



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAROK

ELC MISC. SUIT NO. 10 OF 2020

KAITUAI OLE MARERU.....APPLICANT

–VERSUS–

NOORETET ENOLE MARERU.....RESPONDENT

RULING

1. What is before the court for determination is the Applicant's Notice of Motion application dated 24th September, 2020 which is anchored on the provisions of **section 3, 3A, 63(c), (e)** of the **Civil Procedure Act, Order 51 Rules 1 and 3** and **Order 22 Rule 29** of the **Civil Procedure Rules, 2010**. The Applicant is seeking the following orders from the court:

a) Spent;

b) That this Honourable Court grants leave to file an appeal from the District Land Dispute Tribunal Misc. Case No. 15 of 2011 out of time; and

c) Costs be in the cause.

2. The grounds in support of the application are set out in the Supporting Affidavit sworn by the Applicant on 24th September, 2020 wherein he deposed that the decision in **Misc. Land Case No. 15 of 2011** was filed and adopted by the Narok Senior Principal Magistrate Court on 26th July, 2014, and that he applied for the proceedings on 1st August, 2011. It was his case that he was furnished with the proceedings on 2nd September, 2011 which is over one month of the time provided for filing an appeal.

3. The Applicant also deposed that he became very ill and was in and out of hospital with different conditions. It was his contention that the District Land Registrar while giving evidence had confirmed that he is the rightful owner of the suit property.

4. Further, the Applicant also told the court that he had drafted a Memorandum of Appeal which is ready for filing, and that he cannot file the same unless he is granted leave to file it out of time for the reason that he received the proceedings from the court late. The Applicant therefore urged the court to grant him leave to file an appeal out of time before the Land Dispute Appeals Tribunal.

5. The Respondent opposed the application vide Grounds of Opposition dated 9th December, 2020 wherein he raised the following grounds:

i) The application offends the provisions of section 79G of the Civil Procedure Act;

ii) The Applicant is guilty of inordinate delay and have not demonstrated any discernible and justifiable reason to warrant filing the appeal out of time;

iii) Equity does not aid the indolent;

iv) The Applicant did not take any substantial steps to file an appeal since 6th March, 2014;

v) The record shows that the purported appeal is otherwise manifestly hopeless beyond redemption and cannot be brought back to life through ventilators of an appeal;

vi) Section 9(3) of the Law Reform Act (Cap 26, Laws of Kenya) provides that in the case of an application for an order of certiorari to remove any judgment, order or decree conviction or other proceedings for the purpose of being quashed, leave shall not be granted unless the application for leave is made not less than six months after the date that judgment, order, decree,

conviction or other proceedings or such shorter period as may be prescribed under any written law in addition the said provision is reproduced in Order 53 Rule 2 of the Civil Procedure Rules, 2010;

vii) *Simply put, by hearing the instant application will be denying the Respondent of an advantage of the statute of Limitation at the time of filing of the claim as the instant filing has been done outside the time limitation;*

viii) *It is therefore unfortunate that the Applicant since 2014 upto 2020 now wants to institute Judicial Review Proceedings which in the Respondent's view is pure time wasting and taking the court round the circles and failing to appreciate the scope of jurisdiction of the judicial review court and seeking to convert the proceedings which lapsed with the adoption of the award in the Chief Magistrates Court to two processes of an appeal out of time and at the same time Judicial Review;*

ix) *From the foregoing, is a not a practice which is permissible. The instant application in this Honourable Court is geared towards wasting precious judicial time and constrained resources and it is for this reason that this Honourable Court shall find that the said application is not warranted or merited. Henceforth it must be dismissed for misunderstanding the legal process; and*

x) *Accordingly, the application for stay of execution lacks merit and ought to be dismissed forthwith with costs to the Plaintiff/Respondent.*

6. The Applicant filed his written submissions on 16th November, 2021 wherein he submitted that that there is nothing he could have done to be able to file the appeal yet he was sick on different occasions all over those years. He contended that he had provided evidence through a medical report to show that he was indeed indisposed.

7. It was further submitted by the Applicant that the drafted appeal has merit, hence, the court was urged to grant leave for filing of the appeal out of time. It was also the Applicant's submission that his appeal is arguable and has high chances of success, therefore, he contended that for him to enjoy his right of appeal, it is imperative that leave is granted to file the appeal out of time.

8. The Applicant therefore urged the court to allow the application contending that no party shall be prejudiced. He relied on the case of *In re John Mwangi Ng'ang'a alias John De Matthew [2016]eKLR* to advance his arguments in support of his application.

9. The record indicates that the Respondent in spite being granted time to file his submissions failed to do so as directed by the court. The Respondent instead opted to file what he termed as ***"facts that grounds the opposition to the two in one application i.e. the judicial review and an out of time application"***. It is not clear what informed the filing of the aforesaid document by the Respondent which is unknown to law and practice in this court.

10. Nonetheless, in light of Article 159(2)(d) of the Constitution of Kenya, 2010, the court considered the arguments advanced by the Respondent. It was contended that the application offends section 79G of the Civil Procedure Act which requires that appeals from the subordinate courts to the High Court be filed within thirty (30) days. It was the Respondent's contention that the Applicant had not shown good and sufficient cause for the delay in filing the appeal.

11. The Respondent further argued that there had been inordinate delay in filing of the appeal by the Applicant. The Respondent also submitted on the point that an application for leave to file judicial review case ought to be filed within six (6) months of the decision sought to be challenged. The court was thus urged to dismiss the application.

12. Reliance was placed on the cases of *Nicholas Kiptoo Arap Korir vs Independent Electoral and Boundaries Commission & 7 Others, Zedekiah M. Mwale vs Bikeke Farm Directors & Another, Robert Adera Opiyo & Another vs Roseline Amondi Otieno*, and the case of *Republic vs Kenya Civil Aviation Authority & Another ex parte Elite Earth Movers Limites [2017]eKLR*.

13. Having considered the Notice of Motion application by the Applicant and the material in support thereof including the submissions as well as the Respondent's response thereto and the material presented, the following substantive issues arise for determination by the court:

i) *Whether there are good and sufficient reasons for allowing the application; and*

ii) *Whether the application is merited under the circumstances.*

14. Regarding the application before the court, section 8(1) of the Land Disputes Tribunal Act provided as follows:

"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.

15. The decision sought to be appealed was made on 8th June, 2011 and later adopted on 26th July, 2011. Pursuant to section 8(1) of the Land Disputes Tribunal, the Applicant ought to have lodged his appeal before the Provincial Appeals Committee within thirty (30) days. He did not, hence the application now before the court.

16. The power of the court to grant leave for filing an appeal out of time is provided under section 79G which provides that:

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time”

17. The burden therefore rests with the Applicant to satisfy the court that there is good and sufficient cause for him not filing the appeal on time. The Applicant blames the delay on illness contending that he was in and out of hospital, and that in spite requesting for the copy of the proceedings on 1st August, 2011, the same were availed to him by the Tribunal on 2nd September, 2011 which is over one month of the time provided for filing an appeal.

18. As earlier adverted to, the record indicates that the decision of the Tribunal was made on 8th June, 2011 and later adopted on 26th July, 2011 by the Narok Senior Principal Magistrates Court. It is therefore apparent that by the time the Applicant was making an application to be furnished with the proceedings by the Tribunal, the thirty (30) days period for lodging an appeal under section 8(1) of the Land Disputes Tribunal Act has already lapsed. The Applicant has not explained why he did not file the instant application back then since he was aware that he had thirty (30) days to lodge an appeal. Instead, he opted to request for a copy of the proceedings while aware that the time provided for filing the appeal had already lapsed.

19. The court has also considered the medical report relied on by the Applicant which was marked as exhibit “KM3”. The medical report indicates that the Applicant first attended the hospital on 14th January, 2011 for medical examination. From the record, it is apparent that the Applicant did attend and was aware of the decisions of the Land Disputes Tribunal and the Narok Senior Principal Magistrates Court. The proceedings were all taken after the Applicant first went to the hospital on 14th January, 2011.

20. The upshot of the foregoing is that the court is not satisfied that there exist good and sufficient cause for granting leave to the Applicant to file his appeal out of time. The court is of the opinion that the Applicant has not demonstrated proper diligence of one who really wanted to appeal but could not do so for good reasons. It is also not lost on this court that the impugned decision was made over ten (10) years ago, hence, the court is also of the opinion that it is in the interest of justice that litigation must come to an end at some point.

21. In a nutshell this court finds no merit in the Applicant’s application. Accordingly, the application is hereby dismissed with costs to the Respondent.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 27th DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

27/1/2022

IN THE PRESENCE OF:

CA:Timothy Chuma