



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Misc Civil Appli 171 of 2006**

ONESMUS MUNGUTI KIOKO.....APPLICANT

VERSUS

GIDEON MUTILU MUANGE .....1<sup>ST</sup> RESPONDENT

JOHN NGULU MUTEVU.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The application before court is the Notice of Motion dated 20/09/2006 brought under the provisions of Section 79G of the Civil Procedure Act, Section 8 of Act 18 of 1990 and Section 3A of the Civil Procedure Act and all enabling provisions of the Law. The applicant seeks orders:?

(i) ***THAT this Honourable Court be pleased to grant leave to the applicant to file an appeal against the decision of the Embu Land Appeals Committee made on or about 26.5.2006 beyond the statutory 60 days period.***

(ii) ***THAT the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of requisite fees.***

(iii) ***THAT costs of this application to (sic) abide the outcome of the intended appeal.***

2. The application is based on three grounds: (a) that the statutory 60 days period allowed for appeal expired on 26.7.2006; (b) that the Committee misled the parties hereto that the decision had first to be read by the Subordinate Court before the right to an appeal in the High Court could be exercised and (c) that the application has been brought without undue delay.

3. The affidavit in support dated 20/09/2006 is sworn by the applicant. He says that he was the second respondent in the appeal to the Provincial Appeals Committee at Embu. He says further that on the 26/05/2006 he was summoned to Embu for hearing of the appeal, but that no appeal proceeded on that day and that instead the parties were told to go back home and wait. Later he says the parties were summoned to Kilungu Law Courts on 31/07/04 on which day they were given copies of the decision of the Appeals Committee and that they were informed that the Magistrate's Court had no jurisdiction to read the award. Annexure marked "OMK1" is a copy of the record of the DM's Court at Kilungu in which the court (P.M. Kariuki, RM) noted that the court had no jurisdiction to read the award from the Provincial Land Disputes Tribunal. The parties were requested to appear for mention on 31/08/2006 with a view to determining whether the parties could apply to the High Court for Judicial Review. Mr. Kioko says that the parties had no prior knowledge of the decision of the Appeals Committee until 31/07/2006.

4. From the record, and in particular pages 2 and 3 of the annexure marked "OMK1" the Appeal was heard and determined on 26/05/2006, and the outcome therefrom was communicated to the Resident Magistrate Kilungu by a letter dated 7/06/2006. Mr. Kioko does not say how and when he was summoned to appear before the Kilungu Resident Magistrate's Court. The proceedings at Embu however show that the disputed land was awarded to Gideon Mutilu Mutunge, the 1<sup>st</sup> respondent herein.

5. The application is opposed, the Replying Affidavit is sworn by the 1<sup>st</sup> respondent, Gideon Mutilu Mutunge who says he has the authority of his co-respondent to swear the affidavit. The court is however not able to see a filed copy of the

authority given to Mr. Mutunge by his co-respondent. I shall return to this point later in this ruling.

6. Mr. Mutunge says that contrary to what the applicant says, the appeal was heard on the 26/05/2006 and that the applicant indeed attended the said hearing. Mr. Mutunge also says that on 31/07/2006, the parties were each given an opportunity to appeal against the Provincial Appeals Committee decision within thirty (30) days failing which the Provincial Appeals Committee's decision would be deemed to be final. Mutunge refers to the record of 31/07/2006 which reads:

***“COURT: This court has no jurisdiction to read as Award from the Provincial Land Dispute Tribunal and can only read an Award once according to section 7 of the Land Dispute Tribunal No. 18 of 1990 all the same matter can be mentioned in a month's time to see the Development of both Parties concerning whether they can Appeal to the High Court for Judicial Review. Mention 31/8/06 and if nothing is done the Award of Provincial Land Disputes Tribunal will be final.***

***Mention 31/8/06 and status quo to be maintained.***

***Signed***

***(P.M. KARIUKI, RM)***

***31/7/06”***

7. My own reading of that order by the court is that the order is self defeating in that whereas the decision as to whether or not to appeal was to be made on 31/8/06 during the mention, it at the same time bars the parties from exercising their right to go to the High Court if they will not have taken action within the thirty (30) days between 31/07/06 and 31/08/06. Mr. Mutunge says the Appeals Committee explained to the parties what they were supposed to do after the ruling was delivered. The record of the sitting at the Embu Appeals Committee showed that the present applicant who was the 2<sup>nd</sup> respondent was present together with the two appellants who are the present respondents. The 1<sup>st</sup> respondent was shown not to be present. The respondent says that the applicant has not given any good reasons why he did not lodge the appeal within the stipulated time, and that the applicant's instant application is an afterthought and an abuse of the due process of the court. In particular, Mr. Mutunge points out that the applicant has already filed Judicial Review Proceedings vide **Nairobi High Court Miscellaneous Application No. 184 of 2007** seeking to quash the decision of the Appeals Committee. In that application, the present applicant was granted leave to apply for an order of certiorari to issue to remove into the High Court for purposes of quashing the undated award by the Eastern Province Appeals Land Disputes Committee, Embu No.164/2002 – (**Onesmus Munguti vs Gedion Mutilu Mutunge & Others**). The leave so granted was to operate as a stay pending the hearing and determination of the matter. The order granting the leave was given on 7/03/2007. It is however not clear whether the applicant filed the substantive motion in the Judicial Review matter since he did not file any Further Affidavit in response to the Replying Affidavit.

8. At the hearing of this application, Mr. Makundi for the applicant reiterated the averments of the affidavit in support and urged the court to find that the applicant has demonstrated that he is entitled to the orders. Mr. Muli for the respondent also reiterated the averments of the Replying Affidavits and urged the court to find that there was no confusion on the 31/07/2006 as alleged by the applicant. He also urged the court to find that this court has no power to extend the time for filing of an appeal under section 8(9) of Act 18 of 1990. Mr. Makundi responded by saying that this court has unfettered discretion to grant the orders sought under the provisions of section 79G of the Civil Procedure Act which reads:-

***“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

9. I said earlier that I would return to the respondent's Replying Affidavit later in this ruling. This is the point at which the respondent averred that he had the authority of his co-respondent to make and swear the affidavit, thus bringing himself under the ambit of Order 1 Rule 12 of the Civil Procedure Rules which requires that such authority as claimed by the respondent shall be in writing and shall be filed in the cause. I noted that there is no evidence of such authority having been obtained and filed. In the circumstances, I do find and hold that the respondent's affidavit is not validly on record and the same is struck out.

10. Having struck out the respondent's affidavit means that the applicant's application remains uncontroverted as to facts but controverted on points of law. The applicant alleged that he was not present at the hearing of the appeal on 26/05/2006, but the record shows that he was present. However, the court will give him the benefit of the doubt because the record of the purported appeal hearing is undated, thus leaving the court in doubt as to whether indeed the session of 26/05/2006 took place as alleged. The court also gives the applicant the benefit of the doubt because of the self defeating order made by the Kilungu Resident Magistrate on 31/07/2006. If the court had no jurisdiction to deal with the matter, it did not have jurisdiction period. I am satisfied that this court has jurisdiction under both sections 3A and 79G of the Civil Procedure Act to make such orders as would meet the ends of justice.

11. In the premises, I allow the applicant's application and grant leave to the applicant to file appeal against the undated award by the Eastern Province Appeals Land Disputes Committee Embu, No.164/2002 – (Onesmus Munguti vs Gedion Mutilu Mutunge and Others). Secondly, I order that the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite court filing fees. If the requisite fees are not paid within seven (7) days from the date of this ruling the leave granted herein shall lapse. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

**Dated and delivered at Machakos this 14<sup>th</sup> day of May 2008.**

**R.N. SITATI**

**JUDGE**

Delivered by Lenaola J

In the presence of:-

Mr. Makuwi for Applicant

No appearance for Respondent

**I. LENAOLA**

**JUDGE**