

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
Misc Civil Appli 65 of 2004

MOSES OUYA MAHOCHA.....APPELLANT

VS

1. ANCETUS ADONGO)

2. NICHOLAS ADONGO).....RESPONDENTS

3. BILASIO HAINJA)

RULING

The applicant, Moses Ouya Mahocha, took out a motion dated 7.6.2004 pursuant to sections 3 A and 79G of the Civil Procedure Act, Order XLIX rule 5 of the Civil Procedure Rules and Section 7 of the Land Disputes Tribunal Act. In the motion he prayed for two main orders:

(i) Leave to appeal out of time against Funyula Land Disputes Tribunal's decision as adopted by Busia S.R.M'S court on 30.10.2003 vide Busia S.R.M. Land case No. 24 of 2003 to the provincial appeals committee and for

(ii) An order of stay of execution of the S.R.M'S adoptive order of 30.10.2003 pending the filing and hearing of the intended appeal.

The motion is supported by an affidavit sworn by the applicant dated 9th June 2004.

The Respondents resisted the motion by filing grounds of opposition dated 24th June 2004.

Before considering the grounds raised in support of the motion I will set out the brief background of this dispute. The Respondents Ancletus Adongo Aqdongo, Nicholas Aqdongo and Bilasius Hainja Adongo filed a complaint against the applicant before the Funyula Land Disputes Tribunal claiming ownership of L.R. No. SAMIA/LUCHULULO/BUKHULUNGU/774. It would appear the complainant was heard by the tribunal which came to the conclusion that the aforesaid parcel Respondents. The Tribunal in fact proceeded to cancel the title ordered it to be registered in the names of the Respondents. The proceedings from the Tribunal were annexed to the affidavit of Moses Ouya Mohache. The proceedings appear were signed by the chairman on 25.7.2003 and the other two members on 10th July 2003. The same were filed & adopted by the Senior Resident Magistrate on 30th October 2003. being dissatisfied the applicant filed a Judicial Review application in the High Court vide Busia H.C. MISC. Application No. 327 of 2003 in the nature of certiorari and sought to have the decision quashed. However the aforesaid application was struck out because it was filed out of time without leave of court hence this motion.

The applicant prays to this court on the first ground that he be granted leave to appeal out of time because he delayed to lodge the appeal within time because he took a lot of time pursuing a judicial review application. He says that he promptly filed this application immediately the judicial review application was struck out. The applicant has also annexed a copy of the proposed memorandum of appeal to show that he has goods to present before the tribunal's appeals committee. At the same time the applicant also prayed for a stay of execution of those orders issued at the stage of adopting the tribunal's decision because he thought he would suffer substantially if the order is not granted to preserve the subject of the dispute.

The Respondents were of the view that the provincial appeals committee had become functus officio

when the S.R.M'S court adopted the order from the tribunal. The Respondents saw this excuse as not a good reason to enable this court exercise the discretion to extend time to appeal. The law under the Land Disputes Tribunals Act limits the time to appeal against a

Divisional Land Disputes Tribunal to 30 days under S. 8 (1). The Act does not provide for extension of time to appeal. The Act does not also bar this court from exercising its inherent power to extend time. I take the position that the Act did not attempt to oust this court's discretion to exercise its inherent power to extend time to appeal. I now proceed to consider whether the appellant has discharged the burden to satisfy this court that he has good reasons to excuse the delay. The main reason advanced is that he followed the wrong course which failed him in the process. The applicant has shown that he instructed counsels to take legal steps to challenge the tribunal's decision. It would appear his legal advisers failed him while acting on his instructions. To my mind, I think the applicant's reason is Plausible and I accept that the delay is excusable in law. It has been argued by the respondents that the applicant's motion is frivolous because the Provincial Appeals Committee has been rendered functus officio in view of the fact that the tribunal's decision has been adopted.

As we speak, the tribunal's decision has been adopted as the order of the Senior Resident Magistrate's court. The same has not been set aside. I agree with the submissions of Mr. Omondi that once a tribunal's decision has been adopted as the order of the court pursuant to the provisions of Section 7 (2) of the Land Disputes Tribunals Act, the provincial appeals committee become functus officio because the decision will have gone out of its jurisdiction. I hold the view that at that stage the only available remedy for a litigant is to seek for an appeal to the High court pursuant to the provisions of Section 7 (9). In the circumstances and for the above reasons therefore this motion has no merit it is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE