



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 55 OF 2012**

**NYAGILO ADIENGE .....1<sup>ST</sup> APPLICANT**

**LUKAS JABUYA ADIENGE ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**AYOKO ADIENGE .....RESPONDENT**

**(Being an application for extension/enlargement of time within which to lodge an appeal from the ruling and/or decision of the Nyanza Provincial Land Disputes Appeals' Committee dated 28<sup>th</sup> January, 2011 and for directions/orders that the intended appeal raises questions of law.)**

**RULING**

1. What is before me is the applicant's application brought by way of Notice of Motion dated 10<sup>th</sup> April 2012 under Order 50 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders;-

- a. That the honourable court be pleased to certify this matter as urgent and that due to its urgency, service thereof be dispensed with and the same be heard ex parte in the first instance.**
- b. That this honourable court be pleased to extend and/or enlarge the time within which the intended appellants may lodge an appeal against the ruling and/or decision of the provincial land disputes appeals committee dated 18<sup>th</sup> January 2011.**
- c. That this honourable court be pleased to certify that the intended appeal raises salient/arguable points of law and that the same be admitted for hearing on the grant of leave herein.**
- d. That this honourable court may give such other or further just and fit orders as the circumstances of the case may demand.**
- e. That costs of and incidental to this application be provided for.**

The application is supported by the affidavit of the 2<sup>nd</sup> applicant sworn on 10<sup>th</sup> April 2012. The circumstances that led to the present application are as follows. The 1<sup>st</sup> applicant, the respondent and one, Adalo Adienge (deceased) who is the 2<sup>nd</sup> applicant's father were at all material times the registered proprietors of all that parcel of land known as **LR No. South Sakwa/Kogelo/567** (hereinafter referred to

as “**the suit property**”). Sometimes in the year 2010 or thereabouts a dispute arose between the applicants and the respondent over the division and sharing of the suit property between them. The dispute concerned the manner in which the suit property that was jointly registered in the name of the 1<sup>st</sup> applicant, the 2<sup>nd</sup> applicant’s father and the respondent should be shared between them. The bone of contention was the entitlement of each of them in the said property. After they failed to resolve the dispute amicably, the respondent lodged a complaint against the applicants with Migori/Rongo Land Disputes Tribunal (hereinafter referred to only as “**the Tribunal**”) in the year 2010. The respondent’s complaint was that the applicants had without his consent proceeded to forcefully divide the suit property in a manner that suited them and in the process encroached on the portion of the suit property which has been occupied by the respondent and members of his family over the years.

2. The tribunal heard the respondent’s complaint and made its award and/or decision on 14<sup>th</sup> June 2010. In its decision, the tribunal ordered that the suit property be divided into three (3) portions between the families of the respondent, the 1<sup>st</sup> applicant and Adalo Adienge, deceased. The tribunal made a further order that the division of the suit property should be carried out in accordance with the boundaries that were fixed by the clan elders in the year 1984. The tribunal nullified the alleged forceful sub-division of the suit property that had been carried out by the applicants in the year 2009. The tribunal ordered further that the executive officer of the court should sign all documents necessary to effect the sub-division of the suit property in compliance with its award. The applicants have contended herein that the proceedings before the tribunal were conducted without notice to them. The proceedings of the tribunal indicate however that the applicants ignored the Summons from the tribunal.

3. The tribunal’s award was lodged before the Senior Resident Magistrate’s court at Rongo for adoption as a judgment of the court pursuant to the provisions of the Land Disputes Tribunal’s Act, No. 18 of 1990 (now repealed). The same was adopted as such on 8<sup>th</sup> August 2010 and a decree issued on the same day. The applicants were aggrieved by the said decision and/or award by the tribunal and pursuant to the provisions of section 8 (1) of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) aforesaid, they lodged an appeal against the same to **Nyanza Land Disputes Appeals Committee** (hereinafter referred to only as “**the appeals committee**”). The applicants appeal was registered as Case No. 48 of 2010. The applicants’ appeal before the appeals committee was dismissed on 18<sup>th</sup> January 2011 for non attendance. The applicants have contended that they were not notified of the hearing date for this appeal and that is the reason why they did not appear before the appeals committee on 18<sup>th</sup> January 2011 when the appeal was dismissed. The applicants have contended that they only came to realize that the said appeal had been dismissed in March 2012 through other proceedings that involved them and the respondent. They have contended that by the time they had notice of the dismissal of the said appeal, the time within which they were entitled to appeal against the said decision had expired and the appeals committee had also been dissolved by operation of law. It is on account of the foregoing that the applicants have brought the present application for extension of time to file an appeal against the said decision of the appeals committee. The applicants have contended that they have good grounds of appeal against the said decision.

4. The applicants’ application has been opposed by the respondent through a replying affidavit sworn on 24<sup>th</sup> April 2014. In his affidavit, the respondent has contended that the applicant’s intended appeal is not maintainable. The respondent has contended that the applicants were summoned to appear before the tribunal but failed and/or refused to do so. The respondent has contended further that the applicants were also notified of the hearing date of the appeal that they lodged with the appeal’s committee but once again they failed to and/or refused to turn up before the said committee to prosecute their appeal thereby leaving the committee with no alternative but to dismiss the appeal for non attendance. The respondent has contended that the appeals committee did not make any decision on the merit of the appeal which can be made the subject of an appeal before this court. The respondent has contended that the applicants only have a right of appeal to this court on a point of law and that the dismissal of the appeal for non attendance does not give rise to an issue of law appealable to this court. The respondent has contended further that this court has no jurisdiction to grant the orders sought because the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) did not provide for an extension of time to file an appeal. The respondent has contended further that the applicants’ application has been brought after inordinate delay

and as such the applicants are not entitled to the orders sought.

5. When the applicants' application came up for hearing before me on 4<sup>th</sup> February 2013, I directed that the same be heard by way of written submissions. The applicants did not file their submissions within the time that was fixed by the court and have not done so to date. The respondent filed his submissions on 17<sup>th</sup> April 2014. I have considered the applicants application together with the affidavit filed in support thereof. I have also considered the respondent's affidavit in opposition to the application. Finally, I have considered the respondent's written submissions and the authorities cited in support thereof. The applicants' application is seeking extension of time within which to file an appeal to this court from the decision of the appeal's committee. The power to entertain appeals from the appeal's committee was donated to this court by section 8 (9) of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) (hereinafter referred to as "**the Act**"). That section gave this court the power to entertain appeals from the decision of the appeal's committee on points of law only. The section provides that such appeal should be filed within sixty (60) days from the date of the decision of the appeals committee sought to be appealed. Neither the Act nor the rules made thereunder provided for extension of the sixty days time limit within which appeals from the appeal's committee should be filed before this court.

6. The applicants have urged me to exercise this court's inherent jurisdiction under section 3A of the Civil Procedure Act to extend time for the intended appeal. On the other hand, the respondent has contended that since the court has not been given the power by the enabling statute to extend time, this court has no jurisdiction to do so. I am in agreement with the submission by the respondent that this court has no power to extend the time that was provided for under the Act within which to file an appeal from the decision of the appeals committee. Jurisdiction is conferred. It cannot be assumed. The inherent power of the court under section 3A of the Civil Procedure Act cannot be used to confer upon the court a jurisdiction that it does not have. In the case of **Owners of Motor Vessel "Lillian" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1**, it was held that:-

**"Where a court takes it upon itself to exercise a jurisdiction that it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."**

7. Under section 79G of the Civil Procedure Act, this court has power to extend time within which to file appeals to this court from the decisions of the subordinate courts provided good and sufficient cause is shown. The appeals committee that was established under the Act is not a subordinate court. The time limited by the Act for filing an appeal arising from its decision cannot therefore be extended under this section. Order 50 rule 6 of the Civil Procedure Rules also gives this court the power to extend time. Under that rule however, this court can only extend time limited under the Civil Procedure Rules of by summary notice or by an order of the court. The power given by the court under this rule cannot therefore be extended to cover the limited time fixed under another statute such as the Act.

8. I am of the opinion that if the legislature had intended to give the court power to extend the time set out under section 8 (9) of the Act, it would have done so expressly either in the Act or the rules that were made thereunder. The power could have been given to the appeals committee and/or to this court being the appellate court for the decisions from the appeals committee. If the appeals committee had been given the power to extend that time then this court could have had no difficulty in the absence of the said committee to perform similar function. Under section 78 (2) of the Civil Procedure Act, the appellate court enjoys the same power and can perform the same duties as the courts of the original jurisdiction or the court's appealed from. In the present case the appeals committee did not have the power to extend time within which to appeal its decision to this court. This court cannot therefore extend that time in exercise of the powers conferred on an appellate court under section 78 (2) aforesaid. For the foregoing reasons, it is my finding that this court has no jurisdiction to extend the time limited under section 8 (9) of the Act within which an appeal from the appeals committee can be instituted.

9. The determination of that issue of jurisdiction is sufficient to dispose of the applicants' application herein. I would wish to mention however that even if I am wrong on the said issue of jurisdiction of this court, I would still not have granted the applicants' application on account of inordinate delay. The application herein for extension of time was brought after the expiry of over one (1) year after the

decision of the appeals committee. The explanation given by the applicants for this delay is not convincing. The applicants have contended that they were not aware that their appeal had been dismissed until March, 2012 when they learnt of the same from the respondent. What this means is that for over one (1) year, the applicants had not checked on the status of their appeal before the appeals committee. This sort of indolence cannot be entertained by the court. The relief sought by the applicants is discretionary. This court cannot exercise its discretion in favour of an indolent party.

10. The upshot of the foregoing is that the applicants' Notice of Motion application dated 10<sup>th</sup> April 2012 has no merit. The same is accordingly dismissed with costs to the respondent.

**Delivered, signed and dated at KISII this 13<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the applicants

Mr. Bigogo h/b for O. M. Otieno for the respondent

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**