



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Miscellaneous Civil Case 49 of 2008

DAVID NIRAINI NDINWA.....APPLICANT

VERSUS

VERONICA WAGATHIRU WARUI.....RESPONDENT

R U L I N G

The Notice of Motion dated 5/5/2008 is premised on Section 8(9) of the Land Disputes Tribunal Act No.18 of 1990 and Order XLIX of the Civil Procedure Rules. The Appellant is seeking 4 prayers as hereunder:-

- 1. That the Honourable court do certify that there are points of law in the intended appeal and grant leave to file an Appeal.***
- 2. That this Honourable court do order a stay of execution of the lower court's award.***
- 3. That the annexed memorandum of Appeal be deemed to be filed within time.***
- 4. That the Respondent be condemned to pay the costs of this application.***

It is supported by 2 grounds on its face and on the supporting affidavit of the applicant dated 5/5/2008.

The same is opposed vide the Respondent's replying affidavit dated 28/1/2010.

I must however say that I find the application to file the appeal out of time a bit confusing. I say so because; the award in question was adopted by the court on 8/4/2008. The magistrate erroneously gave the applicant 30 days to prefer an appeal. I say erroneously because Section 8(9) of the Land Disputes Tribunal Act which is the parent Act in this matter gives a party 60 days within which to file an appeal against a decision of the Provincial land Disputes Committee decision. Be that as it may, the applicant still managed to file the draft memorandum of appeal along with this application on 5/5/2008 which was in my considered view still within the 30 days given by the magistrate. The prayer to file the appeal out of time is in my considered view misplaced. The appeal itself and not the intended memorandum of Appeal ought to have been filed on 5/5/2008. Counsel should then have moved this court to certify that the appeal did raise points of law and ask the court to admit the same for hearing.

Prayer 3 of the application is therefore misplaced. I have considered the rest of the application, the rival affidavits herein along with the annexures thereto. I have also studied the authorities cited to me by counsel which I nonetheless find largely irrelevant.

I will nonetheless assume that this application is properly before me and proceed to determine whether the same raises triable points of law.

According to the applicant, the Tribunals had no jurisdiction to determine matters concerning a Rice Holding. I have looked at the document titled "***National Irrigation Board Irrigation (National Irrigation Scheme)***" Regulation 1977 (which is not properly marked as an annexure like all the other documents the applicant is relying on). The same was issued on 7/7/2004. It bears the name of the applicant. When I look at the proceedings before the Land Disputes Tribunal however, I note that the dispute was heard on 25/6/2004. This clearly means that the letter from the Irrigation Board which the applicant is relying on was issued after the Land Disputes Tribunal award had already been given and even filed in court. That document would not therefore support the applicant's claim that he was a licensee of the Mwea Irrigation Board. The Judgment by my sister Judge Okwengu does not therefore assist him, and that is why I said earlier that it was irrelevant.

This therefore means that the applicant has not shown that he was a licensee of Mwea Irrigation Board whose rights could only be determined under the National Irrigation Board Act.

There are no other points of law raised in this appeal and this application must therefore fail. I therefore dismiss the same with costs to the Respondent.

W. KARANJA

JUDGE

Delivered dated and signed at Embu this 27th day of April 2010.

In presence of:-Ms Thungu for Respondent and both parties.