



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC CIVIL APPLICATION NO. 71 OF 2013

MUTHIKE MWANIKIAPPLICANT

VERSUS

GENESIO KUBUNYA NJAGIRESPONDENT

JUDGMENT

By his application dated and filed herein on 22nd July 2008, the applicant sought the following orders:-

1. *Spent*
2. *Spent*
3. *That this Court do set aside the judgment delivered on 25th January 2007 by the Resident Magistrate's Court in Arbitration Case No. 26 of 2006 Wanguru in which the order of the Mwea Land Disputes Tribunal dated 24th July 2006 was adopted*
4. *That this Court do enlarge time for the applicant to appeal to the Provincial Land Dispute Appeal Committee against the order of Mwea Land Dispute Tribunal dated 24th July 2006*
5. *That in the alternative and without derogation to the foregoing, this Court do enlarge the time for filing an appeal against the judgment of the Resident Magistrate's Court in Arbitration Case No. 26 of 2006 Wanguru*
6. *That this Court do stay the adoptive judgment of the Resident Magistrate's Court in Arbitration Case No. 26 of 2006 Wang'uru of 25th January 2007 pending the filing and hearing of the intended appeal*
7. *That the costs of this application be provided for.*

The application was brought under **Section 3A, 5 and 79 G of the Civil Procedure Act, Order XLIX Rule 5 and Order L Rule 2 of the Civil Procedure Rules, Section 7 and 8 of the Land Disputes Tribunal Act No. 18 of 1990** and all other enabling provisions of the law. The same was grounded on the grounds appearing on the face of the application and supported by the applicant's affidavit in which he depones, inter alia, that:-

- *That he is the proprietor of parcel of land No. MWERUA/KABIRIRI/1109*
- *That the respondent filed a case at Mwea Land Disputes Tribunal claiming the same*
- *That the Tribunal awarded him the land and their decision was adopted as judgment of the Court on 25th January 2007*
- *That he filed a High Court Misc Application No. 32 of 2007 to quash the award but a Preliminary Objection was raised by respondent and up-held by Lady Justice Khaminwa on 2nd May 2008 and his application was dismissed on a technicality*
- *That he has a meritorious appeal hence this application*

The application was opposed and when counsels for the parties appeared before me on 7th August 2013, it was agreed that the application be canvassed by way of written submissions. I have considered the application and the submissions by counsels.

On the issue of enlargement of time, I am persuaded by the reasoning of both Justice Serгон in MOSES MAHOCHA VS ANCETUS ADONGO and 2 OTHERS H.C. MISC Civil Application No. 65 of 2004 BUSIA and also Justice Okwengu (as she then was) in SIMON NDUNGU and ANOTHER VS KANGAITHIA KIUMA H.C MISC Application No. 191 of 1999 (NYERI) that although the Land Dispute Tribunal Act (CAP 303 A Laws of Kenya) does not contain a provision for extension of time against the decision of the Tribunal, such extension can be granted pursuant to the inherent powers of this Court under Section 3A of the Civil Procedure Act. This application, as indicated above, was also brought under the provision of Section 3A of the Civil Procedure Act. It is therefore properly before this Court.

Has the applicant demonstrated to this Court that he has a good and sufficient cause for not filing the appeal in time? Has there been inordinate delay?

The applicant did move to the High Court within 40 days of the reading of the award seeking orders of Judicial Review. However, his legal advisor failed to make a critical procedural step thus leading to the striking out of his review application. The applicant was not to blame for that error and he should not be punished for the mistake of his counsel whom he expected to handle his brief in accordance with the law. It is clear that by the time the error was discovered, the time within which to lodge an appeal to the Provincial Committee had run out. This application was filed on 22nd July 2008 following the decision on the Preliminary Objection dated 2nd May 2008 and in the circumstances of this case, bearing in mind that the applicant had been let down by his legal advisor, I do not find that to be inordinate delay. It cannot be said of this applicant that he went to sleep. Indeed the applicant has annexed to his supporting affidavit a letter dated 15th July 2008 (annexture MM 7) in which he addressed the Chairman of the Land Dispute Appeal Committee raising grounds of appeal against the decision of the Mwea Land Dispute Tribunal). It is also clear from the consent order recorded herein on 7th August 2013 that the applicant herein is in exclusive occupation of the land subject matter of this case and there are orders in place restraining the respondent from, inter alia, selling, disposing or trespassing thereon. There is therefore nothing to suggest that rights of other third parties would be affected if this application is allowed. Lastly, there are serious jurisdictional issues raised in this matter which enjoins this Court to have the appeal determined on merits.

Accordingly, having taken into account all the peculiar circumstances obtaining in this case, I find it a proper matter in which to grant leave to file an appeal against the decision of the Tribunal to this Court and in accordance with the order of the Court of Appeal in Civil Appeal No. 82 of 2009 (NYERI), the appeal be filed in this Court within thirty (30) days of delivery of this ruling.

Each party to bear his own costs of this application.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013

23/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Applicant present

Respondent present

Language – English/Kiswahili

COURT: Ruling delivered this 23rd day of October 2013 in open Court

Applicant – present

Respondent – present

Counsels absent