

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 115 OF 2007

(Appeal arising from the decision Western Provincial Land Disputes Appeals

Committee in Appeal No. 39 of 2007 delivered on 6.9.2007)

FREDRICK BULIMU MASIMBA APPELLANT

V E R S U S

TOROKASI ONGENGE EMBOLOGONYE RESPONDENT

R U L I N G

In her application dated 7.3.2012 the respondent is seeking to have the appeal struck out with costs. The application is supported by her affidavit sworn on the same date. The respondent filed a replying affidavit sworn on the 1.10.2012. Parties agreed to file written submissions. The respondent's counsel did file submissions while the counsel for the appellant informed the court that he is only relying on the case of **JOSEPH AMUYEKA & ANOTHER V PHILIP MWACHI OTINGA [2006] eKLR**.

The respondent maintains that the application herein was filed after the expiry of 72 days whereas the law requires that appeals from the Provincial Appeals Land Committee be filed within 60 days. According to the applicant the decision of the Appeals Committee was made on the 5.7.2007 when both parties attended the hearing at the Provincial Commissioner's office and judgment was delivered on the same day. The respondent maintains that the judgment was not read on the 6.9.2007 as alleged by the appellant. The totality of the written submissions is to the effect that the appeal was filed out of time and no application to have the time extended as required by the law was filed. Counsel for the respondent relies on the case of **JAVAN LASIEMA & 2 OTHERS V STEPHINE NJOROGE & 2 OTHERS Kakamega HCCA No. 64 of 2008** and that of **FESTUS AMUHANDA LUGOHE V JOTHAM NGUZA HAMISI Kakamega HCCA No. 9 of 2007**.

According to the replying affidavit of the appellant it is stated that the appeal was heard on 5.7.2007 and the appellant on the 4.9.2007 received a notice dated 31.8.2007 for the delivery of judgment through his post. According to the appellant it appears that the judgment was backdated to 5.7.2007.

I have gone through the proceedings before the Provincial Land Disputes Appeals Tribunal and it is indicated that the appeal was heard on the 5.7.2007. A notice calling upon the parties to attend the hearing was issued on the 21.6.2007. It is unlikely that the appeal was heard on the same date and the committee members stayed to have the proceedings typed and thereafter signed the judgment the same day. There is another notice dated 31.8.2007 which appears to have been issued by the same person who issued the earlier notice calling parties for a hearing dated 21.6.2007. The second notice was calling parties for the reading of the appeal on the 6.9.2007. Since there is no denial from the Appeals Committee, that indeed the second notice was issued from the committee's office, the contentions by the respondent that the appeal was heard on the same day and judgment issued on the same day cannot be true. Although the judgment is dated 5.7.2007 I will take it to be the date of the hearing and not the date of the judgment. There is no evidence that the appellant created the second notice. If indeed the appellant knew that the judgment was delivered on 5.7.2007 he would have simply filed his appeal immediately and the time lapse was not very long between July 2007 and 17.9.2007 when the appeal was filed. The court could have easily extended the time for filing the appeal. I am certain that the judgment of the Appeals Committee was issued on the 6.9.2007 and therefore the appeal was filed within the required 60 days. There being no other evidence other than the respondent's word against that of the

appellant and there being a notice dated 31.8.2007 which has not been denied by the issuing authority, I do find that the appeal is properly filed.

The purpose of dispensing justice is to hear the parties and resolve their disputes. The respondent has been aware of this appeal which was filed in 2007 and only sprung up in 2012 to contend that the appeal was filed out of time. The application lacks merit and the same is dismissed with costs.

Delivered, dated and signed at Kakamega this 23rd day of October 2013

SAID J. CHITEMBWE

J U D G E