

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.12 OF 2010

WALTER ANDATI SONGA ::: APPLICANT

V E R S U S

JOSHUA NYIKULI ::: RESPONDENT

R U L I N G

1. The Appeal herein is from a decision made on 7.12.2009 by Hon. J. Nduna Esq., SRM in Kakamega CM Misc.Civil Award no. 232/2007. In the Ruling, the learned magistrate overruled a Preliminary Objection raised by the Appellant/Applicant in respect of certain proceedings emanating from the Lurambi Land Disputes Tribunal. I have read the Ruling and in fact what the Applicant had done was to object to the taxation of a Bill of Costs filed by the Respondent. The objection having been overruled and the question that I must address is whether discretion to grant leave to appeal out of time should be exercised in his favour.

2. In Egerton University vs R ex parte Ruga [2004] 2 KLR 132, it was stated inter-alia that discretion to extend time is a discretion that must be exercised judicially and that the court must thereby satisfy itself that the intended appeal is not frivolous and the delay has been adequately explained.

3. In the instant case, I am certain that discretion cannot be properly exercised in favour of the Applicant for the following reasons;

4. Firstly, I do not see the purpose of the intended Appeal in the context of the proceedings before the subordinate court. I say so because the substantive proceedings either before the Tribunal or the adoption (or as was apparent, the non-adoption) of the award are not themselves under challenge either before the Provincial Appeals Committee, the subordinate court or this court. What is being challenged is the striking out of an objection to taxation of a bill of costs. Even if that order were lifted on appeal, there would still be the substantive order to contend with and that makes the present intended appeal one fought with frivolity and the appeal, one without a substantive focus.

5. Secondly, it is argued that there was delay in filing the appeal because the court file was not traced and no notice of delivery of the Ruling was given. I note that the delay was one of three months. No single letter of protest was filed to indicate the seriousness of the Applicant who was represented by counsel and while in other instances such as the Egerton case (supra), three months is not too long a period, in this case, the lame excuse given cannot be sustained. I deliberately raise this point because whereas in the present Application, the applicant has pointed fingers at the subordinate court for not informing him of the date of the Ruling, I have seen two letters dated 10.2.2009 and 13.7.2009 addressed to the Chairman of Law Society of Kenya and in both letters the Applicant was complaining about the Respondent who is an advocate and in the letter dated 13.7.2009, he clearly indicated that the options available to the Respondent were either those under **section 9 (1)** of the Land Disputes Tribunal Act, or Order 53 of the Civil Procedure Rules or adoption of the award **section 7 (2)** of the Land Disputes Tribunals Act. That is a correct exposition of the law and one would have expected any serious litigant to pursue his appeal with zeal. He did not and yet he seemed to have clear knowledge of the legal issues arising.

6. Having said all these things there is one troubling aspect of this matter which I deem appropriate to raise; the Applicant has stated that although he succeeded before the Tribunal, the subordinate court failed

to adopt the award under **section 7 (2)** of the relevant Act. That issue is an arguable point and because I am not seized of the matter, that is all I can say about it. The Applicant is represented and should be advised accordingly.

7. In any event, I am satisfied that the Application before me is merely an emotional act against payment of costs which issue has not even been determined. The Applicant is dismissed with no order as to costs.

8. Orders accordingly.

Delivered, dated and signed at Kakamega this 10th day of February 2011

ISAAC LENAOLA
J U D G E