



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO 04 OF 2017**

**FORMERLY MERU HIGH COURT CIVIL APPEAL CASE NO. 34 OF 2006**

**NEW MAGUMONI F.C.S LTD.....APPELLANT**

**VERSUS**

**EUSTUS MUTUA MUSYOKA.....RESPONDENT**

*(Being an appeal from the Decision/Award of the Eastern Provincial Land Disputes Appeals Committee in Embu read in open court on 22.3.2006).*

**RULING**

1. This application states that it is brought to court under Order 50 rule 6 and 7 of the Civil Procedure Rules; Section 7 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya and any other enabling provisions of the Law.
2. The application is dated 20<sup>th</sup> September, 2018 and seeks the following orders:
  1. That this honourable court be pleased to grant leave to the applicant to file Notice of Appeal and or to file appeal out of time.
  2. Cost of this application be provided for.
3. The application is supported by the Affidavit of Anderson Murithi who states that he is the Secretary of the Applicant/Appellant and has the following grounds:
  1. That applicant/plaintiffs (sic) have not been informed of the delivery of the judgment of this suit by their counsel who was in conduct of this suit Mr. David John Mbaya.
  2. That the applicants learnt about the delivery of the judgment on 1<sup>st</sup> August, 2018 when the time allowed for serving a Notice of Appeal had already lapsed.
  3. That the delay in filing and serving the Notice of Appeal was not intended at all.
4. The affidavit says that the appellant was not made aware of this court's judgment delivered on 19<sup>th</sup> December, 2017 by his advocate. It also states that, it has obtained all documents necessary for it to file an appeal. It blames its advocate for the predicament it finds itself in. It asks the court to extend the period for filing the apposite appeal. Mr. A.G. Riungu, holding brief for advocate D. J. Mbaya, the appellant's advocate, postulated the same reasons for urging the court to extend time for the appellant to file an appeal.
5. Miss Wambugu for the respondent opposed the application. She told the court that judgment was delivered on 19.12.2017, almost 10 months ago. She observed that the appellant had at all times been represented by her advocate up to the day the date for delivery of the impugned judgment was fixed by the court. She asked the court to take judicial notice of the number of times the court had indulged the appellant who, according to her, deliberately delayed the hearing of the appeal. She prayed for the dismissal of the application.
6. I find it a contradiction in terms that the advocate who is alleged by the appellant not to have given it information that a judgment had been delivered by this court, is the same advocate who has filed this application. He has himself not explained why he did not tell his client that a judgment had been delivered. He has not filed an affidavit to explain his indolence or any other reason why he failed in his duty to keep his client aware of what was happening in its case. Having said this however, I opine that it was the appellant's duty to always follow up the circumstances surrounding developments pertaining to its case from his advocate or even from the court.

7. This appeal was filed on **18<sup>th</sup> May, 2006**, over **12 years ago**. I agree with the respondent that there has been inordinate delay in the prosecution of this appeal. The impugned judgment was delivered on **19<sup>th</sup> December, 2017**, almost ten months ago. I do find that there has been an inordinate delay in the filing of this application.

8. I agree with the reasons postulated by the respondent regarding why this application should not be allowed as contained in the respondent's replying affidavit and in the oral evidence proffered by the respondent's advocate.

9. I have taken into account the one authority proffered by the applicant/appellant to buttress its assertion that extension of time to file an appeal ought to be allowed. It is Nyeri ELC Civil Appeal No. 8 of 2013 [2016] eKLR – Edward Njane Nganga & Another (Applicants and Damaris Wanjiku Kamau & Another (Respondents). It is a good authority that in proper circumstances, a court of law can exercise its judicial discretion to extend time for filing of an appeal. I opine that the circumstances of this suit, as already laid out, do not evince any plausible reason as to why the applicant should benefit from this court's judicial discretion to allow it to file an appeal out of time.

10. Among other things, in its judgment delivered on **19<sup>th</sup> December, 2017**, this court at paragraphs 8, 9, 10, 11, 12 and 13 found that it had no jurisdiction to entertain this appeal. The court had also at paragraphs 2, 3, 4, 5, 6 and 7 taken issue with serial disobedience of this court's orders by the appellant. To put matters into their proper perspective, I reproduce in full this court's judgment delivered on **19<sup>th</sup> December, 2018**.

### JUDGMENT

1. The Memorandum of Appeal in this Appeal is dated **16<sup>th</sup> May, 2006** and has the following grounds:

**1.The** Appeal committee erred in law by disregarding the provisions of the Limitation of Actions Act Cap. 22 Laws of Kenya.

**2.The** Eastern Provincial Disputes Appeal Committee acted outside its mandate as provided for in the Land Dispute Tribunal Act (1990).

**3.The** appeals Committee erred in law in entertaining and adjudicating aspects of transfer of land registered under Cap 300 Laws of Kenya.

**4.The** Appeals Committee erred in law by entertaining the claimant's claim while he did not have capacity to institute the proceedings therein.

**5.The** appeals committee erred in law by entertaining aspects relating to contract/agreement which is not within its jurisdiction.

**6.The** Appeals Committee failed to appreciate that the Appellant (New Magumoni Co-operative Society Ltd) was a creature of a liquidation Committee very separate from the original Magumoni Farmers Co-operative Society Limited thus there existed no privity of contract between the appellant and the Respondent.

**7.The** Appeals Committee erred in law by purporting to adjudicate over matters of succession and the distribution of the deceased estate which was not within its powers.

**8.The** award is bad in law and a nullity.

**9.The** Appeals Committee erred in Law by disregarding the provisions of section 27 and 28 of the Registered Land Act (Cap. 300 Laws of Kenya).

2. This appeal was filed on 18<sup>th</sup> May, 2006. A perusal of the court file shows that on 21.4.2009, the parties took out the matter from the cause list, by consent, because the record of appeal had not been filed. On 29.9.2012 many years later the Hon. Justice J. A. Makau, J, marked the Appeal S.O.G. because Mr. B. G. Kariuki, the respondent's advocate told him that he had not been served with that day's hearing notice. After that, the matter only resurfaced in court, almost 3 years later when the court was asked to deal with an application filed by the respondent dated 26.3.2015 which sought dismissal of the appeal for non prosecution in terms of order 42 Rule 35 of the Civil Procedure Rules. Although, pellucidly, the application had merit as the appeal had not been set down for hearing for close to 10 years, in the interest of justice, vide a ruling I delivered on 31.7.2017, the appellant was ordered to file and exchange his written submission within 30 days of that day and the respondent was ordered to do so within 30 days after receipt of the appellant's submissions.

3. The appellant did not file its written submissions within the stipulated time. On 24.10.2017, the appellant was granted another chance to file and serve its written submissions within 14 days of that day. It was also directed to serve the orders issued by the court on that day, including the next date for directions upon the respondent within 5 days from 24.10.2017.

4. When the parties came to court for directions on 16.11.2017, advocate Mutunga, holding brief for advocate D. J. Mbaya for the appellant told the court that he had noticed that the appellant had not served the respondent with the court orders issued on 24.10.2017. He asked the court to re-issue the said orders. These orders were re-issued in the following terms:

a) As a last chance, the appellant, who has in the past ignored this court's orders concerning service upon the respondent, is

ordered to serve upon the respondent the orders issued by this court today, including the next date for mention for directions, within 10 days of today.

b) The appellant is also ordered to serve upon the respondent its submissions dated 30.10.2017 and filed on 8.11.2017 within 10 days of today.

c) Directions on 4.12.2017.

5. On 4.12.2017, the appellant's advocate noncharlantly and without apologizing came to court late. A perusal of the court file shows that there was no evidence that the respondent had been served with the appellant's written submissions and with the mention date. Mr. Mutura, the appellant's advocate, did not offer any explanation. He merely asked the court to give directions. As a result, the respondent has not been given a chance to give his side of the story. But somehow, litigation must come to an end at some point. This court cannot be held to ransom by the multiplicity of ingenious contrivances perpetrated by the appellant to delay the hearing and determination of this appeal. The fact that this appeal has been, since May, 2006, in the judicial pipeline for close to 12 years is a veritable aberration upon the judicial process.

6. For the serial disobedience of court orders, apparently with veritable alacrity, by the appellant, I find that he has failed in his duty to assist the court to further the overriding objective contained in section 1A(1) of the Civil Procedure Act, that is to facilitate the expeditious, proportionate and affordable resolution of this dispute. He has failed, as decreed by section 1 A(3) of the Civil Procedure Act to faithfully participate in the apposite processes of this court and to comply with the directions and orders of this court.

7. I find that this appeal merits dismissal for serial disobedience of court orders. The law requires this court to conduct efficient disposal of its business. Dismissal of this appeal will be in consonance with this requirement and will be within the ambit of the overriding objective of the Civil Procedure Act.

8. However, that is not all. The Memorandum of Appeal is dated 21<sup>st</sup> July, 2015. Although I am unable to ascertain the date it was filed, it must have been around that time. From the records in the court file, it is clear that this appeal was never admitted by a Judge as required by section 79 B of the Civil Procedure Act. In other words, there is no appeal for which this court may make a determination.

9. If however, it is found that an appeal of this nature does not have to be admitted in accordance with section 79 B of the Civil Procedure Act, there is more to be said. On further perusal of the court file, it is clear that this appeal was not certified by a Judge that it is predicated upon an issue or issues of law as required by section 8(9) of the Land Disputes Tribunal Act. I find that this appeal is not properly before this court.

10. Jurisdiction as succinctly stated by the classic case of the "Owners of the Motor Vessel" "Lillian S" Versus Caltex Oil (Kenya) Ltd, [1989] KLR 1], is everything. Justice Nyarangi, JA, opined as follows:

***"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion, that it is without jurisdiction".***

11. This position has been eruditely restated with finality by the Supreme Court of Kenya in the case of Samuel Kamau & Another Versus Kenya Commercial Bank and 2 others, Sup. Ct. Civil Application No. 2 of 2011. The court opined as follows:

***"A court's jurisdiction follows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submission that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings".***

12. I opine that some of the directions given in this matter were issued per incurium. This especially applies to directions that the parties do file written submissions. Although the appellant should not have disobeyed the said orders, it is my finding that this court should not have issued the said orders as this appeal, as I have already explained, is not properly before this court. This innocent mistake was facilitated by the age of the appeal which has been in court for close to 12 years.

13. I restate that this court has no jurisdiction to handle an appeal which is not properly before it. I therefore dismiss the appeal.

14. Having dismissed the appeal, there is no necessity to consider and determine the grounds upon which it is buttressed.

15. I add that, even though this has no consequences as I have already dismissed the appeal, I would have dismissed the appeal for serial and untrammled disobedience of court orders by the appellant.

16. For avoidance of any doubt, this appeal is dismissed.

17. Costs shall follow the event and are awarded to the Respondent.

18. It is so ordered.

Delivered in open court at Chuka this **19<sup>th</sup> day of December, 2017** in the presence of:

CA: Ndegwa

Parties not present

**P.M. NJOROGE**

**JUDGE**

11. For the reasons given in the earlier part of this ruling and especially the fact that this application has been filed nine months after the apposite Judgment was delivered, I find that this application lacks merit. It is, therefore, dismissed.

12. Costs shall follow the event and are awarded to the respondent.

13. It is so ordered.

Delivered in open court at Chuka this **2<sup>nd</sup> day of October, 2018** in the presence of:

CA: Ndegwa

A.G Riungu h/b D.J Mbaya for the applicant/appellant

B. G. Kariuki absent for the respondent.

**P.M. NJOROGE**

**JUDGE**