



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

Misc Civil Appli 923 of 2003

ANDREW KOMBO TSAKAAPPELLANT

VERSUS

SHONGORO JANA KALUNGORESPONDENT

RULING

Andrew Kombo Tsaka, the applicant herein took out, a motion pursuant to order XLIX rule 5 of the Civil Procedure rules seeking for leave to file an appeal out of time. The applicant filed an affidavit he swore on 19th September 2006 to support the motion.

It is the submission of Gekonda advocate for the applicant that leave to file appeal out of time should be granted to the applicant because the delay to file the same in time was due to the mistake of his counsel i.e. the firm of Kamoti & Co. Advocates. The applicant has attached to his affidavit, a copy of the Coast Provincial Land Appeals Tribunal's decision dated 15.5.2006. It is clear that the applicant was given 60 days from 15.5.2006 to appeal against that decision. As of 19th September 2006 the applicant had not filed any appeal. He now blames his advocate for failing to file the appeal in time despite having instructed him in time.

I have considered the applicant's arguments and I think he has good reasons as to why he delayed in lodging the appeal. He was let down by the firm of Kamoti and Company Advocates. I have also perused the proposed grounds of appeal and I am convinced that the grounds are arguable hence the intended appeal is not frivolous. The time to appeal against the decision of the Appeals committee is fixed by an Act of Parliament under Section 8 (9) of the Land Disputes Tribunals Act. Section 8(9) reads as follows:-

“(a) 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 (60) days from the date of the decision complained of”

The question which must be answered here is whether or not this court has jurisdiction to extend time fixed by Parliament . One thing which is clear to all is that the Land Disputes Tribunals Act No. 18 of 1990 does not have a provision giving any court the discretion to extend time to file appeal out of time. I am of the considered view that this court has no jurisdiction to extend time to appeal out of time where parliament did not provide for such discretion. I have already stated that the applicant cited the provisions of order XLIX rule 5 of the Civil Procedure Rules as the basis of his motion. A careful perusal of order XLIX rule 5 will reveal that the court will gain jurisdiction to extend time to appeal only where the time is fixed under the Civil Procedure rules or by summary notice or by an order of the court. The matter now before this court is in respect of time fixed by parliament. It is in my humble view that order XLIX rule 5 can only be applicable in such matters when the decision has been placed before the

Magistrate's court for adoption of the tribunal findings. Whatever the court decides at that stage becomes the order of the court hence it automatically comes under the ambit of the provisions of order XLIX rule 5. Courts are not allowed by the principles of separation of powers to play the role of the legislature. If parliament intended to give courts power to enlarge time under section 8(9) of the Land Disputes Tribunals Act then it could have explicitly said so. The scenario obtaining here is that the applicant intends to appeal directly to the High Court from the decision of the Coast Provincial Appeals Committee. I restate by saying that parliament did not intend to cede that power to extend time to courts of law.

The court of Appeal dealt with a near similar situation in the case of **Wilson Osolo =vs= John Ojiambo Ochola and the A.G. C.A. No. 6 of 1995** in which it stated as follows:

“Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure rules, that procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act.”

The above position taken by the court of Appeal squarely applies to this matter.

In the end I am of the view and hold that the motion is incompetent and no merit. The same is ordered struck and dismissed with no order to costs.

Dated and delivered at Mombasa this 13th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Ouma h/b of Mr. Gekonde for Applicant.

Court:

Certified copies of the ruling and proceedings be supplied upon payment of the requisite fees. Leave to appeal against the ruling given.

Sergon, J