



**BURHAN ALI MANSUR.....APPLICANT**

**VERSUS**

**ZAINABU MWIHAKI MAHMOUD)**

**SAIDA WAITHERA SALIM ).....RESPONDENTS**

**R U L I N G**

By a notice of motion dated 22<sup>nd</sup> January, 2007 and filed in court on 23<sup>rd</sup> January, 2007, **Mr. Burhan Ali Mansur**, hereinafter referred to as “*the applicant*” sought from this court an order:

**“That the Honourable court be pleased to exercise its inherent powers and enlarge time for filing appeal at the appeals committee against the decision of Nyeri Municipality Land Disputes Tribunal in case number 4 of 2005 made on 12<sup>th</sup> September, 2005”**

The applicant also asked that the cost of the application do abide the outcome of the intended appeal. The application was expressed to be brought under section 3A of the Civil Procedure rules.

The application was brought on the grounds that the Nyeri Municipality Land Disputes Tribunal made its decision in favour of the respondents on 12<sup>th</sup> September, 2005. The applicant was aggrieved by the decision and on 16<sup>th</sup> December, 2005 commenced judicial review proceedings to quash the award. That the application for judicial review was not heard until 16<sup>th</sup> January, 2007 when it was dismissed on a technicality. That the time limited for the filing of judicial review proceedings of 6 months has expired hence the applicant cannot bring such an application. That the law does not provide for extension of time to file judicial review proceedings. That the applicant’s only option is to appeal against the decision of the tribunal. That the time to file the appeal to the appeals committee has expired. That this honourable court is possessed of inherent powers to extend time for the ends of justice to be met. That the decision of the tribunal is being challenged for want of jurisdiction and the applicant wishes to challenge the said decision on the same ground to ensure that the process of the court is not abused. That the dispute involves parcels of land and if the applicant is not allowed to appeal out of time he will suffer irreparable damages. That the delay in bringing this application has not been deliberate. Finally, that it is only fair and in the interest of justice that the application be allowed as the respondent will not be prejudiced at all.

The application was further supported by two affidavits sworn on 23<sup>rd</sup> January, 2007 and 26<sup>th</sup> March, 2007 respectively. In the main, the said affidavits merely reiterate and expound on the grounds of the application aforesaid.

The application was opposed through **Zainabu Mwihaki Mohmoud**, hereinafter referred to as “*the respondent*”. She filed a replying affidavit to the application. In the said replying affidavit, the respondent in the main depones that the applicant was bent on denying her the fruits of the award, that the applicant having opted to go for judicial review instead of appealing against the decision of Nyeri Municipality land disputes tribunal he is estopped from seeking extension time so as to appeal, that to

allow the application will be tantamount to asking the appeals committee to adjudicate on a matter already determined by the High Court, that this court having struck out the judicial review proceedings, the only option available to the applicant would have been to appeal against that decision, that having struck out the judicial review proceedings the court became functus officio, that, litigation must come to an end; and finally, that there was inordinate delay in prosecuting the judicial review application.

In his oral submissions in support of the application, **Mr. Mugo**, learned counsel for the applicant stated that the delay in filing the appeal to the appeals committee was occasioned by the applicant pursuing a remedy in judicial review. When the application for judicial review was struck out time limited for the filing of the appeal had expired. Counsel maintained that no prejudice shall be occasioned to the respondents.

In response, **Mr Muhoho**, learned counsel for the respondents submitted that following the decision of the tribunal, the applicant had 2 options, to appeal to the provincial appeals committee against the award or to challenge the award by way of judicial review. Having opted for judicial review, the applicant is estopped from commencing the instant proceedings. That the reasons advanced for the delay are not sustainable. That litigation must come to an end and that the respondents should not be tossed from one court to another.

I have now carefully considered the application, the grounds in support thereof, the supporting and replying affidavits as well as submissions of respective counsel. The first issue which comes to mind is whether this court has jurisdiction to extend time to enable the applicant to lodge his appeal to the provincial land disputes appeals committee from the decision of the Nyeri municipality land disputes tribunal. The Land Disputes Tribunal Act has no provision that confers such jurisdiction to this court. No wonder that the applicant invoked section 3A of the Civil Procedure Act. When asked counsel to address me on the issue, the applicant invoked the decision in Nyeri, **H.C. MISC.APP.NO.108 of 2006 Jackson Kariuki Ngatia VS Samuel Muhindi Muriatha** to come to his aid. However that decision did not address squarely the issue of jurisdiction. On his part, counsel for the respondent merely opted to distinguish that decision from the facts of this case. I am aware however that being a decision of the High Court, it is not binding on me. It is of persuasive authority to me only.

*Section 8(1) of the Land Dispute Tribunals Act provides that:*

**“.....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.....”**

The Act is however silent as to what happens to a party who is unable to lodge such an appeal within the prescribed period of time for good cause. I do not think that such a party should be penalised by being locked out of the appeal process. If for instance he is unable to lodge the appeal due to illness and or failure to obtain the proceedings of the Land Disputes Tribunal in time, should such a party be locked out from challenging the award on appeal merely because of limitation of time. I think that section 3A of the Civil Procedure Act should comfortably be invoked to come to the aid of such a party for the ends of justice to be met. Having said so, I am of the view that the instant application is properly before me.

However as correctly observed by **Mr. Muhoho**, the award having been made, it was open to the applicant to challenge it either by way of appeal to the appeals committee constituted for the province in which the land the subject matter of the dispute is situated or file judicial review proceedings to quash the award. The applicant elected to pursue judicial review remedy. Having made such an election, he cannot again come back and ask this court to allow him to pursue the other option that was available to him initially. The applicant elected to pursue the judicial review remedy at his peril. Much as the judicial review application was struck out on a technicality, it was still open to the applicant to appeal against that

decision. He did not do so for reasons best known to him. To allow the instant application in the circumstances of this case is tantamount to allowing the applicant a second bite of the same cherry at the expense of the respondents. A party cannot be allowed to keep on opening new war fronts at every turn. It amounts to subjecting the other party to unnecessary expense, inconvenience and prejudice. Having elected to pursue his remedy in judicial review, the applicant cannot be allowed to turn around having lost the judicial review application, commence fresh proceedings by way of appeal to the provincial land disputes appeals committee.

It is sound policy that litigation must at some point come to an end. It cannot be in the interest of justice that the respondent as in the instant case be tossed from one court to another. The decision sought to be impugned by the applicant by way of appeal was made on 12<sup>th</sup> September, 2005. That is over 2 years ago. I do not think it will be in the interest of justice to have this matter tied around the necks of the respondents unnecessarily by reopening the same by way of an appellate process.

I note that though the judicial review application was filed on 8<sup>th</sup> December, 2005 it was not until 16<sup>th</sup> January, 2007 that it was heard and struck out as being incompetent. Although the applicant explains away the delay in prosecuting the application on the basis

that the court diary was full, I am unable to accept such flimsy excuse. There is nothing that would have stopped the applicant from having the application accompanied by certificate of urgency to enable the same to be dealt with expeditiously. I have looked at the application for judicial review and noted that it was not brought under certificate of delay, hence the delay in disposing it off. The respondents cannot be held responsible for the delay. It is also not lost on me that in striking out the application for judicial review, the learned Judge made this telling remarks:

**“.....it follows that this ex-parte chamber summons whose hearing has been inordinately delayed suggesting lack of serious interest on the part of the applicant, is incompetent and should not be entertained.....”**

It is my view that the respondents should not be denied the fruits of their judgement by reopening these proceedings by allowing the applicant to commence the appellate process under the land disputes tribunals Act. Accordingly the application is dismissed with costs to the respondents.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of January, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**