



**REPUBLIC OF KENYA**

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

**ELCA NO. 10 OF 2020**

**CHARLES WANJUKI MIRICHO**

**Suing as the personal representative of the**

**estate of STEPHEN MIRICHO NGUNJIRI).....APPELLANT**

**VERSUS**

**WANJIRU BAARI THITWA.....RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 8<sup>th</sup> October, 2019 brought under **Sections 3A, 75, 78, 79G of the Civil Procedure Act (Cap. 21) and Order 42 of the Civil Procedure Rule (the Rules) and all enabling provisions of the law**, filed in Nyahururu ELC Misc. Application No. 7 of 2019, the Appellant sought leave to file an appeal out of time from the award of the Central Provincial Land Appeals Committee (*the Committee*) dated 28<sup>th</sup> March, 2000. The record shows that leave was granted on 9<sup>th</sup> March, 2020 and the Appellant was required to file his record of appeal within 30 days.

2. The record further shows that the Appellant did not comply with the order for filing his record of appeal within time. He later on filed an application dated 7<sup>th</sup> May, 2020 seeking extension of time to file his record of appeal. The said application was allowed on 18<sup>th</sup> May, 2020. The Appellant ultimately filed his record of appeal on 23<sup>rd</sup> December, 2020 after seeking other extensions of time.

**B. THE RESPONDENT'S APPLICATION**

3. By a notice of motion dated 5<sup>th</sup> February, 2021 based upon **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 42 rule 13 and Order 51 rule 1 of the Rules and all enabling provisions of the law**, the Respondent applied for the appeal to be dismissed with costs. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on 5<sup>th</sup> February, 2021 by Mr. Kariuki Mwangi the advocate on record for the Respondent.

4. The grounds of appeal may be summarized as follows. First, that the court had no jurisdiction to entertain the appeal since it was statute barred. Second, that the appeal was an abuse of the court process. Third, that it had been overtaken by events since the award of the Tribunal had long been executed and the suit property sub-divided and distributed to persons who were not parties to the appeal.

**C. THE APPELLANT'S RESPONSE**

5. The Appellant filed a replying affidavit in opposition to the said application sworn on 2<sup>nd</sup> March, 2021 by Caroline Musyimi who is the advocate acting for the Appellant. It was contended that the application was frivolous, vexatious and merely intended to delay the hearing and disposal of the appeal. It was disputed that the appeal was statute barred under the **Limitation of Actions Act. (Cap 22)**. It was further contended that, in any event, the court had discretion to extend the limitation period. It was the Appellant's case that the Respondent was seeking to introduce new evidence at the appellate state by seeking to show that the suit property was no longer available. The court was consequently urged to dismiss the application and allow the appeal to be heard on merit.

**D. THE RESPONDENT'S REJOINDER**

6. The Respondent filed a further affidavit sworn by her advocate on record, Kariuki Mwangi, on 11<sup>th</sup> March, 2021 in which it was denied that the Respondent was introducing fresh evidence at the appellate stage. It was contended that that the Respondent was merely adducing

evidence to demonstrate that the suit property was no longer in existence and had gone into the hands of persons who were not before the court. It was further contended that the rights of the parties had been determined with finality over 20 years ago hence the court had no jurisdiction to re-open the matter.

#### **E. DIRECTIONS ON SUBMISSIONS**

7. When the said application was listed for *inter partes* hearing on 4<sup>th</sup> March, 2021 it was directed that it shall be canvassed through written submissions. The parties were granted 14 days each to file and serve their respective submissions. The record shows that the Respondent filed her submissions on 19<sup>th</sup> March, 2021 whereas the Appellant filed his on 7<sup>th</sup> April, 2021.

#### **F. THE ISSUES FOR DETERMINATION**

8. The court has perused the Respondent's notice of motion dated 5<sup>th</sup> February, 2021 together with the supporting affidavit and exhibits thereto, the Appellant's replying affidavit in opposition thereto, as well as the Respondent's further affidavit. The court is of the opinion that the following issues arise for determination:

(a) *Whether the court has jurisdiction to entertain the instant appeal.*

(b) *Whether the instant appeal is an abuse of the court process.*

(c) *Whether the appeal has been overtaken by events.*

(d) *Who shall bear costs of the application.*

#### **G. ANALYSIS AND DETERMINATION**

##### **(a) Whether the court has jurisdiction to entertain the instant appeal**

9. The court has considered the submissions of the parties and the material on record on this issue. The Respondent submitted that the court had no jurisdiction to entertain the appeal because the appeal was filed more than 20 years after the impugned decision was made hence it was time barred under **Section 4 (4) of the Limitation of Actions Act**. The said provision stipulations that:

**“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”**

10. The court is not satisfied that the instant appeal is time barred under the said provision of the law. The court is of the opinion that the bringing of an action “upon a judgment” refers to any proceedings intended to **enforce** a judgment or to realize the fruits of a judgment. The material on record indicates that the Appellant's father had lost before the Committee and that the instant appeal is merely seeking to **overturn** the decision of the committee. This is unlike the case of **M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe [2007] eKLR** where the Respondent sought to **execute** a decree after the lapse of more than 12 years after it was passed.

11. The court is further of the opinion that the only limitation period for filing an appeal such as the instant appeal is the period of 60 days which was stipulated under **Section 8 (9) of the Land Disputes Tribunals Act 1990 (repealed)**. Although it is evident that the instant appeal was filed way out of the prescribed period, there are several orders on record extending the period for lodging the appeal. The issue of delay and the reasons for the delay were ventilated in Nyahururu ELC Misc. Application No. 7 of 2019 where leave was granted and the same cannot be reopened except through review or appeal.

12. The mere fact that the decision of the committee was rendered more than 20 years ago cannot deprive the court of its statutory jurisdiction to entertain the appeal. Similarly, the mere fact that there were subsequent proceedings at which the award of the committee was adopted as a decree by the Magistrates' Court cannot deprive the court of its jurisdiction as defined in the case of **Owners of the Motor Vessels “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** to entertain the appeal. Equally, the mere fact that the appeal appears to be weak or unmeritorious does not deprive the court of its jurisdiction to entertain an appeal.

##### **(b) Whether the instant appeal is an abuse of the court process**

13. The Respondent contended that the instant appeal was an abuse of the court process because it offended “public policy”. It was submitted that the Appellant had “excessively” and improperly used the judicial process to annoy and irritate the Respondent. Finally, it was contended that the Appellant had omitted some crucial documents from the record of appeal which was an indication of bad faith.

14. The court is, again, unable to find any demonstration of abuse of the court process by the Appellant. The mere fact that the Respondent may have been annoyed or irritated by the instant appeal cannot, without more, make the appeal an abuse of the court process. The omission of material documents does not necessarily constitute evidence of bad faith or abuse of court process. It may well be evidence of lack of diligence on the part of the Appellant. Accordingly, the court is not satisfied that there is sufficient material on record to lead to a reasonable conclusion that the appeal is an abuse of the court process.

**(c) Whether the instant appeal has been overtaken by events**

15. The court has considered the submissions and material on record on this issue. The Respondent contended in her application that the award of the committee was adopted as a judgment by the Magistrates' Court in 2001 and fully executed and perfected. It was further contended that the suit property was later on distributed amongst her children who were not parties to the instant appeal.

16. The Appellant did not, in his replying affidavit, dispute the distribution of the suit property. The Appellant's concern was that new evidence was being introduced at the appellate stage. The Appellant did not dispute the genuineness of the mutation form and the certificates of official search demonstrating the sub-division and disposal of the suit property.

17. The court is of the opinion that a distinction has to be drawn between fresh evidence being adduced in opposition to an appeal on the merits and affidavit evidence being tendered in support of an application for striking out or dismissal of an appeal. The Respondent's supporting affidavit and the exhibits thereto were merely filed in support of the instant application as required by the **Rules**. No leave of court was required to file such affidavit. The Respondent was not seeking to introduce new evidence on the merits of the appeal.

18. The court is of the opinion that on the basis of the material on record, the Appellant's appeal has been overtaken by events for at least three reasons. First, the award of the committee sought to be challenged is no longer in existence in its original state. It was adopted as a decree by the Magistrates' Court in 2001 and it ceased to exist on its own. Second, the said decree was executed and perfected a long time ago. Third, the suit property is no longer in existence as there is adequate evidence on record to demonstrate that it was sub-divided and disposed of to the Respondent's children who are not parties to the instant appeal.

19. The court is also alive to the rules of natural justice in litigation. Since the current proprietors of the suit property are not before court, the court cannot make any adverse orders which may affect their proprietary rights. It would, therefore, be futile to proceed with the appeal whereas it is clear that the suit property is out of the court's reach and any order or decree which may ultimately be made with respect thereto may be unenforceable. It has been held that a court of law ought not to undertake proceedings or make orders in vain.

**(d) Who shall bear costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Respondent shall be awarded costs of the application.

**H. CONCLUSION AND DISPOSAL**

21. The upshot of the foregoing is that the court finds merit in the Respondent's notice of motion dated 5<sup>th</sup> February, 2021 in one respect only, that is, that the appeal has been overtaken by events and that the current proprietors of the suit property are not parties to the appeal. Accordingly, the court makes the following orders for disposal of the application:

**(a) The Appellant's appeal is hereby struck out with costs to the Respondent.**

**(b) The Respondent is hereby awarded costs of the application as well.**

22. It is so decided.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 24TH DAY OF JUNE 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Kariuki Mwangi for the Respondent

No appearance for the Appellant

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**Y. M. ANGIMA**

**JUDGE**