



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 192 of 2010

ORENGE MOTIKA APPELLANT

AND

DAVID OKETCH ACHIENG RESPONDENT

(Being an appeal from the decree in Homa Bay SRM's Court Misc. application No.37 of 2009)

RULING

1. The Respondent herein filed the Notice of Motion dated 29th May 2012 seeking an order striking out this appeal. In the alternative, the applicant prays that the appellant be ordered to provide security for costs for the Respondent/Applicant.
2. The application is predicated upon grounds that are set out on the face thereof and in particular the applicant avers that the appeal herein was filed out of time and without leave of the court and in contravention of the clear provisions of the law. The applicant avers that in the premises, the appeal is likely to prejudice, embarrass or delay the execution of the decree in Homa Bay SRMCC NO.37 of 2009. The application is also supported by the affidavit sworn on 29th May 2012 by Duke S. Onyari, the advocate who has the conduct of this matter on behalf of the respondent/applicant.
3. Though duly served with the application on the 27th July 2012, the appellant Orange Motika did not file any replying affidavit or grounds of opposition.
4. When the application came up for hearing on 1st October 2012, there was no appearance for the appellant/respondent. Mr. Nyamweya appearing on behalf of the firm of Duke Onyari & Co. Advocates prosecuted the application before me and submitted that the appeal herein should be struck out on grounds that the appellant, by bringing this appeal contravened the provisions of **section 8 (1) of the Land Dispute Tribunals Act, No. 18 of 1990**. The section reads:-

“8(1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.”
5. The rest of **section 8** of the **Land Disputes Tribunals Act** makes provision for the manner in which the appeal referred to in **sub section (1)** shall be registered and determined. An appeal against the

decision of the Appeals Committee can be preferred to the High Court by either party to the dispute on a point of law. Such an appeal is expected to be filed within sixty days of the decision of the Provincial Appeals Committee. The proviso to **section 8** states 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.**”

6. It is not in dispute that the appeal herein emanates from the decision of the Homa Bay District Land Disputes Tribunal concerning land parcel No. Kanyamwa/Kayambo/Kwamo/1285 vide claim No.194 of 2009. The Tribunal decided that the claimant David Oketch Achieng, the Respondent in this appeal should repossess the subject parcel of land on the ground that the sale agreement under which the said land was irregularly acquired by the appellant was null and void.

7. After the award, the matter was filed before the SRM’s court at Homa Bay and on the 9th September 2009, the award dated 17th June, 2009 was read over to the parties in open court and subsequently adopted as a judgment of the court. The parties were informed of their right of appeal within 30 days. Subsequently the appellant came before this court on appeal. The appeal was filed on 30th May 2012 and it is this appeal that the respondent now seeks to have struck out.

8. The application for striking out was not opposed. I have considered the relevant provisions of the **Land Disputes Tribunals Act, No. 18 of 1990 (the Act)**. It is clear to me from a reading of the said Act that the appellant herein has adopted the wrong procedure in coming before this court. He was under a duty to appeal to the Provincial Appeals Committee against the Land Disputes Tribunal’s award as provided under **section 8 (1)** of the **Act**. Alternatively the appellant should have come to court by way of a judicial review application questioning the award of the Tribunal. Having failed to follow the proper procedure and having filed the appeal out of time and without leave of the court and also having failed to respond to the application for striking out, I do not find any reason to keep this appeal on record. The same is accordingly struck out with costs to the Respondent.

9. There are two other related appeals, namely **Civil Appeal NO.193 of 2009 – Samson Ondijo Nyamweyo –vs- David Okech Achieng** and **Civil appeal No.194 of 2009 – Vitalis Odera Tolo –vs- David Okech Achieng**. In these two appeals, the disputes are over the awards of the Ndhiwa District Lands Dispute Tribunal concerning Land Parcels Kanyamwa/ Kayambo/Kwamo/133 and Kanyamwa/Kayambo/Kwamo/268 respectively. The reasons given by the respondent in support of the applications for striking out in the these two files are the same as those given in this appeal. The respondent asked the court to make similar orders in these two other files.

10. Having carefully read the said two appeal files, I am persuaded that the applications for striking out are merited. Accordingly, I allow the applications for striking out in Civil Appeal Nos.193 and 194 of 2009 respectively. The orders made in this file shall apply in these two files mutatis mutandis.

11. It is so ordered.

Dated and delivered at Kisii this 9th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Erick Ntabo & Co. (absent) for Appellant/Respondent

M/s Duke Onyari & Co. (absent) for Respondent/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.