



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 533 OF 2004

ESTHER TALA CHEBIEGON.....APPLICANT

VERSUS

KIPLAGAT ARAP BIATOR.....RESPONDENT

RULING

The Applicant, has moved this court by notice under **Section 79G of the Civil Procedure Act, Order L rule 1 and Order XLIX Rule 4 of the Civil Procedure Rules** for orders that the applicant be allowed to file an appeal against the decision of the Rift Valley Provincial Land Disputes Appeal dated 16th of March 2000, out of time. The grounds in support of the application are that the applicant's appeal No. 35 of 2000 (which she had previously filed) was struck out on the 12th of November 2004. The applicant stated that she wishes to file another appeal and would not do so if leave to file appeal out of time is not granted. She further stated that she had come to court without undue delay. She craved to be allowed to argue her appeal which she termed as a good appeal as the previous appeal had been struck out on technicalities and not merit. The application is supported by the annexed affidavit of Ester Tala Chebiegon and a further affidavit sworn by Juma Kiplenge. The application is opposed. The respondent filed a notice of preliminary objection to the entire application. The respondent raised three points, namely that the court did not have jurisdiction to grant the prayers sought; that the application was incurably incompetent and finally that the provisions of the **Civil Procedure Act** did not apply to matters relating to the Land Disputes Tribunal.

At the hearing of the application, Mr Karanja, Learned Counsel for the respondent was allowed to raise the preliminary objection. He submitted that the applicant was seeking to appeal against the decision of the Land Disputes Tribunal.

Under the said Act (Section 8(9)), the applicant ought to have filed an appeal within sixty (60) days. Learned Counsel submitted that Section 79G of the Civil Procedure Act only applied to decisions made in the subordinate courts; it did not extend to awards made by a Land Disputes Tribunal. It was his argument that the court did not have power to extend time under the Land Disputes Tribunal Act. The only time upon which an aggrieved party could appeal from a decision of the Provincial Appeals Tribunal was within sixty (60) days of the delivery of the said decision. He submitted that the court did not have power to grant extension of time to appeal out of time. He urged the court to strike out the application.

Mr Kiplenge, Learned Counsel for the application opposed the preliminary objection. He submitted that the High Court had unlimited jurisdiction as provided by the constitution over civil and criminal cases. It was his argument that the other statutes only added jurisdiction to the High Court. He further

submitted that the jurisdiction of the High Court could not be limited by an Act of Parliament. He referred the court to the preamble of the **Land Disputes Tribunal Act**. Learned Counsel argued that the said Act created Tribunals as the primary hearing bodies. The Provincial Tribunal were created to hear the appeals from the Land Tribunals. An aggrieved party could only appeal to the High Court on a point of law. He submitted that the applicant had filed her appeal within the requisite sixty (60) days to the High Court but her appeal had been struck out on a technicality. Learned Counsel submitted that in such an eventuality, the applicant could not be left without any remedy as her appeal had not been determined on merits but on a technicality. He urged the court to disallow the preliminary objection and set precedent.

In reply, Mr Karanja submitted that the right to appeal was a creature of statute. He argued that when parliament enacted the Land Disputes Tribunal Act, it was aware that there could arise a situation where a party could wish to file an appeal out of time but it choose not to provide for the said extension of time.

I have read the application filed by application in this case together with the annexed affidavits thereto. I have also considered the submissions made by the parties to this application on the preliminary objection raised. The issue for determination by this court is whether the preliminary objection raised by the respondent has merit and therefore should be upheld. Certain facts as relates to this application are not in dispute. The initial appeal that the applicant had filed, was filed within time. However the applicant failed to comply with the requirements of Section 8(9) of the Land Disputes Tribunal Act which required that she obtains a certificate that an issue of law (other than customary law) was involved in the said appeal so that the said appeal could be admitted to hearing. The applicant did not comply with the said section of the Act inspite of being reminded severally to do so. Finally after nearly three years the applicant's appeal was struck out for non-compliance with the said section of the Act. The said appeal was struck out on the 12th of November 2004 by Musinga J. Immediately thereafter the applicant make this application to be granted extension of time to appeal out of time.

I have carefully considered the arguments made by the counsel for the respondent in his preliminary objection and the response made thereto by the counsel of the applicant. It is common ground that both parties agree that the Land Disputes **Tribunal Act** does not provide for extension of time once the sixty days upon which an appeal ought to be filed to the High Court under Section 8(9) of the said Act has expired. The applicant is of the view that the court should invoke its unlimited jurisdiction as provided by Section 60 of the Constitution to extend time. On his part the respondent has submitted that the court cannot grant itself powers which were not granted by Parliament when the Land Disputes Tribunal Act was enacted. The respondent relied on the Court of Appeal decision in **Wilson Osolo –vs- John Ojiambo Ochola Civil Appeal No. 6 of 1995 (Nairobi) (unreported)** where it was held (in relation to a similar application for extension of time under the Law Reform Act (Section 9(3)) that;

“where 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 for the extension of time limited by statute, in this case, the Law Reform Act.”

I am inclined to agree with the submissions made by the respondent. The procedure as provided by the **Land Dispute Tribunal Act** excludes any provision related to extension of time. The applicant cannot import the Civil Procedure Rules into a specific procedure provided by the **Land Disputes Tribunal Act** and purport to seek extension of time. In my mind, the applicant can only invoke the jurisdiction of the court where there is no specific law governing the situation. In the instant case, the Land Disputes Tribunal Act has excluded provisions for extension of time. I agree with the respondent that Parliament knew that it could have provided for extension of time in the Land Disputes Tribunal Act but in its wisdom choose not to include it. This court cannot import provisions of the law where none exists. In the circumstances of this case, much as I may sympathise with the applicant, the law is clear; An aggrieved party to the decision of the Provincial Appeals Tribunal has to file the appeal within sixty days as provided by Section 8(9) of the Land Disputes Tribunal Act. No extension of time is envisaged by the Act for a party, who for some reason, does not file an appeal within sixty days.

For the above reasons, the preliminary objection has merit. The same is upheld. The application herein

is incompetent. The same is struck out with costs to the respondent.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE