



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISCELLANEOUS CIVIL APPLICATION 397 OF 2009**

ESTHER WAGUTHI BERKELAARAPPLICANT

-versus-

FELIX MAINA WARINGURESPONDENT

RULING

This ruling is the offshoot of the Notice of Motion dated 18th December 2009 taken out pursuant to the provisions of order XLIX rule 5 and order L rule 1 of the Civil Procedure rules. In the aforesaid motion, Esther Waguthi Berkelaar, the Applicant herein, beseeched this court to enlarge time to appeal against the judgment and decree of Nanyuki Senior Principal Magistrate's court vide Land case No. 6 of 2006 out of time. The motion was served upon Felix Maina Waringu, the Respondent herein. The Respondent did not file any response neither did he attend court for the interpartes hearing of the motion. This court was prompted to grant the Applicant leave to prosecute the motion exparte pursuant to the provisions of order L rule 16(3) of Civil Procedure Rules.

I have considered the oral submissions of Mr. Chweya, learned advocate for the Applicant. I have further considered the grounds set out on the face of the motion plus the facts deponed in the supporting affidavit of applicant sworn on 18th December 2009. The background of the facts leading to the filing of this motion can easily be deduced from the facts deponed in the affidavit of the Applicant. It would appear the Respondent herein filed a complaint before the Lamuria Divisional Land Disputes Tribunal claiming to be entitled to the parcel of land known as L.R. No. Laikipia /Tigithi/ Matanya/Block 3/282 (Matanya centre), vide claim No. 10 of 2005. Felix Maina Waringu told the Land Disputes Tribunal that he bought the aforesaid parcel of land measuring 3.6 acres from one Joshua Nderitu in 1985 at Kshs. 18,500/-. The tribunal heard the complaint and found the case in favour of the Respondent in its award delivered on 8th January 2006. The Tribunal noted that the Applicant herein had been summoned on four occasions to appear before the tribunal but she chose to ignore the summonses hence the case proceeded for hearing exparte. The award was filed before the Nanyuki Senior Principal Magistrate's court for adoption under S. 7(1) of the Land Disputes Tribunals Act No. 18 of 1990 on 17th November 2006 vide Nanyuki S.P.M. Land case No. 6 of 2006. The award was finally adopted as the order of the Senior Principal Magistrate's court on 24th November 2006. The Applicant averred that she was not aware of those proceedings until her domestic worker informed her on 2nd December 2009 that some people had visited her land with the intention of evicting her. Upon receipt of this information the Applicant visited the Laikipia Lands office where she learnt of the existence of the decree issued by the Nanyuki S.P.M.'s court. By then the time to appeal had lapsed. She is now before this court for leave to appeal out of time.

The motion is taken out pursuant to the provisions of order XLIX rule 5 of the Civil Procedure Rules. The Applicant is basically seeking for leave to appeal out of time against the decision of the Land

Disputes Tribunal as adopted by the Senior Principal Magistrate's court. Under the aforesaid provisions, the court is given the discretion to extend time to appeal out of time where time is fixed by the Civil Procedure rules or by summary notice or by an order of court. I doubt whether the aforesaid provision is applicable in this case. To begin with, the time to appeal against the tribunals decision to the Provincial Appeals Committee and to this court is fixed by section 8(1) and 8(9) of the Land Disputes Tribunal's Act No. 18 of 1990. Therefore this court's jurisdiction has not been properly invoked. The time to appeal was not fixed as envisaged under order XLIX rule 5 of the Civil Procedure Rules. Secondly, even if the court's jurisdiction had been properly invoked I do not think the motion will see the light of the day because I do not think this court has the discretion to extend time fixed by the statute.

I have carefully perused the provisions of the Limitation of Actions Act and I did not find any provision giving this court the discretion to extend time limited under the provisions of the Land Disputes Tribunals Act. The Court of Appeal in the case of Wilson Osolo =vs= John Odhiambo Ochola & the A.G. C.A. No. 6 of 1995 (unreported) expressed itself inter alia as follows:

“Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules, that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act.

There is no provision for extension of time to apply for such leave in the limitation of Actions Act (Cap. 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period.”

It is obvious that the period to appeal to the Provincial Appeals Committee and to this court was fixed by Parliament. This court has no jurisdiction to extend time. In the circumstances of this motion, I do not think it is necessary to consider the merits of the application. I find the motion to be incompetently before this court. The same is hereby ordered struck out with no order as to costs.

Dated and delivered this 11th day of... June..2010.

J.K. SERGON
JUDGE

N/A for Applicant and in the presence of Wairoma for the state.
J.K. SERGON
JUDGE