



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Misc Appli 198 of 2002**

**HABIBA MOHAMED .....APPLICANT**

**VERSUS**

**ABDI HARAKE ROBA.....RESPONDENT**

**R U L I N G**

The applicant, **Mohammed Nana Maale** has made an application to be granted extension of time to file an appeal against the decision of the Provincial Land Disputes Appeals Committee, Central Province dated 27<sup>th</sup> March, 2002. The application is expressed to be brought under *orders XLIV rule 5, L rule 1* of the Civil Procedure Rules and all other enabling provisions of the law. The grounds in support of the application are stated in the body of the application and are supported by the annexed affidavit of the applicant. The main reasons advanced by the applicant as to the delay in filing the appeal in good time are that the original applicant, the mother of the instant applicant passed on sometimes on 6<sup>th</sup> March, 2004 before she could prosecute her application dated 26<sup>th</sup> June, 2002 in which as in the instant application she had sought extension of time within which to file an appeal against the ruling and award of the Provincial Land Disputes Appeals Committee, Central Province. That the delay to lodge the appeal was due to illness of the original applicant. That the instant applicant petitioned for the grant of letters of administration so that he could be substituted for his deceased mother which was granted to him on 4<sup>th</sup> July, 2005. That the intended appeal raises crucial issues of law and the applicant ought to be given a chance to ventilate his case. Finally the applicant points out that no prejudice will be occasioned to the respondent if the orders sought are granted.

The application is opposed. **Mr. Muhoho**, learned counsel for the respondent maintained that the application is an abuse of the court process as it was brought under wrong provisions of the law, that there has been inordinate and an unexplained delay in the filing and prosecution of the instant application. The delay also extends to the initial application, that despite the allegation that the initial applicant was unwell, no evidence of her illness was adduced. That the award was read out to the parties herein 6 years ago, that the application is meant to keep away the respondent from the fruits of his judgment and finally that the intended appeal has no chances of success as the original applicant declined to participate in the arbitral proceedings.

At the hearing of the application, I heard oral submissions from **Mr. Kahiga**, learned counsel for the applicant and **Mr. Muhoho**, learned counsel for the respondent. The issue for determination by this court is whether the applicant has established sufficient grounds to persuade this court to grant him extension of time within which to file an appeal. The principles upon which this court acts in applications of these nature are well settled. These are; that this court must be satisfied that the ends of justice would be met by the said extension of time. In entertaining applications of these nature, the court has unfettered discretion but such discretion must be exercised judicially and not capriciously. The court must be satisfied that the applicant has not been indolent. The court must also consider the length of delay and the reasons for the delay. Finally the court will consider whether the intended appeal is arguable.

In the instant application, the applicant has gone to great length to explain the circumstances that led to his inability to file the appeal within time. His mother had all the intentions to file the appeal. Indeed on 27<sup>th</sup> June, 2002, she had filed in person an application for extension of time. However she passed on, on 6<sup>th</sup> March, 2004 before she could prosecute the application. From the court record, that said

application was on 10<sup>th</sup> December, 2003 fixed for hearing on 16<sup>th</sup> December, 2004. But the applicant as already stated passed on before the date of hearing. It now fell on the instant applicant to prosecute the application. However, he could not do so until he petitioned and was granted letters of administration Ad Litem. It was not until 4<sup>th</sup> July, 2005 that he managed to obtain the said grant. Thereafter he filed an application seeking to be substituted in the instant application in place of his deceased mother. The application was granted on 17<sup>th</sup> January, 2007. On 30<sup>th</sup> January, 2007 he filed an application for leave to file appeal out of time. However when the same came up for hearing on 1<sup>st</sup> November, 2007, he was forced to withdraw the same as the court had yet to issue a certificate that the intended appeal raised points of law as required under the relevant provisions of the Land Disputes Tribunal Act. The applicant subsequently applied for the certificate which was duly issued by this court on 3<sup>rd</sup> March, 2008. It was then that the applicant filed the instant application. From this chronology of events, it cannot be said that the applicant has been indolent contrary to the submissions of **Mr. Muhoho**. Indeed I dare say that the applicant has indeed been quite vigilant all through. I think that the applicant has sufficiently explained reasons behind the delay. Although a delay of 6 years may appear inordinate, however considering the chronology of events as set out hereinabove, the delay is excusable.

Although the respondent has vehemently opposed the application, in my opinion however, this is one of those cases that this court is enjoined to exercise its discretion in favour of the applicant. The delay cannot be attributed to the indolence of the applicant. I have looked at the draft memorandum of appeal and I am satisfied that it is not frivolous despite the fact that the applicant did not attend the hearing before the Provincial Land Disputes Appeals Committee. The decision was *exparte*. That notwithstanding however, the intended appeal raises jurisdictional issues which are weighty and ought to be determined on merit. In any event, an inconvenience caused to the respondent can be adequately be compensated for by an award of costs.

Accordingly and in the exercise of my unfettered discretion, I would allow the application. The applicant is granted seven (7) days from the date hereof to file and serve the appeal. The applicant shall however pay to the respondent costs of Ksh.6,000/= which must also be paid within the next seven (7) days from the date hereof. Should the appeal not be filed and costs paid as aforesaid then the instant application shall stand dismissed.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of October, 2008.*

**M.S.A. MAKHANDIA**

**JUDGE**