



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 40 of 2012

JABIRI BANZI.....APPELLANT

VERSUS

MWANZALA MWANDO.....RESPONDENT

RULING

1. The applicant in this matter filed a Miscellaneous Application seeking for the following orders:

- a. **That the appellant be allowed to file his appeal out of time.**
- b. **The executive officer be directed to extract the decree on behalf of the appellant.**
- c. **Costs be in the cause.**

1. The application is supported by the applicant's unsworn affidavit and on the following grounds:

- a. **That the appellant had all the intention to file his appeal on time and instructed an advocate by the name of Gideon Rangira Angima to file an appeal as soon as the judgment was adopted by the Senior Resident Magistrate in Kilifi.**
- b. **That despite instructing the said advocate and paying legal fees he never filed the appeal as expected.**
- c. **That the mistake of the advocate should not be visited on the appellant.**
- d. **That this matter touches on land and the only place the appellant call home and it is therefore in the interest of justice that the appeal be allowed out of time.**
- e. **The appeal has overwhelming chances of success.**

1. The applicant's supporting affidavit is unsworn and I consequently order that he same be and is hereby struck off the record. However, the Notice of Motion dated 9.10.2012 is saved by the provisions of Order 51 Rule 4 of the Civil Procedure Rules which states as follows:

**“Every Notice of Motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.**

2. The above provision allows the court to entertain a notice of motion which has grounds on the face of it without a supporting affidavit. This would mean that such an application would succeed or fail on the basis of the grounds and the court cannot look at any other document accompanying the application save for the pleadings already filed in the matter.
3. The Applicant represented himself and informed the court that he had all along been under the impression that his advocate Gideon Rangira Angima had filed the appeal after the award of the Lands Dispute Tribunal which was adopted by the Kilifi Resident Magistrate.
4. The Applicant further stated that the suit property which was the subject at the Tribunal was the only place he knew as home and that the mistake of his advocate in not filing the appeal within 30 days as required by the law should not be visited on him.
5. The Applicant informed the court that he paid the said advocate the requisite instruction fees to file the appeal and it was only after he was served with a letter by the Respondent demanding for costs that he realized that his advocate had not filed the appeal.
6. When the matter came up for hearing on 6.12.2012, the Respondent appeared in person. He relied on his Replying Affidavit which was filed on 8.11.2012. The Respondent depones that the Applicant's application has been filed in bad faith and the delay in filing it is inordinate. He further depones that the Applicant was in the Magistrates Court when the decision of the land dispute tribunal was read and adopted by the court on 14.08.2008.
7. The Respondent further states that there is no proof that the Applicant did actually engage the services of Gideon Rangira Angima advocate and that there is no evidence in the form of a charge sheet to show that the said advocate has been charged in court as alleged by the Applicant.
8. The Respondent also states that in accordance with the Lands Disputes Tribunal Act, an appeal to the Provincial Land Disputes Appeals Committee was supposed to be made by the Applicant in person and not through an advocate.
9. The Respondent finally deponed that the application and the draft appeal are a waste of time and meant to delay the Respondent from enjoying the fruits of his judgment.
10. In exercising my discretion to allow or disallow the application for leave to file the appeal out of time, my main concern should be to avoid injustice from being occasioned to a party due to an advertent or excusable mistake.
11. The Applicant herein was present when the award was made by the Land Disputes Tribunal and adopted by the Magistrates Court on 14.08.2008. The Applicant was given 30 days to file an appeal which he never did. His reason for not filing the appeal within the stipulated 30 days is that he had instructed his advocate to file the appeal and that he had all along believed that the said appeal had been filed.
12. Pursuant to the provision of Rule 19 of the Land Disputes Tribunal (Forms and Procedure) Rules, 1993 (now repealed), and as rightly argued by the Respondent, a party is not entitled to representation by an advocate at the Tribunal or at the Appeals Committee. The said Rule states as follows:  
  
**“No party to or other person interested therein shall be entitled to appear by or be represented by an advocate in any proceedings unless a Tribunal or an Appeals Committee directs otherwise.”**
13. It is with the above provision in mind that I find that the Applicant did not require the services of Gideon Rangira Angima advocate to file an appeal for him with the Provincial Lands Disputes Appeal Committee. Having known about the award by the Tribunal and the adoption of the same by the Magistrate's Court, it was upon him to file the appeal within 30 days.

14. Even if the Applicant was entitled to representation by an advocate at the Appeals Committee, and that the mistake in not filing the appeal within 30 days was the advocate's and not the applicant's, the same has not been shown to the satisfaction of the court. No evidence has been tendered on when those instructions were given to the advocate after the decision by the Tribunal was adopted by the court on 14.08.2008.

15. The Applicant has also not tendered any evidence to show the efforts he has taken since 2008 when the award was given by the Tribunal in terms of ascertaining if his advocate had filed the appeal.

16. Whereas I agree with the cases of **PITHON WAWERU MAINA Vs THUKA MUGIRA, (1982-1988) KAR 171; SHAH Vs. MBOGO (1967) EA 161; PATEL Vs EA CARGO HANDLING SERVICES LTD (1974) EA 75** and **GULHAMID MOHAMEDALI JIVANJI Vs F.K. MOTORS (K) LTD, HCCC NO. 1159 of 2002** that where an advocate makes an accidental excusable and inadvertent mistake, his client ought not suffer as a result thereof, I hold that such an accidental excuse and inadvertent mistake has not been shown in this case.

17. Even if the court was to exercise its discretion in favour of the Applicant and hold that the delay of 4 years by the Applicant to file the appeal was excusable, which I have stated it is not, this court could not have exercised that discretion in the absence of a copy of the Tribunal's proceedings and award that the Applicant seeks to appeal against.

18. The court must be persuaded by the Applicant that his intended appeal has high chances of success and the absence of the Tribunal's proceedings takes away any breath that would have remained in this application.

19. As was stated in the case of **KETTLEMAN Vs. HANSEL PROPERTIES LTD (1988) 1 ALL ER 38**, "courts can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of litigants to fall on their own heads."

20. In conclusion, and for the reasons given above, I hold that the delay of four (4) years by the Applicant to lodge his appeal with the Provincial Lands Disputes Appeals Committee is inordinate and in the absence of a plausible explanation inexcusable. No reasonable grounds have been placed before me to exercise my discretion in favour of the Applicant. In the result, I dismiss the Applicant's application dated 9<sup>th</sup> October, 2012. Each party shall bear his costs.

Dated and delivered in Malindi this **18<sup>th</sup>** day of **December**, 2012.

**O. A. Angote**  
**JUDGE**