



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO. 86 OF 2012

DANIEL NGARI KAMAU..... APPLICANT

VS

MARY WAMBUI GACHIRI.....DEFENDANT

RULING

Daniel Ngari Kamau, (**herewith referred to as to applicant**) has invoked the provision of Section 150 (2) of Part XI of the Registered Land Act Cap 300 Laws of Kenya against Mary Wambui Gachiri (**herewith referred to as respondent**) for ones that this Honourable court be pleased to grant leave for extension of time to lodge Notice of Appeal against the Award of the Chief Land Registrar and the leave once granted to operate as stay of the Award of the Chief Land Registrar.

The Award is based on grounds that time for lodging notice of appeal in consonance with Section 150(2) of the Registered Land Act has already run out and that failure to lodge notice of Appeal is not deliberate but was necessitated by a reasons outside applicant's diligence. Moreover, that the applicant was not able to access the proceedings and the award of the chief registrar within good time as none was furnished to the applicant soon after hearing and making of the findings. According to the applicant no party shall be prejudiced as the status of the land parcels affected by this dispute is still unchanged and that the appelland undertakes to pledge any security and undertaking for damages as a requisite for grant of the sought order.

The application is supported by the affidavit of Daniel Ngari Kamau deponed on the 15.5.2012 where he states that got copies of this ruling and award and thereafter consulted his advocate on record who informed him that an appeal from the aforesaid award is imperative since there are pertinent issues which the Chief Land Registrar and/or his representatives failed to consider. That his advocates also informed him that he required leave to file such appeal out of time as the period of 30 days within which the appeal was to be filed had lapsed. He claims that the representatives of Chief Land Registrar stated that his finding is final in contravention with section 150(2) of the Registered Land Act. It is not deliberate to fail to file an appeal within good time and had it not been for their area chief's letter dated 25th April 2012 he would not have known that the respondent intends to execute against the award of the Chief Land Registrar. That unless an order is made to lodge Notice of Appeal together with lodging of Appeal he stands to suffer irreparable loss and damage. In a nutshell he states that the proceedings before the award of the Chief Land Registrar were not furnished to him within good time.

The application is opposed by the Respondent who filed a replying affidavit on 25.5.2012 that was deponed on 24.5.2012. The gist of the affidavit is that the applicant has not stated when he received the award of the Chief Land Registrar to assist the court make an informed decision. The decision of Chief Land Registrar was delivered on 18th January, 2012 and was received by the the applicant within one week of the Award being made as he is the one who informed the respondent that the Award had been

made. The respondent received his copy of the Award before the end of January 2012. That the applicant after the award was delivered has approached the respondent due to the house which lies on the side of his land as per the Chief Land Registrar's Award page 10. The Respondent believes that there is no good reason given for the delay or at all and he urges the court to find that this application is an afterthought meant to delay justice. The Chief's letter dated 25th April 2012 was after several requests to the Applicant to avail himself to place "Mikungugu" features but he failed to appear and hence the respondent requested the Assistant Chief to write to the Applicant.

The *gravamen* of the submissions of Muturi Njoroge is that the applicant is not guilty of inordinate delay and took prompt action to file the application upon learning of the impending execution and award. The applicant argues that there was misrepresentation by the representatives of the Chief Land Registrar that the Registrar's award in such a dispute was final and could not be appealed against. This occurred when the applicant obtained copies of award and by then the requisite time to file the appeal had lapsed. On this ground the Applicant appears to be suggesting that he was misled by the representatives of the Chief Land Registrar when he obtained the copies of the award. The applicant does not give information as to when he received the copies, however, he is clear that when he received the copies time had lapsed. He claims to have similarly learnt of the impending execution by the respondent by way of the copy of the letter from the Chief dated 25.4.2012 and claims that time started to run on the date he received the chief's letter which date is not disclosed but the date of the letter is disclosed.

The Applicant further argues that there is no prejudice to be suffered by the respondent as the Land Parcels in issue are still unchanged and security for damages has been undertaken. Lastly that the applicants intended appeal has merit and high probability of success.

The Respondent on the other hand argues that the High Court in Nyeri HCC No. 76 of 2011 ordered that any dissatisfied person in the proceedings to the award of the Land Registrar to pursue the appeal before the Chief Registrar. The Respondent having been dissatisfied filed an appeal before the Chief land Registrar on 30.6.2011 which led to the Chief Land Registrar's award made on 18.1.2012. He argues that the drafting of the notice on that date of the application was made to hood wink this court that the applicant intended to appeal.

This court agrees with the Respondent that the applicant does not state when he received the ruling and award. The applicant is vague on this dates when he received the award and when he consulted his advocate. Moreover, he does not state the date he received the letter from the chief but relies on it as the determinant of the period when the time starts running. The fact that the applicant has given two conflicting reasons as to his delay in filing the Notice of Appeal, thus the fact that the Chief Registrar's representatives informed him that the award was final and that he did not know that the award was read until he received the Chief's letter dated 25.4.2012, shows that the applicant is not candid because he should choose one ground from the two. He cannot claim that he was misled that the award was final and also claim that he did not receive the same in time and therefore failed to lodge the Notice of Appeal in time.

This court has perused the Registered Land Act Cap 300 Laws of Kenya and finds there are no provision for extension of time to give Notice to Chief Land Registrar under Section 150(2) by any person of his intention to appeal to the High Court against the decision, direction, order, determination or award. The absence of such provision implies that the court has no jurisdiction or power to do so as jurisdiction is only given to the court by statute. Order 80 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act cannot give jurisdiction as the same are only meant to pre-empt abuse of the court process and to enable ends of justice meet.

This court could have stopped at that, however, there are other issues raised that need to be addressed. The question that should be answered is whether the applicant has shown sufficient reasons to warrant the grant of the orders sought. The applicants explanation for delay is that first, he was informed that the Chief Land Registrars decision was final and secondly that he received the same after expiry of the period. This court observes that the decision was made on 18.1.2012 and the application was made on the 15.5.2012. The intended appellant has not told the court when he received a copy of the ruling instead

he has been very evasive on dates.

In his replying affidavit, the Respondent at paragraphs 3, 4 and 5 states that the applicant has not demonstrated to the court when he received the award of the Chief Land Registrar to assist the court to determine the time taken between receipt of the Award and filing of this Application. That the decision of the Chief Land Registrar as per the annexure marked "DMK1" of the further affidavit sworn on the 18th May, 2012 was delivered on 18th January, 2012. That the applicant received the award within one week of the Award being made as he is the one who informed the respondent that he had the Award. That the Respondent received his copy of the Award before the end of January 2012. The applicant received this replying affidavit but chose not to respond to the allegations.

Upon careful examination on this issues I cannot tell with certainty whether the allegations by the applicant are true. The veracity of the applicant's story was challenged by the respondent and therefore it was the applicant's personal burden to explain the delay. It is a clear legal principle that discretion is exercisable on the basis of evidence and sound legal principles and that the duty of placing the necessary evidence before court to enable it exercise its discretion is squarely on the applicant.

Though it was held in WASIKE -VS- KHISA & ANOTHER, CIVIL APPLICATION NO. 248 OF 2003 (KCA) 2004, 1KLR 197 by Githinji J.A, that

“ It would be a fetter on the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained” in *Wasike's* case, the applicant produced a full dossier of evidence to support his claim of having been sick. The dossier was full, comprehensive with dates of consultation names of doctors , court proceedings. In contrast the applicant in the instant case did not give any evidence in respect of the dates. This court does not require him to prove any minute detail of the stories but all that this court requires him is to place before it the minimum to enable it form an opinion that what he was saying was probably true.

In conclusion, the appellant had a right to access to ultimate justice by way of appeal which right was not open extended as Section 150(2) of the Registered Land Act circumscribed the right with a requirement to file the Notice within 30 days. The applicant did not comply. The delay dragged on from one month to two and thirdly to four months and in all, a delay of more than 60 days. Such a delay was by any measure, inordinate. It was inimical to the rights of the Respondents, to enjoy the fruits of the judgment of their long standing dispute. In the result, the application is dismissed with costs to the Respondent.

SIGNED AND DATED AT ELIDORET THISDAY OF..... 2015

OMBWAYO ANTONY

JUDGE

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF JANUARY ,2015

LUCY WAITHAKA

JUDGE