



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC APPL. NO.61 OF 2013

PETER MURUNGA OOLA.....APPLICANT

VERSUS

BENARD OKOTH OOLA.....RESPONDENT

RULING

1. This is a ruling on a Notice of Motion filed here on 26/2/2013 and dated 21/2/2013. The applicant – **PETER MURUNGA OOLA** – wants the court to grant him leave to file appeal out of time. He also asks that provision for costs of the application be made.
2. The application is stated to be brought under Sections 3, 3(a) of Civil Procedure Act (Cap 21), Sections 13(1)(2)(3)(4) and (6) of the Environment and Land Court Act, 2011 and Sections 8(a) of the Land Disputes Tribunal's Act (now repealed). It is premised on the grounds, inter alia, that the applicant is desirous to file appeal out of time from the decision of Nyanza Provincial Land Appeals Committee; that the said decision was delivered in his absence; and that it is in the interests of justice to allow the application.
3. The supporting affidavit accompanying the application states, inter alia, that the applicant first filed a dispute at Siaya Land Dispute Tribunal. A decision was made and he filed an appeal. The appeal was at Nyanza Provincial Appeals Committee. According to the applicant, the appeal was determined in his absence. He said he was never called to attend hearing.
4. He said further that he got to learn of the decision from the respondent. He then went and obtained the decision. He got to know that the decision was delivered on 16/2/2012 yet he got to learn of it in December, 2012.
5. The applicant said the delay in filing the appeal was not intentional as he was not made aware of the hearing and decision. He said he has a good appeal and no prejudice will be occasioned to the respondent.
6. The respondent – **BENARD OKOTH OOLA** - responded vide a replying affidavit filed on 2/5/2013. He deponed, inter alia, that the appeal was heard on 16/2/2011 in presence of both parties and the decision was delivered on the same day. He therefore faulted the Applicant for saying he was never given a hearing.
7. The respondent said further that neither the Environment and Land Court's Act (Act No.19 of 2011) nor the Land Disputes Tribunal Act (Act No.18 of 1990) have provisions for appeal out of time.
8. According to the respondent, there is inordinate delay in bringing the application and that delay is not explained well.
9. Submissions were filed in lieu of oral argument. The applicant's submissions dispute the contents of the respondents replying affidavit and assert the truthfulness of what is stated in the application. In particular, it was stated that the decision was delivered in absence of the applicant. And according to the applicant, the law allows the court to grant what is sought for in this application. Section 13 of Environment and Land Court Act is said to give the court wide powers,

including supervisory jurisdiction over tribunals. The applicant was also said to have explained well the cause of delay in preferring an appeal.

10. The respondent on the other hand submitted that the law allowed appeals on points of law only. And in the same law, there is no provision for allowing filing of appeals out of time. The Environment and Land Court Act is said to have come later and it couldn't change this legal position as it could not apply retrospectively.
11. The Civil procedure Act (Cap 21) was also said not to be applicable to proceedings conducted under Land Disputes Tribunal's act.
12. It was reiterated that there was inordinate delay in filing the appeal and no proper or plausible reasons are given for the delay.
13. I have considered the material laid before me. I have had a look at the Memorandum of Appeal accompanying the applicant's application. It is clear to me that it requires re-evaluation of evidence availed to the tribunal.
14. As pointed out by the respondent's counsel, the applicable law allowed appeals to the superior court only on points of law.

The court was not supposed to entertain appeals based on the merits of the tribunal's decision; yet this is what the applicant is inviting this court to do.

For this position, it is useful to look at the provisions of Section 8(a) of the Land Disputes Tribunals Act (now repealed), which are as follows:-

8(a) Either party to the appeal may appeal from the decision of the Appeals Committee to the high Court on a point of law within sixty days from the date of the decision complained of.

15. A further reading of that same provision enjoins a judge to certify that a point of law is involved. The law in question should not be customary law as customary law was the domain of the tribunal itself.
16. The point I am making here is that even if I were to allow the applicant, I wouldn't entertain the appeal as formulated in the memorandum of appeal. The law expressly forbids me from delving into the merits of the evidence adduced before the tribunal.
17. The respondent submitted that the court has no power to allow filing of appeal out of time. I don't agree with this position.

In a deserving case, and in the new constitutional dispensation, I would allow filing of such appeal. The provisions of article 159 (2)(d) of the Constitution and Section 19(1) of Environment and Land Court Act (No.19 of 2011) unshackle me from the strangulating limitations sometimes occasioned by technicalities of procedure.

18. But the requirement that the appeal be on a point of law only is one of substantive law, not procedure, and the proposed appeal seems to me to be wanting in this regard as it fails to comply with this requirement. It is mainly because of this that I feel granting the application is not helpful at all. This is the pivotal issue that determines the way this application should go.
19. But there are also other concerns. The applicant says he was not present when the decision of the appeals tribunal was given. The respondent says the applicant was present. Both parties have annexed the decision of the appeals tribunal.

The decisions are not alike in every particular.

The respondents availed decision contains the proceedings. It shows that both parties were present and were sworn. In fact the proceedings start with the chairman asking the applicant to explain why he had appealed. The applicants reply is recorded. The proceedings were conducted on 16/2/2011 and it seems the decision was handed down on the same day.

20. The Applicants availed decision does not contain the proceedings. It only contains the decision. But even the decision shows the members observing that the appellant, who is the applicant here, addressed the panel. Given this scenario, I don't think the applicant is telling the truth when he says he didn't participate in the hearing. The respondent comes across as the one who is telling the truth.

21. Given the circumstances obtaining in this matter, it is difficult for me to find for the applicant. I therefore hold that the application herein has no merit and I hereby dismiss it with costs.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a – C/C

No party present

No counsel present

Interpretation: English/Kiswahili

Court: There is a Notice dated 10/3/2015 for delivery of the ruling herein.

Accordingly, ruling on Notice of Motion dated 21/2/2013 and filed on 26/2/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015

AKK/vaa