



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Appli 269 of 2006

PHILIP KIPCHUMBA MISOI

JOSEPH KIMARU METTO

KIBIWOT KIPSOGEI

JOSEPH KIPRUTO

KORIRAPPLICANTS

VERSUS

KACHERO OLE MALALA

GEORGE

KIPTENGRESPONDENTS

RULING

This is an application under the provisions of section 79 G of the Civil Procedure Act as read with section 3 and 3A of the Civil Procedure Act for leave to appeal out of time from various decisions in the following terms:-

1. That leave be granted to the Applicant to appeal against Judgment and decree in Eldoret CM.CC.No. 27 of 2005.
2. That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time from the ruling and/or finding of the Kapsaret Division Land Dispute Tribunal subsequently adopted by the lower court as Judgment in Eld. CM.CC.No.72 of 2005.
3. That this Honourable Court be pleased to grant leave to the interested parties to appeal out of time from the ruling and/or finding of the Kapsaret Division Land Dispute Tribunal subsequently adopted by the Lower Court as judgments in Eld. CM.CC.NO. 27 OF 2005.
4. That the costs of this application be in the cause.

The Applicant sets out the following grounds to justify this application:-

1. That the ruling delivered by the Kapsaret Division Land Dispute Tribunal dated 15th September, 2005 was delivered in Eldoret in the absence of the Applicant herein.
2. That the applicant's absence was not deliberate but the Respondent has been attending meetings without notices to the Applicant.
3. That the Applicants were not served with the proceedings in the tribunal.
4. That the tribunal had no jurisdiction to determine the case.
5. That this application is brought in good faith
7. That it is in the interest of justice that this application be granted.

I have studied the provisions of the Land Disputes Tribunal Act section 7 provides as follows:-

“ 7 (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided and under the Civil Procedure Act.”

My interpretation of the said provision is that what the magistrate's court does is a formality for purposes of the enforcement of the decision of the Tribunal. Upon receipt of the decision the magistrate's court is required to enter it as judgment and a decree issued. It is mandatory. The process does not contemplate any **“hearing”**.

It is therefore my view that once an Award or decision is entered as judgment by the Magistrate's Court it is not appealable. What ought to be appealed against is the decision of the Tribunal under the provisions of section 8(1) and (2) of the Land Disputes Tribunals Act which reads:-

“ 8 (1) 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.

(2) The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3), and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in sub-section (4) of section 3.”

The Applicants state that the Tribunal delivered its decision on 3rd September, 2005 but no notice of hearing was given to them and judgment was delivered in their absence. It is for this reason that leave is sought to file the appeal out of time.

Without any hesitation, I do hereby hold that section 79 G of the Civil Procedure Code does not apply in the present application. As already stated above, the entry of the decision of a Tribunal under section 8 (1) of the Act is not appealable to the High Court.

There is no provision giving the Lands Dispute Tribunal and the Provincial Appeals Committee powers to entertain applications for leave to file appeals out of time both under the Act and the Rules. So where should an aggrieved party go for redress and particularly if he comes to know of the decision after 6 months as contemplated by Order 53, of the Civil Procedure Rules and the Law Reform Act? Does this court have jurisdiction to intervene?

In the case of **PYX GRANITE CO. LTD –V- MINISTRY OF HOUSING AND LOCAL**

GOVERNMENT AND OTHERS 1959, 3 All E.R 1 and 6, Viscount Simonds said:-

“it is a principle not by any means to be whittled down that the subject’s recourse to the majesty’s courts for the determination of his rights is not excluded except by clear words.....”

The right of appeal in any proceedings is a very substantive and important right. That right is given by section 8 of the Act. There is no doubt that a period of 30 days to appeal is a reasonable period but what if the date of judgment was unknown by a party? What if no notice of the delivery of the decision was given to a party? Surely there must be a way to seek justice and ask for extension of time? In such a situation, this court, the High Court of Kenya, will look and search through each ‘hook and Cranny’ to see that justice is done. It is for this reason that this court is given inherent Jurisdiction.

Once a decision of the Tribunal is entered as a judgment of a Magistrate’s court it is stated that the decree shall be enforced in the manner provided under the Civil Procedure Act. Section 3A of the Civil Procedure Act grants the courts inherent jurisdiction and of more importance, section 60 (1) of the costs gives this court unlimited original jurisdiction in Civil or Criminal matters. This court embraces the words of May LJ in **ABSE –V- SMITH** (1966) 1 All E.A. 360, when he said at 361:-

“ First, I have no doubt that it is essential for the proper administration of justice in the courts of this country and the maintenance of the rule of law throughout the land that every court must retain the untrammelled power of regulating its own proceedings at least in all cases where there are not regulated by ancient usage or statute.”

There is no procedure or provision for a party whose right of a appeal has been impinged upon by non-service or notification of the date of a Tribunal’s decision. This means that a statutory right has been taken away. The subject matter is substantial. There are jurisdictional issues disclosed on the face of the record. It would be a total failure of justice, if our laws do not have a solution to this unfortunate situation. It is for this reasons, that I do hereby invoke the inherent jurisdiction of this court, and grant prayer 2 of the Notice of Motion dated 24th May,2006. The Appeal shall be filed within 30 DAYS from today. In exercise of the same jurisdiction and to ensure that the grant of leave is effectual, I do hereby order stay of the execution of the judgment and decree in ELD.CMCC. no. 27 OF 2005 until the Appeal in the Appeal’s Committee is heard and determined. Liberty to apply is granted.

There shall be no order as to costs.

DATED AND DELIVERED ON THIS 6TH DAY OF JULY,2006.

M.K. IBRAHIM

JUDGE

6/07/06

Coram – Ibrahim J

C/C - Chelang’a

Mr. Itaya holding brief for Mr. Onyinkwa for the Applicant.

No Appearance for the interested parties.

M. K. IBRAHIM

JUDGE.