



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA  
MISC APPLICATION 165 OF 2003**

**WABWILE NYARANGA CHESOLI ..... APPLICANT**

**VS**

**WAMALWA MUKUCHI ..... RESPONDENT**

**R U L I N G**

The motion before this court is one dated 29th July 2003. It is taken out pursuant to the provisions of Sections 79 G and 3 A of the Civil Procedure Act. Three prayers are sought by the applicant namely:- First, for leave to file an appeal out of time against the decision of the Bumula Land Disputes Tribunal in Land Disputes Tribunal case number 23 of 2001 as adopted in the Senior principal Magistrate's court at Bungoma on 5th April 2002.

Secondly, for an order of stay of execution of the adoptive order pending further orders of this court. And finally for an order for costs.

The Motion is supported by the affidavit of Wabwile Chesoli sworn on 29th July 2003. The respondent opposed this motion by filing a replying affidavit he swore on 28th August 2003.

The first argument in support of the motion is that the applicant was not present when the award was adopted. The applicant further alleged that he was never invited and hence was not present in court when award was read and adopted and only came to know of the adoption upon being served with the application seeking for vesting orders. The respondent dismissed the applicant's averments and accused the applicant for not being candid to this court. The respondent annexed a copy of the proceedings of 5th April 2002 which clearly shows that the applicant was present when the tribunal's decision was adopted. I have perused the annexure and the original court record. It is apparent that the applicant was present during the reading of the award. There is no reason to doubt the court record. The original record of Bungoma S.P.M.C. L.D.C. No 23 of 2001 reveal that both the applicant and the Respondent were present at the S.P.M 'S court Civil registry on 7th December 2001 when a mutual hearing date of 5.4.2002 was taken. The parties acknowledged their presence by thumb printing on the court record. In my view there was no need even to serve a hearing notice in this case. In a nutshell the date was taken by consent. I am convinced that the applicant was present in court when the Land Disputes Tribunal award was being read on 5.4.2002. The date was taken by consent and the record shows he was present in the two occasions. The delay was therefore intentional.

The second reason advanced by the applicant in support of the application is that he has a good appeal with high chances of success. It is averred that the Land Disputes Tribunal has no jurisdiction to entertain a dispute over registered land. It is also claimed that the claim is statute barred hence the tribunal had no competent dispute to arbitrate.

I have considered the second ground put forward by the applicant. The applicant did not annex to his affidavit in support a copy of the proposed memorandum of appeal to enable this court assess the probability of success of the intended appeal. The applicant does not even allude in his affidavit in support that he has a good appeal with chances of success save for the ground set out in the motion and the submissions made by the applicant's learned advocate from the bar. In the absence of averments on oath over the issue, I am not prepared to accept that the applicant has an arguable appeal

I have come to the conclusion that the applicant has not given me good reasons nor sufficient cause for not filing the appeal in time. Consequently the motion has no merit. The same is dismissed with costs to

the Respondent.

**READ AND DELIVERED 11th THIS DAY OF February, 2004**

**J.K. SERGON**

**JUDGE**