



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. CIVIL APP. NO. 104 OF 2013.

MANGO TWOLI .....APPLICANT

VERSUS

HAMPHREY OKOLWE..... RESPONDENT.

R U L I N G.

The applicant, filed the notice of motion dated 29<sup>th</sup> May, 2013 for leave to file the appeal out of time and costs. The application is based on two grounds that are on the face of the application and supported by the applicant's affidavit sworn on 29<sup>th</sup> May, 2013. The application is said to be brought under “ **section 59 interpretation Act cap 2, section 3 A Civil Procedure Act and section 8 of Land Dispute Tribunal Act**”

The reasons given by the applicant for delay in filing the appeal are as summarized as below;

1. That the Butula Land Disputes Tribunal made their decision on 20<sup>th</sup> December, 2010.
2. That on 22<sup>nd</sup> December, 2010 the applicant went to Kakamega Provincial Land Dispute Appeal Committee to file an appeal against the decision of the Butula Land Dispute Tribunal of 20<sup>th</sup> December, 2010 but asked to produce a copy of the Tribunals decision which he did not have.
3. That he contacted the Chairman Butula Land Dispute Tribunal for a copy of the decision but it took long to be provided.
4. That by the time he returned to Kakamega Provincial Headquarters to file the appeal, he found the Appeals committee had been abolished.
5. That was until the start of April, 2013 that he learned from the Assistant Chief that this court had been established and therefore filed this application.

Attached to the supporting affidavit is a copy of the Butula Land Dispute Tribunal proceedings, copy of the search certificate for Land parcel Marachi/Elukongo/1298 and a draft memorandum of appeal. The application is opposed by the respondent who filed a replying affidavit sworn on 10<sup>th</sup> June, 2013. Annexed to this affidavit, is a copy of a court order dated 28<sup>th</sup> November, 2012 in Busia CMC. Land dispute No. 36 of 2012, letter from District Commissioner Butula dated 22<sup>nd</sup> December, 2010 forwarding the Butula land Disputes Tribunal decision, and a copy of the Butula Land Dispute Tribunal proceedings in relation to Marachi/Elukongo/1298.

The respondent has given several reasons why the application should be rejected. Among the reasons are that the partes were supplied with copies of the Tribunal proceedings and decision on 20<sup>th</sup>

December, 2010. That the award was on 28<sup>th</sup> November, 2012 adopted as judgment of the court and the applicant has not told the court the truth as to why he did not file the appeal within the time required.

The court has carefully considered the contents of the supporting and replying affidavits plus the annexure thereto and it is important to set out the legal possession in applications of this nature before proceedings to the findings of the court. Section 8 (1) of the Land Disputes Tribunal Act (now repealed) states:

**“ 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 .”**

By the time the Butula land Dispute Tribunal made their decision on 20<sup>th</sup> December, 2010 the Land Dispute Tribunal Act was still the Law that guided appeals emanating from tribunal decisions. Any party who was therefore not satisfied with the decision of 20<sup>th</sup> December, 2010 was required to move to the Provincial Appeals Committee within 30 days as provided for under section 8 (1) of the Land Dispute Tribunal Act. The Land Dispute Tribunal Act remained in force until 27<sup>th</sup> August, 2011 when it was repealed by the Environment and Land Court Act No. 19 of 2011. The applicant has not given good reasons as to why he did not lodge his appeal with the Provincial Appeals Committee within the time required. His claim that it took long for him to obtain a copy of the Tribunal proceedings cannot be true as it appears the proceedings were ready on the day the ruling was read on 20<sup>th</sup> December, 2010. Had the applicant made his appeal before the Appeals Committee, then he would have come to this court on appeal on a matter of the law only as provided for under section 8 (9) of the Land Disputes Tribunal Act.

Section 8 (9) of the Land Dispute Tribunal Act provides as follows;

**“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.”**

It is important to determine whether this court has the power to extend the time within which to file appeals emanating from the tribunal established under the Land Disputes Tribunal Act. This issue has been dealt with in several cases including the following:

1. **Simon Ndungu and Another –vs- Kangathia Kiuma (2005)eKLR, where Okwengu j.** (as she then was) held ;

“.....that the land Dispute Tribunal Act (No.18 of 1990) does not provide for extension of the 60 days period for appeal against the decision of the land Disputes Appeal Committee as provided under section 8(9) of that Act...”

The honourable judge further held that section 79 G of the Civil Procedure Act which deals with general appeals from subordinate courts to the High court within the 30 days and Order XLIX of the Civil Procedure Rules which dealt with enlargement of time fixed under the rules or by a court order were not applicable institutions where time is limited by statute.

2. **Philip Kipchumba Misoi and 3 others –vs- Kachero Ole Malala and Another (2006) eKLR,** where Ibrahim j, (as he even was) stated;

**“.....Without any hesitation I do hereby hold that section 79 G of the Civil Procedure does not apply in the present application ....”**

3. **Miriti –vs- Rucha (2004) eKLR,** where Sitati j, was dealing with an application which included a prayer for leave to file appeal out of time the judge referred to section 8(1) of the Land Dispute Tribunal Act and found that an applicant was required to have filed the appeal within 30 days from

9<sup>th</sup> October, 2001. The Honourable judge held that any contemplated appeal at the time of filing the application before her was hopelessly out of time. She further observed that the applicant would have been required to have taken his appeal before the Provincial Appeals Committee and would only have come to the High Court to appeal on the decision of the Appeals Committee.

The applicant in this case did not offer a satisfactory explanation as to why he did not appeal before the Appeals Committee from 20<sup>th</sup> December, 2010 when the decision was made to 27<sup>th</sup> August, 2011 when the Provincial Appeals Committee ceased to exist following the repeal of the Land Disputes Tribunal Act.

Having set out the position of the law, in relation to time for filing appeals as provided under section 8 (1) and (9) of Land Disputes Tribunal Act and the interpretation in the decided cases set out above, which I agree with, the court finds as follows;

1. That the evidence available shows clearly the Butula land Disputes Tribunal proceedings and Ruling was ready by the time the District Commissioner did the forwarding letter dated 22<sup>nd</sup> December, 2010 attached to the replying affidavit .
2. That the applicant has not explained why he did not file an appeal before the Provincial Appeal Committee against the decision of Butula land Disputes Tribunal of 20<sup>th</sup> December, 2010 within the 30 days as required under section 8(1) of the Land Dispute Tribunal Act. This is especially so as the Provincial Appeals Committee remained a legal entity until 27<sup>th</sup> August, 2011 when the Act was repealed.
3. That the court has no jurisdiction to extend the appeal period set out under section 8(1) and (9) of the Land Dispute Tribunal Act as shown in the decisions cited hereinabove which I agree with.
4. That even though the applicant has quoted section 3 A of the Civil Procedure Act which provides the inherent power or jurisdiction of the court, I find he has taken too long to move to this court and he does not deserve the court to exercise its discretion in his favour.

For reasons shown above the applicant's application dated 29<sup>th</sup> May, 2013 is therefore without merit and is dismissed with costs.

**S. M. KIBUNJA,**

**JUDGE.**

***Delivered on 17th day of July, 2013.***