



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL DIVISION

MISC CIVIL APPLI 10 OF 2001

MWICHWIRI FARMERS COL LTD PLAINTIFF

VERSUS

M'RUKARIA & 139 OTHERS DEFENDANTS

R U L I N G

By a Notice of Motion dated 22nd May 2008 and filed in court on the same day, **Messrs Mwichwiri Farmers Company**, hereinafter referred to as "*the applicant*" prayed for order:-

- "1. THAT this Honourable Court be pleased to enlarge the time within which the Applicant may apply for leave to lodge an appeal against the Ruling/Order of this Honourable Court delivered on 19th June 2001 by the Hon. Justice J. V. O. Juma.**
- 2. THAT this Honourable Court does grant the Applicant leave to lodge an appeal against the Ruling/Order of this Honourable Court delivered on 19th June 2001 by the Hon. Justice J. V. O. Juma.**
- 3. THAT the costs of this application be provided for."**

The application was expressed to be brought under Orders L rule 1, XLIX rule 5, XLII rule 2 of the Civil Procedure Rules, section 75 of the Civil Procedure Act and all other enabling provisions of the law.

The grounds upon which the application was anchored are:-

- "(a) THAT the applicant, desirous of lodging an appeal against the ruling of Court/Order of Court delivered on 19th June 2001 dismissing an application in which the Applicant sought the High Court to Certify that there were issues of law under Section 8(9) the Land Disputes Tribunals Act.**
- (b) THAT it is necessary for the Applicant to obtain leave of this Honourable Court to lodge the intended appeal, which leave was not sought at the time of ruling or within the required period.**
- (c) THAT the Applicant had lodged an appeal in Nyeri C.A.C.A. No. 339 of 2002, which however has now been struck out for the reason that no leave was granted by this Honourable Court to appeal from its order.**

(d) THAT in the event the order sought is not granted, the applicant will be shut out unheard for a failure which was occasioned by an inadvertent mistake of counsel, and which mistake is pardonable for the doctrine of *Audi Alteram Partem* to apply.

(e) THAT the orders sought are just, meet and fair to enable the Applicant ventilate its appeal.”

The application was further supported by the affidavit of **Mr. R. Paul Mugambi esq**, learned counsel. In pertinent paragraphs he depones that:

“2. THAT the applicant herein filed an application (sic) 24th January 2001 seeking that the court does certify that there were points of law arising in an intended appeal against the decision of the Central Province Land Disputes Tribunal in Appeal Case No. 141 of 2002.

4. THAT on 19th June 2001, the Honourable Justice Juma delivered the Court’s ruling in the presence of Mr. Muchiri (appearing for the Applicant) and Mr. Mahan (appearing for the Respondent).

5. THAT it is my belief that no leave was requested and/or applied for orally in court at the time when the ruling was read and in my personal knowledge, no application was filed within 14 days to lodge an appeal against the said ruling.

6. THAT immediately after the ruling, on 22nd June 2001, the applicant, unaware and/or inadvertently unaware that they required leave to lodge an appeal against the said ruling lodged a Notice of Appeal.

7. THAT the appeal in Nyeri C.A.C.A. 339 of 2002 was put underway upon obtaining a Certificate of Delay on 7th August 2002 without the issue of the order of leave arising or being canvassed until last October, when the same was fixed for hearing.

8. THAT eventually on 24th October 2007, when the appeal was placed before Justices Omolo, Githinji & Onyango Otieno J.J.A., I was directed by the Justices that the Court (sic) that the appellate court had no jurisdiction to entertain the appeal as no Order for leave was granted to the applicant and the nature of the appeal did not warrant the applicant a right of appeal without leave.

9. THAT the Court of appeal having directed that the appeal in Nyeri C.A.C.A. No. 339 of 2002 be adjourned to the May 2008 session, I did appear before Justices Tunoi, Bosire and Otieno Onyango J.J.A. (and not Omollo J.A.) on 21st May 2008 where I sought to withdraw the appeal to enable applicant come before this Honourable Court to seek its leave to lodge appeal, which appeal was however struck out.

10. THAT it is my honest believe that the failure to seek leave to lodge an appeal against the Order of 19th June 2001 was occasioned by inadvertence or mistake of counsel, which is regretted and for which the applicant should not be made to suffer.

11. THAT the applicant has a good appeal to present before the Court of Appeal, which it endeavoured to prosecute, but for the material and grave technicality of obtaining leave to lodge appeal, which I implore this Honourable Court to grant in order for the ends of justice to be met.

At the hearing of the application, **Mr. Mugambi** orally submitted that the ruling which has triggered these proceedings was delivered on 19th June 2001. By that ruling **Justice Juma** (as he then was) refused to certify that issues of law were involved in the intended appeal against the decision of the Central Province Land Disputes Appeals Committee in appeal case number 141 of 2000 delivered on 23rd November 2000. Dissatisfied by the ruling, the applicant moved to the court of appeal on 22nd June 2001

in Nyeri Civil Appeal number 339 of 2002. However on 21st May 2008, the court of appeal struck out the appeal on the basis that the applicant had not sought and obtained leave to appeal against the ruling as the appeal did not lie as a matter of right to the court of appeal under section 75 of the Civil Procedure Act. Counsel went on to submit that if the application was not granted the applicant risks being shut out without being accorded opportunity to ventilate the dispute in the highest court in the land. That there was mistake on the part of counsel in inadvertently not seeking leave before lodging the appeal. Under Order XLIX rule 5 of the Civil Procedure rules, this court has unfettered discretion to extend time. Finally counsel submitted that the court should take a lenient view of the applicant's position. In support of his submissions counsel relied on the following authorities:

1. **R. Kirtee v/s Fredrick Waweru & Anor. C.A. No. 247 of 2000 (UR),**
2. **Samaki Industries (Nairobi) Ltd v/s Samaki Industries (Kenya) Ltd C.A. No. 260 of 1996 (UR) and**
3. **Taracisio Nyathiga v/s Vacu... Tyres Ltd**

The application was opposed. In opposing the application, the respondents filed grounds of opposition dated 27th October 2008. Those grounds of opposition were couched in these terms:

- “1. **That the Land Disputes Tribunal Act commenced on 1st July 1993.**
2. **That no appeal lies to Court of Appeal from the decision of the High Court under Section 8 of the Act.**
3. **That the High Court did not admit the appeal as no point of law had been advanced by the Applicants.**
4. **That this application is frivolous and has no merits and must be dismissed with costs to Respondents.”**

No replying affidavit or indeed any other affidavit in opposition to the application was filed.

Mr Mahan, learned counsel who appeared for the respondents at the hearing of the application orally submitted that under Land Disputes tribunals Act, there is no right of appeal from the High Court to the court of appeal arising from an appeal from the decision of the Provincial Land Disputes Appeals Committee. That no order had been extracted pursuant to **Justice Juma's** ruling. That the delay in mounting this application was inordinate. Finally counsel submitted that the application was frivolous and should be dismissed.

I have now carefully considered the reasons advanced in favour of the application, the grounds of opposition thereto, rival oral submissions and the law. I have also carefully perused and considered the record and all the circumstances pertaining to these proceedings. In the case of **R. Kirtee (supra)**, the court of appeal restated the principles applicable when a judge is considering an application for extension of time such as the one I am confronted with here. It stated thus quoting from the case of **Leo Sila Mutiso v/s Rose Hellen Wangari Mwangi, Civil application No. Nai 251 of 1997 (unreported)**:

“..... **It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the decree of prejudice to the respondent if the application is granted**”

Those are the considerations that the court of appeal takes into account when faced with an application to extend time to file pleadings out of time under their own rules. Those rules however do not apply in the

High Court. Order XLIX rule 5 of the Civil Procedure rules however grants this court unfettered discretion to enlarge time upon terms (if any) as the justice of the case may require. However that rule does not give the guidelines upon which the court should exercise such unfettered discretion. That being the case it is only fair that we borrow those guidelines as proffered by the court of appeal in determining similar applications in the High Court.

Much as there has been inordinate delay, the same has been sufficiently explained. Immediately **Justice Juma** delivered the ruling on 19th June 2001, the applicant on 22nd June 2001 moved to the court of appeal. He did not know or at least his counsel did not know that leave was required from the court that passed the ruling before an appeal could be lodged. That appeal was not determined until 21st May 2008 when it was struck out for want of competence. On the following day, the applicant filed the instant application. The delay in not having the appeal determined speedily cannot be laid at the doorsteps of the applicant.

How about the chances of the intended appeal succeeding? As correctly submitted by **Mr. Mahan**, No appeal lies to the court of appeal from the decision of the High Court under section 8 of the Land Disputes tribunals Act. The court of appeal itself has restated that view in the recent case of **Humphrey Olwisi Muranda v/s Yakobet Nechesa Wabuko, Civil Appeal No. 44 of 2006 (KSM) (unreported)**. In that case, the said court stated:-

“.....Before embarking on the hearing of any matter, every court must be satisfied that it has the jurisdiction i.e. the legal power or authority to hear the matter. If the court has that power, then and only then does it proceed to hear the matter; but if the court determines that it has no jurisdiction then as was said in the case of The Owners of the Motor Vessel “Lilian S” v/s Caltex Oil (Kenya) Ltd [1989] KLR 1. “..... the court must down tools

The appeal to the High Court was brought pursuant to the provisions of the Act(meaning the Land Disputes tribunals Act). The High Court, as we have said, has dismissed that appeal. There is no provision in the Act allowing an appeal from the decision of the High Court to this Court. Section 64 (1) of the Constitution which creates this Court provides:-

“There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court AS MAY BE CONFERRED ON IT BY LAW.”

So that in order to hear an appeal from the High Court, some law must confer jurisdiction on the Court. Again section 3(1) of the Appellate Jurisdiction Act, Chapter 9 laws of Kenya, provides:-

“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal UNDER ANY LAW.”

The appeal to the High Court which that Court has dismissed was brought pursuant to the provisions of the Act, namely, The Land Disputes Tribunals Act, not under the Civil Procedure Act, Chapter 21 or under the rules made thereunder. Naturally in hearing such an appeal, some rules made under the Civil Procedure Act and even some provisions of the Act would be made use of by the High Court to provide the procedure for hearing the appeal brought under the Act. Appeals to the High Court under the Act can only be brought on issues of law excluding customary law. No right of appeal to this Court is provided by the Act.”

It is clear therefore that the applicant is seeking to appeal against the decision made by **Justice Juma** pursuant to section 8(9) of the Land Disputes tribunals Act. The court of appeal has no jurisdiction to hear any appeals arising from the decision of the High Court in the exercise of its powers conferred by section 8(9) of the Land Disputes tribunals Act. The intended appeal is clearly from a decision of this court pursuant to the provisions of the Land Disputes Act. It matters not that it is an appeal against the Judge’s refusal to certify that the intended appeal to the High Court raises questions of law. I would want to imagine that perhaps the court of appeal had the foregoing in mind when it remarked in this very same

appeal on 24th October 2007 that “..... **We would remind Mr. Mugambi, learned counsel for the appellant that the right to appeal is to be given by law and not by inference. He, however, asks us to give him an adjournment so that he can check the position on whether he has or does not have the right to appeal against the order of Juma, J refusing to certify that there was a point of law which would entitle the appellant to appeal to the High Court under section 8(9) of Land Disputes tribunals Act. While we think that not much use will be gained by an adjournment, we nevertheless are inclined to grant the adjournment sought.....**” (emphasis added). The court of appeal having no jurisdiction to entertain appeals from the High Court from decisions of the High Court made pursuant to the provisions of the Land Disputes tribunals Act, no useful purpose shall therefore be served by granting extension of time to the applicant as prayed in the application. The chances of the intended appeal succeeding if the application is granted are too remote to contemplate. Yes, the applicant may suffer prejudice if the application is not granted. However that alone cannot confer jurisdiction where there is none. That is the law.

Finally under Order XLII rule 3 of the Civil Procedure rules, it is required that an for application for leave to appeal under section 75 of the civil procedure Act against orders which do not enjoy automatic right of appeal to the court of appeal, be made to the court making the order sought to be appealed from either informally at the time when the order is made or within 14 days from the date of such order. The provision is in my view couched in mandatory terms. Such an application must be made within 14 days of the order sought to be appealed from. The rule does not therefore give room for exercise of discretion as I am being asked to do in the instant application.

That being my view of the entire application I would in the premises dismiss the same with costs to the respondent.

Dated and delivered at Nyeri this 28th day of November 2008

M. S. A. MAKHANDIA

JUDGE