



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 44 of 2006

HUMPHREY OLWISI MURANDA APPELLANT

AND

YAKOBET NECHESA WABUKO RESPONDENT

(Appeal from the decision and ruling of the High Court of Kenya at Kakamega (Kariuki, J) dated 16th December, 2005

In

H.C.C.A. No. 55 of 2002)

JUDGMENT OF THE COURT

Before embarking on the hearing of any matter, every court must be satisfied that it has the jurisdiction i.e. the legal power or authority to hear the matter. If the court has that power, then and only then does it proceed to hear the matter; but if the court determines that it has no jurisdiction then as was said in the case of **THE OWNERS OF THE MOTOR VESSEL “LILIAN S” VS. CALTEX OIL (KENYA) LTD [1989] KLR 1**. “----- the court must down tools.” The matter before us was originally dealt with by the Butere Land Disputes Tribunal which rendered its decision over land known as Marama/Shianda/126. The Tribunal’s decision was as follows:-

“THE COURT’S OPINION.

- (a) From the evidence given and the fact that the Defendant’s father on his return from Bungoma never went back to settle on his original land it is enough proof that he had actually sold land to Moses Webuko who in turn had built a house for his son on this land.**
- (b) The court accepts that the procedure and process in transferring land in dispute was conducted properly (through the Land Control Board).**
- (c) The court therefore recommends that the land Title Deed held by the Defendant Humphrey Muranda be nullified and the new Title Deed be issued to the plaintiff Yakobet Nechesa Wabuko as the owner of Marama/Shianda/126.**
- (d) And if there is any contracted sugar cane on this land, the cane proceeds should belong to the plaintiff.**
- (e) The Defendant be held responsible for any damage caused to the house and any other property**

of the plaintiff and to pay for the court costs accordingly.”

Humphrey Olwisi Muranda, the appellant herein, was obviously not amused by the decision of the Tribunal and pursuant to **section 8 (1)** of the Land Disputes Tribunals Act, Act No. 18 of 1990 (“the Act” hereinafter) Humphrey appealed to the Provincial Appeals Committee at Kakamega. The decision of the Appeals Committee was:-

“FINDINGS:

No new evidence adduced.

ORDER:

We uphold verdict given by Butere Land Dispute (sic) Tribunal to the effect that:-

(a) Land is given to respondent – Yakobet Nechesa Wabuko to be issued with new Title Deed.

(b) Title Deed now held by appellant – Mr. Humphrey Maranda be nullified.

(c) Appellant held responsible for damage caused to property of respondent.

Appeal dismissed.”

Humphrey was still dissatisfied and exercising his right of appeal given by **section 9 (9)** of the Act he appealed to the High Court at Kakamega. For a better appreciation of the appeal provisions under the Act, we set out the provisions of the Act pertinent to the issues before us:-

“9 (8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

9 (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.”

Humphrey’s appeal to the High Court was placed before Waweru, J on 16th July, 2002 and that learned Judge stated as follows:-

“Court – I have perused the memorandum of appeal herein. I hereby certify that the appeal involves points of law (other than customary law). The appeal is therefore admitted to hearing subject to direction under Rule 8B of Order 41 of the Civil Procedure Rules.”

The above order must have been made pursuant to the proviso contained in **section 9 (9)** of the Act. We have already set out the provisions of that section. The appeal was thereafter fixed for directions on 10th December, 2002; it again came before Waweru, J and the appellant was present in person while Mr. Getanda represented the respondent Yakobet Nechesa Wabuko. Mr. Getanda told the Judge that Humphrey had served them only with a copy of the memorandum of appeal but had not served them with the records of the original tribunal and the Appeals Committee. Humphrey said he would serve those documents in one month from that date. Waweru, J. then ordered.

“Court – Further directions on 11/02/03. Appellant to serve the Respondent’s counsel with copies of all unserved necessary documents. To-day’s costs to the Respondent in any event.”

On 11th February, 2003, the matter came before Khamoni, J. Mr. Getanda appeared for the respondent

but the appellant was absent, despite his having been told by Waweru, J on 10th December, 2002 that further directions would be given on 11th February, 2003. Khamoni, J then ordered:-

“Appellant has not complied with court order dated 10-12-2002. Appellant given 30 days to comply failure to which the appeal be deemed not admitted to hearing and therefore to stand dismissed. Appellant to pay to-day’s costs to respondent. Also to pay to-day’s court adjournment fees.”

It appears that the appellant did not comply with this order either and so by a summons in chambers dated 13th March, 2003 and lodged in the High Court on the following day and which was purportedly brought pursuant to **Order 41 Rule 31** of the Civil Procedure Rules the respondent asked the High Court for an order:-

“THAT this appeal be dismissed with costs for want of prosecution.”

The summons was heard by Kariuki, J and by his “JUDGMENT” dated and delivered on 11th March, 2004, the learned Judge in effect held that once the appellant had failed to comply with the order of Khamoni, J made on 11th February, 2003 within the 30 days given in that order the appeal stood dismissed as per the terms of the order. The Judge of course wrongly titled his decision as a “*Judgment*” instead of a ruling, but nothing really turns on that point. The learned Judge ended his “*Judgment*” in this way:-

“--- The order of 11.2.2003 clearly stated that if the appeal was not filed within 30 days, it would not be admitted to hearing and therefore it would stand dismissed. Liberty to apply was given to the respondent and as the applicant did not obtain enlargement of time to appeal or variation of the order, the appeal cannot but be dismissed. I dismiss it with costs to the respondent.”

The thinking of the learned Judge with regard to the order made by Khamoni, J on 11th February, 2003 was clearly confused. We cannot find anywhere in that order that the appellant had been given liberty to apply. It was also not right as the learned Judge appears to have thought, that by 11th February, 2003 when Khamoni, J made his order, the appeal had not been filed. The appeal had been filed but certain documents, namely the order and proceedings in the Butere Land Disputes Tribunal and the order and proceedings of the Appeals Committee had not been served on the respondent. It was these documents which Khamoni, J had ordered the appellant to serve within thirty days from 11th February, 2003 and if the appellant failed to comply, the appeal already filed and already admitted to hearing by Waweru, J would be deemed not to have been so admitted and would stand dismissed. But, there is no gain-saying the fact that the appellant did not comply with the order of Khamoni, J with the result that the appeal already filed stood dismissed after thirty days from 11th February, 2003. There was, accordingly no pending appeal which Kariuki, J could dismiss on 11th March, 2004.

But undeterred with all these set-backs, the appellant, through his present counsel, Mr. Namatsi, applied to Kariuki, J to review his order of 11th March, 2004. The learned Judge refused to review the order and this appeal is now brought against the ruling of the Judge, dated 16th December, 2005. The learned Judge refused to review his earlier order “*dismissing*” the appellant’s appeal. As at now there is no pending appeal in the High Court from the decision of the Provincial Appeals Committee.

The High Court, whether wrongly or rightly, has in effect dismissed the appeal. Does this Court have jurisdiction to hear the appeal now before it?

The appeal to the High Court was brought pursuant to the provisions of the Act. The High Court, as we have said, has dismissed that appeal. There is no provision in the Act allowing an appeal from the decision of the High Court to this Court. **Section 64 (1)** of the Constitution which creates this Court provides:-

“There shall be a Court of Appeal which shall be a superior court of record, and which shall have

such jurisdiction and powers in relation to appeals from the High Court AS MAY BE CONFERRED ON IT BY LAW.”

So that in order to hear an appeal from the High Court, some law must confer jurisdiction on the Court. Again **section 3(1)** of the Appellate Jurisdiction Act, **Chapter 9** laws of Kenya, provides:-

“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal UNDER ANY LAW.”

The appeal to the High Court which that Court has dismissed was brought pursuant to the provisions of the Act, namely, The Land Disputes Tribunals Act, not under the Civil Procedure Act, **Chapter 21** or under the rules made thereunder. Naturally in hearing such an appeal, some rules made under the Civil Procedure Act and even some provisions of the Act would be made use of by the High Court to provide the procedure for hearing the appeal brought under the Act. Appeals to the High Court under the Act can only be brought on issues of law excluding customary law. No right of appeal to this Court is provided by the Act. We think we have no jurisdiction to hear the appeal under the Act, and that being so, we must down our tools. Accordingly the appeal before us is and has always been incompetent and we order that it be and is hereby struck out with the costs thereof to the respondent.

Dated and delivered at Kisumu this 25th day of April, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.