



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 159 of 2008

1. BENJAMIN NZIOKI MBINDYO

2. ARON MUTUNGA MBINDYO

3. JOHN MAWEU MUTISO APPLICANT

VERSUS

JAMES NZEKI KILONZO RESPONDENT

R U L I N G

Before me is an application by way of Notice of Motion dated 31st July 2008, filed by the applicants Benjamin Nzioki Mbindyo, Aron Mutunga Mbindyo and John Maweu Mutiso. It is an application filed under Section 79G and 3A of the Civil Procedure Act (Cap 21), and Section 8 of Act No. 8 of 1990 – which is the Land Disputes Tribunal Act.

The prayers are three as follows:-

- 1. This Honourable Court be pleased to grant leave to the applicants to file an appeal out of time against the decision of the Embu Appeals Committee made on or about 7/4/2006 in Provincial Land Disputes Tribunal Appeal Case No. 41 of 2005.**
- 2. The annexed draft memorandum of appeal be deemed as duly filed and served upon payment of requisite court fees.**
- 3. The costs of the application be provided for.**

The grounds of the application are that the decision of the Appeals Committee was not communicated to the applicants until 20/6/2008, when the 60 days allowed for appeal had already lapsed; that the proceedings and ruling of the Appeals Committee were not availed to the applicants until 20/6/2008 despite numerous attempts by the applicants to obtain the same; the applicants had an arguable appeal with high chances of success; the application was brought without undue delay and that the respondent would not suffer any prejudice if the application was granted.

Filed also was a copy of a memorandum of appeal, and a supporting affidavit. The affidavit gives the reasons for the delay in filing the appeal. It was deponed that in pursuing the decision, on 20/6/08 the applicant went to Kilungu Law Courts registry only to find that the decision of the Appeals Committee had already been filed.

The application is opposed. A replying affidavit sworn by the respondent on 6th October 2008 was filed. It was deponed that the award had already been executed and that the applicant was guilty of inordinate delay in bringing the present application.

Parties filed written submissions which they relied upon. I have perused the said submissions.

This is an application for leave to appeal out of time. It was brought under section 79 G of the Civil Procedure Act (Cap 21) which states:-

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

In opposing the application, the respondent has relied on the case of **Kenya Tea Development Authority –vs Roy Transmotors Ltd Nbi Civil Application No. 168 of 2008**. I observe that was a decision on leave to appeal out of time to the Court of Appeal. In the High Court, as section 79G of the Civil Procedure Act (Cap 21) clearly states, there is no requirement to consider the chances of success of the appeal. It is a relevant consideration for appeals to the Court of Appeal however. The delay and reasons of course have to be considered. Granting leave is an exercise of the court’s discretion, which has to be done on valid legal considerations.

The applicant states that he got the proceedings and ruling on 20/6/2008. This application was filed on 6th August 2008. In my view, the period between 20/6/2008 and 6/8/2008 when the application was filed is not an inordinately long period. The applicant could not have possibly appealed before obtaining the proceedings and ruling. In my view, the explanation for delay in filing this application is satisfactory. In any event, if the appeal is not successful, costs will be adequate compensation to the respondent.

I therefore allow the application and order as follows:-

1. **Prayer 1 is granted.**
2. **The appeal will be filed within 14 (fourteen) days from today.**
3. **Costs in the cause.**

Dated and delivered at Machakos this 7th day of **December** 2012.

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George Dulu
Judge

In the presence of:

Mr Mutua Makau holding brief for Makundi for Applicant

Ms. Amala for Respondent
Mutinda – Court clerk