he has refused a stay of execution of the lower court ruling dated 24th July, 2012 and further that the learned magistrate without valid reasons forced the Appellant who was the decree holder to accept the sum of kshs. 480,000/- in lieu of 4 acres of land and thereby choosing for the appellant how to execute his decree and for the reasons and the grounds hereinabove stated the Appellant prayed for the setting aside and striking out the respondent's application dated 22nd May, 2012 and the respondent ordered to deliver 4 acres of land known as Narok/Cis Mara/Oleleshwa 1502 and costs of the appeal.

When the appeal came up for hearing before me the parties agreed that the appeal shall be disposed off by way of written submissions and the appellant in his submissions argued that the law firm of Mulwa & Mulwa Advocate were not validly on record for the respondent pursuant to the provisions of order 9 Rule 1 of the Civil Procedure Rules because the said law firm did not file any Notice of Change of Advocate and serve the appellant and that since the application resulting in the present appeal was filed by a person not authorized then the same is incompetent and fatally defective.

The Appellant further submitted that the decree that was issued by the learned magistrate on 5th September, 2012 and amended on 5th January, 2012 was ambiguous and not precise and did not state clearly what the Respondent was required to do and to this end the Appellant states that the Respondent was to surrender 4 acres of land to the Appellant or in the alternative pay kshs. 480,000/-. The appellant to buttress the above stated that a court should not issue an alternate order where the decree or order is for delivery of immovable property.

The Appellant further states that the application dated 22nd May, 2012 was unlawful since no Notice to Show Cause was issued.

The Respondent in his submissions stated that the appeal lacked any merit and the same ought to be dismissed. The Respondent submitted that the appellant did not seek leave of the court since the Appeal was filed against a ruling of the court dated 24th July, 2012 as provided for under section 75 of the Civil Procedure Act.

The Respondent in his submissions contends that the Appeal be struck out as the same is time barred and was filed out of the mandatory 28 days period and further that his appeal cannot lie against an award of the land Dispute Tribunal and adopted as a judgement of the court.

I had read the submission filed by the parties herein and the issues for determination before me are the following:-

1. Whether the firm of Mulwa and Mulwa advocates were properly on record for the appellant.
2. Whether the decree issued by the court was ambiguous and not precise.

3. Whether leave was sought by the appellant pursuant to the provisions of Section 75 and whether the Appeal herein was filed out of time.

4. Whether an appeal can lie against the award of the land dispute tribunal and adopted as a judgement of the court.

In answering the 1st issue by an application dated 22nd May, 2012 the firm of Mulwa and Mulwa advocate sought to come on record for the respondent in this appeal and together with that there was another prayer seeking to have the sum of kshs. 480,000/- which was due in terms of the decree of the court be deposited within the court. When the application came up for hearing the application was not opposed as the Replied Affidavit in opposition to the same was withdrawn after it was filed out of time and without leave of the court.

It is the appellant's contention that the firm of Mulwa and Mulwa ought to have served afresh Notice of change of advocates even after the said application was allowed.

I have read the proceeding in the lower court file and find that the learned magistrate had rightfully applied the law as when the lawyer acting for the Respondent was formally discharged by the court and even though no formal notice of change of advocate was filed I don't see any prejudice that the appellant has suffered as a result of the above and no appeal from the finding of the learned magistrate was preferred against the said ruling.

On whether the decree was ambiguous and impractical to execute, I have examined the same which was issued by the court on 5th September, 2008 and the same was drawn as herein

(i) The award of tribunal dated 8th May, 2007 is confirmed as a judgement of the court.

(ii) That the 4 acres which Hanif Ayub (defendant) increased to 10 acres which Mary Langas sold to him should be returned to the plaintiff for he took them (4 acres) illegally and without the knowledge neither did he by then.

(iii) That in the alternative Hanif Ayub should pay kshs. 480,000 to Mary Langas with an acre going for kshs. 120,000.

The above being the precise decree as issued by the court I find that the same is expressly clear. The Defendant was to return the 4 acres that he allegedly took and in default to pay the sum of kshs. 480,000. The decree that was exactly the finding of the tribunal which it adopted as a judgement of the court. From the ruling and the decision of the tribunal which was delivered on 17th March, 2007 in the absence of the respondent herein. It was the appellant herein who had requested that the Respondent return the 4 acres and/or pay her the sum of kshs. 480,000/-.

It is my finding that the decree was proper and free from any ambiguity and the burden is on the appellant to choose how to execute the same to insinuate that the court decided for the decree holder how to execute the same is far-fetched and as a result this ground of appeal fails.

On whether leave of the court was sought or not I find that from the proceedings the appellant in the lower court did not seek leave of the court before preferring the appeal here.

Section 75 of the Civil Procedure Act provides the order in which a right of appeal as a matter of right and this being not one of those as envisaged under section 75 of the Civil Procedure Act and no leave having been sought, it follows that the appeal is a non-starter. Further to the above it is evident that the lower court having delivered its ruling on 24th July, 2012 and the record of appeal was filed on 23rd June, 2014 the same is statutory time barred as it was filed outside the time and hence the appeal filed outside the time and hence the appeal in its eternity.

From the above therefore I find that the appeal herein lacks merit and for the reasons I have stated above, I dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **12th day of October, 2018**.

Mohamed N. Kullow

Judge

12/10/18

In the presence of:-

Mr. Musembi for the respondent

N/A for the Applicant

CA:Chuma