



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**LAND AND ENVIRONMENT COURT**  
**MISC.APPL. NO.93 OF 2012**

BERNARD NGANGA SOLOMON.....PLAINTIFF

**VERSUS**

WAITHIRA GITITU.....DEFENDANT

**RULING**

On the 28th June 2002, the District Registrar, Murang'a Senior Principal Magistrate's Court issued a certificate of confirmation of grant in Succession Cause No.81 of 2001 under the provisions of section 71 (3) of the Succession Act in the estate of the late Chege Mugane.

The grant had been issued to Ernest Waraga Chege. In the certificate of confirmation of grant, the schedule of property is clearly given as **Loc.2/Kinyona/380**. The said property was to be shared between the heirs of the deceased as follows:-

- a. **Ernest Waraga Chege – 0.5 acres**
- b. **Bernard Ng'ang'a Solomon – 1.0 acres**
- c. **David O. Solomon Nambute – 0.5 acres**

The respondent thereafter lodged a land dispute claim with the Land Disputes Tribunal at Kigumo. A decision must have made against the applicant as a result of which he appealed to the Central Provincial Land Appeals Committee against the said decision and the award on grounds that the Tribunal had no jurisdiction to tamper with the land that had been subject of a succession cause.

The Provincial Appeals Committee declined to set aside the decision of the Tribunal and ordered the respondent to occupy the land and possess it because her brother (appellant) had the original land of 4.5 acres.

The applicant was dissatisfied with the decision of the provincial appeals committee and sought the services of an advocate who disappointed him by not filing the appeal within the prerequisite 60 days.

He now prays for the court to grant him leave to file an appeal in the High Court against the award and judgment entered in terms of award of the Provincial Appeals Committee at Nyeri delivered on 30th July, 2008.

The applicant argument on delay is two fold. Firstly that his advocate caused the delay in failing to file the appeal within the 60 days. Secondly that it is fair and in the interest of justice that he be allowed to appeal out of time to prevent the ends of justice from being defeated as no court order had been issued

reversing the confirmation of grant and the mode of distribution of the estate as it had been confirmed.

The respondent filed grounds of opposition to the application in the following terms;

- a. **The application has been brought under the wrong provisions of the law.**
- b. **The application has been brought after inordinate delay – a period of four years having elapsed since the order sought to be appealed against was made.**
- c. **The inordinate delay in bringing the present application has not been sufficiently explained.**
- d. **A lot of prejudice will be occasioned to the respondent as litigation has to come to an end.**

I have considered the Notice of Motion dated 14/6/2012 the supporting affidavit and the grounds of opposition and the rival submissions of the parties and do find that the applicant's delay of approximately four years to file an appeal in the Central Provincial Land Appeals Committee is inordinate. There is no proper explanation for the delay. The allegation that the appellant was let down by his advocate who failed to file the appeal despite being paid legal fees for the same was not proved as no receipt was produced. Moreover the applicant could have sought the services of another counsel or litigated in person within time provided for appeal or immediately after the expiry of the period for filing the appeal but within reasonable time. On these grounds only, this appeal should be dismissed with costs.

However, this court should consider the facts of this matter objectively as each party has a favourable order that entitles him to the parcel of land a fact that leads to absurdity. The court cannot allow this absurdity to remain on record as it is likely to cause confusion on the rights of the parties. The applicant is relying on the grant and confirmation of grant that distributed the parcel of land **LOC./KINYONA/380** which was the subject of succession cause No.81 of 2001.

On the other hand, the respondent is boasting of an order of the Provincial Appeals Tribunal in claim No.Maragua 15 of 2003.

This court has a residue of powers under the provisions of Article 159 of the Constitution and the overriding objective in law to do justice and to overlook technicalities that would amount to injustice.

I have weighed the scales of justice in this matter and do find that they tilt towards granting the orders prayed for and thus leave to appeal out of time to enable the absurdity to be determined.

Though not necessary at this point, I have looked at the draft copy of the memorandum of appeal and do find that the same is arguable as the issue of jurisdiction has been raised. The second issue that the court should deliberate on appeal is whether the Land Disputes Tribunal can overrule the Senior Principal Magistrate's Court .

The upshot of the above is that the application is allowed with costs in the cause. The intended appeal to be filed within 15 days from today failure of which the application stands dismissed

**Dated, signed and delivered this 10th day of June 2013.**

**A. OMBWAYO**

**JUDGE**