



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Miscellaneous Application 137 of 2011

MATEO GITHUA NGURUKIE.....APPLICANT

Versus

SOLOMON MWANIKI WAMBOO

JOYCE WANJIRU MWAURA.....RESPONDENTS
RULING

This ruling is based upon the notice of motion filed in court on 19th July 2011 seeking leave to appeal out of time against the ruling made by the panel of elders on the 27th September 2001 in the Provincial Land Dispute Appeal Committee Nyeri case No. 60 of 1998.

It was brought under section 75, 78, 79G of the Civil Procedure Act and orders 22 rule 1, 50Rule 5 and order 51 Rule I.

It is grounded upon the following grounds.

- a. That the panel of elders delivered a ruling on 27th of September 2001 and ordered as follow**
- 1. That the right owner of L.R. No. Othaya/Kihugiru/424 is Patrick Mwaura Mithaa Id No.1077583/64.**
 - 2. Officer in charge Othaya police station is humbly authorized to evict the defendant Mateo Githua from that piece of parcel of land known Othaya/Kihugiru/424 situated in Othaya Division of Nyeri District within the Republic of Kenya within 30 days.**
 - 3. That any aggrieved party may appeal to the High court Nyeri within 60 days on a point of law.**
 - 4. That the application for review the said order was made on 12th October 2001 and ruling thereof was delivered by the Hon. Justice Sergon on 19th November 2010 whereby he declined to grant the orders sought on the ground that ruling appeared to have the effect of a final judgment whose only remedy was an appeal.**
 - 5. That meanwhile the time for an appeal had run out.**

It is supported by the affidavit of the applicant MATEO GITHUA NGURUKIE in which he deponed that the second defendant/respondent had filed an appeal on 7th December 1998 and that on 30th June 2011 the second defendant moved to the chief magistrate's court in civil award No. 73/2001 and

obtained orders to the effect that the elders award made on 27th day of September 2001 be adopted as an award of the court and that no notice was issued to him.

The application was opposed by the Respondents who filed replying affidavit on 5th September 2011 sworn by JOYCE WANJIRU MWAURA on 1st September 2011 in which she deponed that the dispute related to land registered in her deceased husband's names. That section 8(8) of the Land Dispute Tribunal Act clearly states that an appeals committee decision is final and no appeal lies and that the applicant has not exhibited what sort of appeal he would be filing after a period of over ten years and that the applicant has not obeyed the court decisions in various cases that he has lost namely Nyeri High court Civil case No. 17 of 1968, 122 of 1987, 206 of 1995 and the magistrate's courts award.

One Samuel Githua Ngurukie swore a supplementary affidavit filed on 15th November 2011 wherein he stated that the affidavit in support was sworn by himself having been substituted as representation of his late father and that there is a crucial point of land on the jurisdiction of the provincial land dispute appeals committee in making a decision touching on the issue of title to land parcel No. OTHAYA/KIHUGIRU/424 and has now annexed a draft memorandum of appeal.

Directions herein were given that this application be heard by way of written submissions and I must point out that at the time of writing this ruling it is only the respondents who had filed the submissions of 18th April 2012.

It was therefore submitted on behalf of the second respondent that she was substituted on 20th March 1992 and has been in occupation of the said land which was bought by her late husband at a public auction.

That this originating summons was dismissed by Lady Justice Ang'awa on 2nd February 1995. The applicant then filed a suit in the High Court Nyeri Civil Case No. 206 of 1995 which was referred to arbitration by the court.

It is submitted that the judgment to be appealed against was entered on 27th September 2001 and the applicant had 60 days to appeal to High Court on point of Law which he did not and now seeks the courts indulgence for stay on to file an appeal after a period of 12 years. Mr. Mahan has submitted the authority of

MWICHUIRI FARMERS COMPANY LTD. VERSUS M'RUKARIA & 139 OTHERS. NYERI HIGH COURT MISC. CIVIL APPLICATION NO. 10 OF 2001 in which the court quoted **LEUSILA MUTISO vs ROSE HELLEN WANGARI MWANGI CIVIL APPLICATION NO. NAI. 252 OF 1957** It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matter which this court take into account in deciding whether to grant an extension of time are first the length of delay. Secondly the reason for the delay. Thirdly (possibly) the chances of the appeal succeeding if the application is granted and finally the degree of prejudice to the respondent if the application is granted..."as the issues that the court of appeal take in consideration. Order XLIX rules of the Civil Procedure rules however grants this court unfettered discretion to enlarge time upon terms (if any) as the justice of the case may require. She went ahead and borrowed the guidelines set by the Court of Appeal.

It is therefore submitted that the application herein is resjudicata the delay is not only inordinate but grossly over-rated and that there is no point of law and that it is the appellant who involved the jurisdiction of the Land Disputes Tribunal and therefore can not complain against the same.

I have looked at the submission filed by the respondent and at the proceedings so far and will first deal with the issue of resjudicata.

In High Court Civil Case No.206 of 1995 Mr. MATEO GITHUA NGURUKIE through whom the present application allegedly suing took out a notice of motion dated 12th October 2001 in which he

sought that the court set aside the Provincial Land Disputes appeal Committee Nyeri 60/1998 award and order delivered on 27th September 2001 between the parties and that the honourable court proceed with the matter on a point of law.

The defendant in the said suit are the current respondents and the subject matter of the said suit is LR. No. OTHAYA/KIHUGIRU/424 the subject matter of this notice of motion. It was there at alleged that the tribunal relied upon forged documents and that it did not have power to order or authorize the officer in charge of Othaya Police Station to evict the plaintiff/applicant. The judge pointed out that the applicant opted to file the motion thereon instead of lodging an appeal.

It is therefore clear to my mind that the issue herein were available to the applicant in the said suit and therefore this notice of motion is clearly resjudicata.

The other issue is that of delay. No explanation has been given by the applicant of the delay of over 12 years in lodging the appeal. It has also not been explained by the applicant the delay between 19th November 2010 and 10 July 2011 when the present notice of motion was taken out.

I am of the view that this is a party the court should not exercise its discretion in favour of.

I have also noted from the grounds of memorandum of appeal that the main ground of appeal is that the tribunal did not have jurisdiction but has been pointed out by Mr. Mahan for the respondents it is the appellant who invoked the said jurisdiction and therefore is estopped from questioning the same.

In the final analysis I find no merit on the notice of motion dated 19th July 2011 and therefore dismiss the same. Having taken into account the history of litigation on the same subject matter I order the applicant to pay costs herein.

Dated and delivered at Nyeri this 27th day of September 2012.

J. WAKIAGA
JUDGE

Read in open court in the absence of the parties.

J. WAKIAGA
JUDGE