

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCMISC. NO. 3 OF 2004

METHA MIRITI APPLICANT

VERSUS

JOHN MBAE RUCHA RESPONDENT

RULING OF THE COURT

The application before me is a chamber summons dated 9/1/2004 brought under sections 3A and 95 of the Civil Procedure Act and all other enabling provisions of the law. The applicant seeks various orders, among them an order of stay of proceedings in Chuka LDT Case No. 64 of 2001 pending hearing and determination of an intended appeal, and also seeks leave to file appeal out of time against the orders dated 9/10/2001 in Chuka LDT Case No. 64 of 2001. He also seeks an order of inhibition against land parcel number MWIMBI/SOUTH/MUGUMANGO/407 restraining all dealings on the said land pending the hearing and determination of the intended appeal.

The grounds upon which the application is premised are in the main that the applicant is likely to be evicted from the suit land and further that the applicant's failure to appeal within time was occasioned by a mistake of an advocate who had acted for him earlier. That no prejudice will be occasioned to the respondent if the orders sought are granted by this honourable court. Finally, the applicant avers that his intended appeal is highly meritorious. The application is also supported by the applicant's supporting affidavit in which he has deponed that he is the 1st registered owner of the suit land which the respondent is laying a claim to vide Chuka LDT case No. 64/04. The Chuka LDT found in favour of the respondent on 9/10/2001. That though applicant paid an advocate, one WANJA MUTEKI advocate to lodge an appeal against the Chuka LDT dated 9/10/2001, the said advocate closed her offices before filing the requisite pleadings for the applicant and that for this reason, the applicant should not be punished for mistakes made by his former advocate. The applicant has annexed to his affidavit a draft Memorandum of Appeal as "MM2" and property section of Title Deed as "MM1" showing he was the registered proprietor as at 4.8.86.

The application is opposed. The respondent relies on a replying affidavit filed in court on 27.1.2004. The respondent has deponed that the applicant's application is hopelessly out of time and that the same is actuated by malice and greed. That the applicant is not entitled to the orders sought.

I have considered the applicant's application in detail, the brief submissions by each party and the contents of both the supporting and replying affidavits and my humble view is that the application has no merit. First and foremost, what the applicant seeks to achieve through this application are matters that fall within the purview of order 53 of the Civil Procedure Rules and not the kind of application that he has brought to this court. He would be seeking an order for leave to remove into the high court the decision of the Chuka LDT case No. 64 of 2001 and to quash the same. He would also be seeking an order of stay of those proceedings and other proceedings touching on the issue. Section 8(1) of the Land Disputes Tribunal's Act, 1990 provides as follows:-

"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 in subject matter of the dispute is allocated."

Assuming therefore that the Chuka LDT Case No. 64 of 2001 falls within the provisions of section 3 of the LDT Act the applicant was required to have filed the appeal within 30 days from 9/20/2001. Any contemplated appeal at this time is hopelessly out of time. In any event such an appeal would first of all have been taken to the Provincial Appeals Committee and would only come to the High Court as an appeal from the Appeals Committee decision.

Secondly, since the applicant seeks to quash the decision of the Chuka LDT dated 9.10.2001, the application should have been made under Order 53 of the Civil Procedure Rules and not by way of chamber summons under section 3A and 95 of The Civil Procedure Act. Applications under order 53 are of such a special nature that section 95 of the CPA (Cap 21) would not generally apply. Order 53 Rule (2) of the CPR provides as follows:-

“(2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not less than six months after the date of the proceeding or such shorter period as may be prescribed by the Act; and where the proceeding is subject to appeal, and a time limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The provisions of the said rule are mandatory so that the applicant would even have no chance of being granted the orders sought even if the application had been properly brought before this court.

In the result I find no merit in the applicant’s application and the same is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Meru this 20th day of Dec. 2004.

RUTH N. SITATI

Ag JUDGE