



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Miscellaneous Civil Application 693 of 2009

MARY WANGARI GAKUU.....APPLICANT

VERSUS

JANE NYAMBURA WAINAINA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. The application before me is the Notice of Motion dated 16/12/2008, expressed to be brought under Sections 3A and 79 of the Civil Procedure Act, Order XLIX Rule 5 and Order L of the Civil Procedure Rules praying for an order that the time limited by Section 8(1) of the Land Disputes Tribunal Act, No. 18 of 1990 be enlarged to enable the Applicant lodge an appeal against the decision of the Land Disputes Tribunal, decreed by the Chief Magistrate's Court of Thika on the 28/04/2008 in D.O. case No. 11 of 2008 to the Central Province Appeals Committees at Nyeri. For ease of reference, I shall reproduce here-below subsection 1 and 8 and 9 of section 8:-

“8.(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within Thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

8(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.

2. The application is premised on four (4) grounds on the face thereof, namely:-

(a) *THAT failure to lodge an Appeal against the decision of the Land Disputes Tribunal Gataga to the Central Province Appeal Committee at Nyeri was occasioned by inadvertence and negligence on the part of the applicant's previous advocates.*

- (b) *THAT mistake of the former advocate should not be visited upon the applicant.*
- (c) *THAT the applicant has good grounds of appeal against the decision of the Land Dispute Tribunal sitting at Gatanga and ought not to be locked out.*
- (d) *THAT the respondents does not stand to be prejudiced if the application is allowed.(sic)*

3. The application is also supported by the sworn affidavit of **Mary Wangari Gakuu**, the Applicant herein. The deponent says that the decision of the Thika Land Disputes Tribunal in claim No. 32 of 2007 was entered as judgment of the court by the Chief Magistrates Court, Thika on 28/04/2008 and that thereafter, she instructed her former advocates M/s Asembo & Company to lodge an appeal; that regrettably, the said advocate inadvertently lodged an appeal in the High Court being CA No. 287 of 2008 instead of lodging the appeal before the Provincial Appeals Committee. She also says that due to the wrong procedure adopted by her former advocates and the wrong advice given to her, her civil appeal No. 287 of 2008 will not and cannot be admitted for hearing. The deponent begs this court to enlarge the time within which she can lodge her appeal with the Provincial Appeals Committee and also prays that the mistake of her former advocates should not be visited on her. The deponent also says that the Respondent will not suffer any prejudice if the orders sought are granted. Finally, the deponent urges this court to find that the slight delay in bringing this application was brought about by her search for another advocate to act for her in the matter.

4. The application is opposed. The first Respondent, **Jane Nyambura Wainaina** swore a Replying affidavit dated 9/03/2009. She says that the Applicants' application is not only vexatious, but that it is also an abuse of the process of the court. She says that the delay in bringing this application is inordinate; that in any event, it is the Applicant herself who insisted on proceeding with her Civil Appeal No. 287 of 2008 despite a Preliminary Objection having been raised against it by the Respondents. The deponent also says that the Applicant has not explained why she did not move the court sooner than 16/12/2008 following the striking out of her appeal on 17/10/2008. In the mind of Jane Nyambura Wainaina, the Applicant has been indolent.

5. It is to be noted here that the 2nd Respondent did not file any Replying Affidavit but responded to the application only on points of law. At the hearing of the application, Mr. O.P. Ngoge appeared for the Applicant while Mr. Maina for Muturi Njoroge appeared for the 1st Respondent. Mr. Njuguna represented the Hon. the Attorney General. Mr. Ngoge reiterated the averments contained on the face of the application and in the Applicant's supporting affidavit. His main argument was that the Applicant was pushed into a corner by her previous advocates who gave her wrong advice and filed the appeal before a wrong forum. Mr. Ngoge also argued that any prejudice that may be suffered by the Respondents is compensable in costs.

6. Mr. Maina, advocate for the 1st Respondent also relied on the averments contained in the 1st Respondent's Replying Affidavit. He contends that there was an unexplained delay of six months between the decision of the District Lands Disputes Tribunal's decision and the filing of this application. He also said that the Applicant had failed to explain the delay between 17/10/2008 and the date of filing of this application on 16/12/2008 a period of exactly two (2) months. Mr. Maina urged the court to dismiss the application with costs to his client.

7. Mr. Njuguna for the Hon. the Attorney General submitted that section 79 of the Civil Procedure Act is not applicable in this case. The section reads:-

79. *"The provisions of this part, relating to appeals from original decrees shall, as far as may be, apply to appeals –*

(a) *from appellate decrees; and*

(b) *from orders made under this Act or under any special or local law in which a different procedure is not provided"*

Mr.Njuguna did not expound on the matter further.

8. He also submitted that Order XLIX rule 5 of the Civil Procedure Rules is not applicable for reasons that the procedure for dealing with disputes under the Land Disputes Tribunals Act is set out under the Act itself. Order XLIX Rule 5 of the Civil Procedure Rules provides:-

“5. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

9. Finally, Mr. Njuguna submitted that the Applicant has enjoined the AG in this matter without complying with section 13(A) of the Government Proceedings Act, Cap 40 which requires that the Attorney General be served with a requisite 30 days notice. He further argued that even if such notice was given the Applicant is also required under Section 13(A) (2) (c) to give details of the name of the department concerned and the full names of any Government servant/agent intended to be enjoined in the suit. Mr. Njuguna submitted that the Applicant is guilty of non-compliance in this regard.

10. In reply, Mr. Ngoge made the following points – (a) that the court should completely disregard the AG’s submissions on facts since the AG did not file either Grounds of Opposition or Replying Affidavit (b) that this matter is not a suit as defined under Section 2 of the Interpretation and General Provisions Act, Cap 2 (c) that the Civil Procedure Rules apply to these proceedings because ultimately, an appeal from the Provincial Appeals Committee lies to this court, and therefore that Order XLIX Rule 5 of the Civil Procedure Rules applies (d) that even if Order XLIX Rule 5 does not apply, this court can still exercise it’s inherent power under section 3A of the Civil Procedure Act and grant the orders sought.

11. I have now considered the application as filed, the Replying Affidavit of the 1st Respondent, the law and the submissions made by all counsel appearing. The issue that arises for determination is whether this is a proper case in which I can exercise the discretion confirmed upon me by Section 3A of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules in favour of the Applicant. Mr. Njuguna for the 2nd Respondent contends that the provisions of the Civil Procedure Act and Civil Procedure Rules do not apply to this case because the disputes under the Land Disputes Tribunals Act should or ought to be dealt with under the provisions of the Act itself. Rule 5 of “The Land Disputes Tribunals (Forms and Procedure) Rules 1993, as read with section 8 of the Land Disputes Tribunal’s Act (the Act) establishes the procedure and format of filing appeals to the Provincial Appeals Committee.

Section 10 of the Act empowers the Minister to make rules

(a) prescribing the procedure of Tribunals, in particular –

(i) the form in which any decision, order or determination of a Tribunal shall be given;

(ii) the evidence which may be admitted in proceedings before a Tribunal and the taking of such evidence;

and generally for all matters in connection with the bringing, hearing and determining of disputes referred to a Tribunal to be resolved;

(b) prescribing the composition and qualifications for membership of the Tribunal and of the Appeals Committee and the terms of service of such members all of whom shall be eligible for re-appointment;

(c) prescribing any procedural requirements which the Minister may deem desirable in relation to appeals additional to the provisions set out in section 7; and

(d) prescribing generally for all other matters which may be deemed by the Minister necessary for the better carrying out of the provisions of this Act and for the payment of all such fees as may be considered necessary.

12. Under paragraph (c) above, the Minister may make rules prescribing any procedural requirements which he may deem desirable in relation to appeals additional to the provisions set out in section 7 of the Act. Pursuant to the said provisions the Minister made “The Land Disputes Tribunals (Forms and Procedure) Rules 1993 (the Rules) which I have already referred to elsewhere in this ruling. It is only rule 5 of the Rules that deals with appeals.

Sections 7 of the Act provides as follows:-

“7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered, a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

So that the decision of the Thika Chief Magistrate’s Court made on 28/04/2008 is subject to the provisions of the Civil Procedure Act, which provisions include those of the Civil Procedure Rules.

Section 13 of the Act (Transitional provisions) subsection (3) thereof reads:-

“(3) For avoidance of doubt, it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court.”

13. In the instant case, the time limited for bringing an appeal under the Act is already expired. The Applicant filed an appeal but did so before the wrong forum. Should she now be shut out from ever appealing against the decision of the Tribunal? I think that every litigant has a constitutional right to appeal any decision made against such a litigant. In this case, the Applicant’s appeal did not reach the proper forum on time because of the mistake of her advocate who, though instructed in good time misadvised the Applicant by filing the appeal before the wrong forum. In the circumstances of this case, I think that the mistake of counsel should not be visited upon the Applicant. An issue has been raised by both Respondents that the Applicant has been indolent, but again taking all the circumstances of this case into account, I think that the two months’ delay by the Applicant does not constitute inordinate delay.

14. For the reasons given above, I will exercise my unfettered discretion conferred upon me by the provisions of sections 3A and 79(b) of the Civil Procedure Act, in favour of the Applicant. Accordingly, the Applicant’s application dated 16/12/2008 is allowed in the following terms:-

(a) that the time limited by section 8(1) of the Land Disputes Tribunals Act be and is hereby enlarged to enable the Applicant lodge an Appeal against the decision of the Land Disputes Tribunal (decreed by the Chief Magistrates Court at Thika on the 25th day of April 2008 in D.O. case No. 11 of 2008) to the Central Province Appeals Committee at Nyeri

(b) that the intended appeal shall be filed within 14 (Fourteen) days from today and in default thereof, the order enlarging time shall lapse.

(c) *That costs of this application shall be paid by the Applicant to the Respondents.*

It is so ordered.

Dated and delivered at Nairobi this 1st day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr Mwangi h/b for Ngoge for the Applicant

N/A for the Respondents

Weche – court clerk