



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION 277 OF 2006

ESTHER MUTHEI MUTISO 1ST PLAINTIFF

RICHARD KIEMA MUTISO 2ND PLAINTIFF

VERSUS

GREGORY WAMBUA NDIVO 1ST DEFENDANT

DISTRIC COMMISSIONER MAKUENI DISTRICT 2ND DEFENDANT

DISTRICT SURVEY OFFICER MAKUENI DISTRICT3RD DEFENDANT

RULING

1. The Application before me is dated 5/12/2008 and is premised on Order XLI of the Civil Procedure Rules. The Applicant seeks orders that;

- i. Leave be granted to file an appeal out of time;
- ii. the memorandum of appeal attached to the Supporting Affidavit be deemed as filed within time.

2. From the Supporting Affidavit of Esther Muthei Mutiso and Richard Kiema Mutiso, the Applicants depone that the intended Appeal relates to proceedings over Plot No. 271 in Kivani Adjudication Section and specifically the decision of Orlando P.P. Esq. District Commissioner, Makueni on behalf of the Minister in-charge of Lands in **Minister's Appeal case No. 421 of 1996**. The decision was made on 27/4/2004. That the decision was to the effect that Gregory Wambua Ndivo would be awarded the disputed plot **“per the boundaries originally marked on the ground in accordance with the sale agreement produced in court. The boundary at the disputed section must be restored as indicated on the ground.”**

3. In the same decision, the present Applicants were advised to **“wait until the land is registered then they can proceed to the High Court if not satisfied with (the) judgment”**.

4. They were dissatisfied and now claim that the above decision was bad in law because the Minister's decision in effect nullified the previous decisions of **“the objection and Arbitration”** (sic) which had ruled in their favour.

5. No reason has been given for delay in filing the appeal and no time frame for doing so has been alluded to and no law has been cited as to whether in fact there is a right of appeal in the circumstances of this case. In his submissions however, learned advocate for the Applicants submitted from the bar that the Applicants' previous advocate had failed to act in time hence the delay.

6. I note that the proceedings that triggered the present Application were pursuant to Section 29 (1) (2) and (4) of the Land Adjudication Act, Cap 284. That section for avoidance of doubt provides as follows:-

“29. (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and**
- (b) sending a copy of the appeal to the Director of land Adjudication,**

The Minister shall determine the appeal and make such order thereon as he thinks just and the order be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3)

a.

b.

(4) Notwithstanding the provisions of section 38 (2) of the Interpretation and General Provisions Act or of any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”

7. The District Commissioner, Makueni was acting pursuant to powers conferred by Section 29 (4) aforesaid and that being the case by dint of Section 29 (1) (b) the decision made whether palatable or not to any party becomes final. No party therefore has any right of appeal against such a decision and to approach this court for leave to appeal out of time is clearly an unlawful and unprocedural act.

8. A party may however may invoke Section 30 of the Act and approach this or any other court once the adjudication register for the relevant adjudication section has become final. Section 30 (1) provides as follows:-

“30. (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.”

9. Without saying more, where is no right of appeal, no leave of whatever kind can be granted, least of all, leave to appeal out of time.

10. Since the Application before me is misguided, the same is struck off with costs to the 1st Respondent only.

11. Orders accordingly.

Dated and delivered at Machakos this **28th** day of **May** 2009.

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ISAAC LENAOLA

JUDGE

In the Presence of: Mr Kimeu h/b for Mr Mulwa for Respondent

N/A for Applicant

ISAAC LENAOLA

JUDGE