



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 7 OF 2017

MARGARET WANGECHI KAHOYA.....APPLICANT

VERSUS

WINFRED ESTHER WANGARI MUTUGI.....RESPONDENT

RULING

I must at the onset of this ruling point out that my ruling in **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016** (which incidentally involved the same parties and the same counsel) was made on the basis that the Applicant had sought the main order that she be granted leave to appeal out of time against the decision of the Land Disputes Tribunal No. 9 of 2007 **BARICHO** and the subsequent decree in **BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES TRIBUNAL CASE No. 8 of 2007**. She also sought an order staying execution of the decree in **BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES TRIBUNAL CASE No. 8 of 2007** dated **30TH JULY 2008** pending the hearing and determination of the appeal and

the maintenance of the status quo obtaining on land parcel No. MWERUA/KAGIO/2041. This Court therefore treated the application in that case as one seeking leave to appeal out of time and applied the principles set out in the case of ***NICHOLAS KIPTOO arap KORIR SALAT VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS 2014 e K.L.R*** in dismissing that application. I am of course not bound by my earlier decision nor a decision of a Court of concurrent jurisdiction if there is sufficient grounds to depart from such decision. I hasten to add that counsel for the Applicant was largely to blame by framing the application in **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016** as one seeking leave to appeal out of time rather than an application seeking that this Court be seized with Central Provincial Land Disputes Appeal Tribunal Appeal No. 50 of 2008 which is what he has now properly done in the application subject of this ruling. However, as the saying goes, to error is human and both counsel and Courts are no exception to that adage. The fact remains however, that Courts can and do so, where circumstances permit, distinguish and depart from their earlier decisions including those of Courts of concurrent or superior jurisdiction.

I have before me the Appellant's Notice of Motion dated 22nd June 2017 in which the Appellant seeks the following orders:

1. Spent.

2. That this Court be seized with Central Provincial Land Disputes Appeal Tribunal Appeal No. 50 of 2008 MARGARET WANGECHI KAHOYA and ESTHER WAMURANGO alias ESTHER ROMANO (deceased) VS WINFRED ESTHER WANGECHI MUTUNGI per clause 3 of the Chief Justice Practice Directions on proceedings relating to the Environment and occupation of land and Section 13 of the Environment and Land Court Act No. 19 of 2011.

3. That this Honourable Court do review, nullify, up-lift and set aside the award in BARICHO LAND DISPUTES TRIBUNAL No. 9 of 2007 and BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES CASE No. 8 of 2007 which are by law a nullity.

4. That the orders made in BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES CASE No. 8 of 2007 be stayed pending the hearing of the appeal inter-partes.

5. That costs of this application be provided for.

The application is supported by the Applicant's affidavit to which are annexed several annexures including the title to land parcel No. MWERUA/KAGIO/2041, the subject of the appeal, proceedings of the **BARICHO LAND DISPUTES TRIBUNAL in Case No. 9 of 2007**, the decree in **BARICHO RESIDENT MAGISTRATE'S LAND DISPUTES TRIBUNAL CASE No. 8 of 2007** as well as the memorandum of appeal filed at the **CENTRAL PROVINCIAL LAND DISPUTES APPEAL TRIBUNAL in APPEAL No. 50 of 2008**.

The gravamen of the application is that the Applicant was at all times the registered proprietor of land parcel No. MWERUA/KAGIO/2041 which was the subject of litigation between her and the Respondent together with two others at the **BARICHO LAND DISPUTES**

TRIBUNAL CASE No. 9 of 2007 which awarded the Respondent half of the suit land. That award was adopted as an order of the Court at **BARICHO LAND DISPUTES TRIBUNAL CASE No. 8 of 2007**. Being aggrieved by that decision, the Applicant promptly filed an appeal No. 50 of 2008 at the **CENTRAL PROVINCIAL LAND DISPUTES TRIBUNAL** and although she visited the Appeals Tribunal at Nyeri severally with a view to having it heard, she was told to wait for an official letter inviting the parties for hearing. Then in 2016, she saw beacons being placed on her land and so she sought legal advice and filed this application.

The application is opposed and the Respondent has filed grounds of objection describing the same as frivolous, vexatious and an abuse of the due process of the Court. Further, that the issues raised in this application have been addressed in an earlier application being **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016**.

The application has been canvassed by way of written submissions which have been filed both by Mr. **V.E. MUGUKU ADVOCATE** for the Applicant and Mr. **MAINA KAGIO ADVOCATE** for the Respondent.

I have considered the application, the supporting affidavit and annexures thereto, the grounds of objection and the submissions by counsel.

On the issue that this application is raising matters canvassed in **KERUGOYA MISCELLANEOUS APPLICATION No. 54 of 2016**, I wish to state that the said application had sought the main order that the Applicant be allowed to file an appeal out of time as well as orders of stay of execution and maintenance of status quo on land parcel No. MWERUA/KAGIO/2041. That application for leave to appeal out of time was dismissed for the reasons stated in my ruling delivered on 16th June 2017. The application now before me seeks the main order that this Court be seized with the Central Provincial Land Disputes Tribunal Appeal No. 50 of 2008. That was not an issue in **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016** and I do not therefore take the view that this application can be defeated by the provisions of *Section 7 of the Civil Procedure Act*.

It is common ground that the Provincial Land Disputes Appeals Committee established under *Section 9 (1) of the repealed Land Disputes Tribunal Act* were disbanded following the repeal of that Act with the enactment of the *Environment and Land Court Act of 2011*. Under the Transitional provisions of the Environment and Land Court Act, any proceedings relating to the Environment and Land pending before any Court or Tribunal were to continue being heard and determined by such Courts and Tribunal until this Court was established after which such proceedings would be determined by this Court including pending appeals. That is why the Chief Justice issued several Practice Directions including *Gazette Notice No. 5178 of 25th July 2014* directing that appeals from Magistrates Courts and Tribunals would lie to this Court. The Provincial Land Disputes Appeals Committees were therefore expected to transfer all appeals pending before them to this Court. That appears not to have been done with respect to this appeal and notwithstanding the fact that this Court did issue directions through the Deputy Registrar that such appeals be transferred to this Court. That is what the Court of Appeal reiterated in the case of **FRANCIS KIMANI KIRIMIRA VS CHEGE MACHARIA C.A CIVIL APPEAL No. 20 of 2015 (NYERI) (2015 e K.L.R)** when it said:

“We are of the considered view that where, as in this case, an award has been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the Court to be followed by the usual process of decree and execution and appeal where the parties so desire.

Such appeal would be to the High Court by dint of clause 13 of the Practice Direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act”

The Applicant has explained in paragraph eight (8) of her replying affidavit that she visited the Appeals Tribunal at Nyeri with a view to having it heard but was told to wait for an invitation letter. Mr. Kagio has taken issue with the fact that this averment is very contrary to the Applicant's previous averment contained in my ruling in **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016** and therefore the Applicant is not candid nor deserving of the exercise of this Court's discretion. That may be so but it must be remembered that in **KERUGOYA ELC MISCELLANEOUS APPLICATION No. 54 of 2016**, what was before me was an application to file the appeal out of time and the delay of eight (8) years was obviously an important factor. Now that it is clear that the appeal at the Provincial Appeals Committee was filed in good time and bearing in mind that Courts must aim at doing substantive justice to the parties by hearing their cases on merits, it is proper that this Court be seized with the pending appeal and have it determined. Failure to do so will only mean that the Applicant will have no other avenue to address her grievances. That will cause great injustice to the Appellant while on the other hand, it is not suggested that the Respondent will be prejudiced as it appears that the decree arising from the award has not yet been executed. I would therefore grant prayer No. 2 of the Notice of Motion dated 22nd June 2017.

As for prayer No. 3, it seeks the setting aside, review and nullification of the awards in **BARICHO LAND DISPUTES TRIBUNAL No. 9 of 2007** and **BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES CASE No. 8 of 2007** for being a nullity. That prayer cannot be granted as to do so will amount to determining the appeal at an interlocutory stage.

Prayer No. 4 seeks the stay of the orders issued in **BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES CASE No. 8 of 2007** pending the hearing and determination of the appeal. It is clear from the pleadings herein that the jurisdiction of the **BARICHO LAND DISPUTES TRIBUNAL** to determining a dispute over registered land will be central to this appeal. If the appellate Court annuls the award on grounds of jurisdiction after it has been executed, a grave injustice will have been caused to the Applicant. An order of stay is well merited in the circumstances.

With regard to costs, the Applicant should meet the Respondent's costs since the delay has been occasioned by her.

Ultimately therefore, this Court makes the following orders after considering the Applicant's Notice of Motion dated 22nd June 2017.

1. The Court be seized with the CENTRAL PROVINCIAL LAND DISPUTES APPEAL No. 50 of 2008.

2. The record of appeal be prepared and filed within 45 days from the date of this ruling.

3. Costs of this application shall be borne by the Applicant.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February 2018 at Kerugoya

Mr. Ngigi for Mr. Kagio for Respondent present

Mr. Muguku for Applicant absent

Applicant present.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018