



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. CIVIL APPLICATION NO. 61 OF 2012

M'RUTERE M'ITONGA.....APPLICANT

VERSUS

NAOMI M'RUTERE.....RESPONDENT

R U L I N G

1. The Notice of Motion dated 5th July, 2012 seeks orders:-

- (1) **THAT** the applicant be granted leave to file an appeal out of time against the decision of the Land Dispute Appeals Committee Eastern Province in case No. 86 of 2008 dated 29/07/2009
- (2) **THAT** the annexed draft Memorandum of Appeal be deemed as properly filed.
- (3) **THAT** costs of this application be in the intended appeal.

2. The grounds in support of the application are:-

- (1) **THAT** the period provided by statute for instituting an appeal against the decision of the Land Disputes Appeals Committee has lapsed.
- (2) **THAT** failure to institute such an appeal within the limitation period was as a result of the vague nature of the decision.
- (3) **THAT** the Applicant understood the decision to be granting the respondent a right to occupation and use of land as opposed to a right to title.
- (4) **THAT** the Applicant has realized that the Respondent utilized the impugned decision to grant herself title to a substantial portion of the Applicant's land.
- (5) **THAT** the Committee acted beyond its statutory mandate.
- (6) **THAT** this Court is vested with the inherent power to ensure that the ends of justice are met.

3. Applicant has also filed a Supporting Affidavit where he has deponed as follows:-

- (1) **THAT** I am the Applicant herein well versed with all the issues stated herein and thus competent to swear this affidavit in support of the application to which it is attached.
- (2) **THAT** the Respondent instituted a claim with the Meru Central District Land Disputes

Tribunal against the Applicant claiming an interest in the Applicant's parcel of land number NTHIMBIRI/ABONYA1/30.(Annexed hereto and marked "MMI" is a copy of green card thereof.

(3) THAT the Tribunal found in favour of the Respondent prompting the Applicant to appeal to the Land Disputes Appeals Committee Eastern Province in Case No. 86 of 2008.

(4) THAT the Appeals Committee decided in favour of the Respondent as can be deduced from a copy of its decision dated 29/07/2009 annexed hereto and marked "MM 11".

(5) THAT the Appeals Committee did not read its decision to the parties but the same was pronounced in Court. (Annexed hereto and marked 'MM III' is a copy of proceedings at the lower court).

(6) THAT all through the proceedings at the Tribunal and Appeals Committee, I understood the Respondent's claim to be for use and occupation of land.

(7) THAT indeed when the award was read to us by the lower Court and its import explained, I got the impression that the Appeals Committee was awarding the Respondent's a portion to occupy and utilize.

(8) THAT My understanding of the decision was given credence on 23/04/2010 by the dismissal of the Respondent's application seeking the subdivision of my parcel of land in an apparent move to implement the Appeals Committee decision. (See the record of 23/04/2010 in annexure "MM 111").

(9) THAT thereafter I was never served with any Court process regarding the matter and was only recently surprised when agents of Kenya Power Company came to my home to install electricity for which I had not applied for.

(10) THAT being aware that only a registered owner of land can properly apply to be supplied with power, I immediately conducted a search with regard to my parcel and was taken back to realize that the title thereof had been closed on subdivision into parcels. (See entry number 5 of annexure "MM 1").

(11) THAT I realized that the Respondent had managed to have the main land subdivided into two parcels, being L.R NOS. NTHIMBIRI/ABONYAI/594 & 595 with the former registered in her name. (Annexed hereto and marked 'MM IV a' and "MM IV b' are copies of green cards for both parcels respectively).

(12) THAT I did not participate in the proceedings that granted the Respondent the power to undertake the subdivision and subsequent transfer of a portion of my land to her on the strength of an application similar to the one that was dismissed on 23/04/2010. (Annexed hereto and marked 'MMV' is a copy of the application).

(13) THAT I was not with the application as alleged, otherwise I would have opposed the same vigorously.

(14) THAT I am advised by my Advocates on record that the Appeals Committee had no jurisdiction to make orders affecting title to land as interpreted by the Respondent.

(15) THAT I thus feel gravely aggrieved by the unfortunate turn of events and would thus desire to Appeal against the decision albeit belatedly.

(16) THAT I believe that I have a very strong appeal against the decision of the Appeals Committee with high chances of success. (annexed hereto is a copy of a draft memorandum of appeal marked 'MM VI').

(17) THAT I pray to the Court to exercise its discretionary powers and grant me the orders sought herein in order to remedy the obvious injustice meted out against me.

(18) THAT the instant application is instituted in the interest of justice and fairness.

(19) THAT I deponed to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and understanding.

4. The Respondent has opposed the Application through her Replying Affidavit of 15th September, 2012 where she states:-

“The I am well versed with this matter and that the applicant is my husband.

(1) THAT I am the 1st wife of the applicant and we were blessed with five children.

(2) THAT the applicant at the moment lives with the 2nd wife and has totally neglected me and my children.

(3) THAT the applicant wanted to chase me from the suit property where my matrimonial home is.

(4) THAT when it became apparent that he didn't want me and my children on the suit property, I went to the District Land Dispute Tribunal and filed a case against him.

(5) THAT the reason was to have the suit property NTHIMBIRI/ABONYAI/30 divided between the two houses of the applicant since I had no where to go if I was chased from the suit property.

(6) THAT in the year 2008 the District Land Disputed Tribunal ruled that I get two acres out of the applicants parcel of land and he remains with 2 ½ acres.

(7) THAT the applicant herein was not satisfied and he challenged the award in the Provincial Tribunal Appeals Committee in Embu.

(8) THAT on 29/7/2009 the applicants appeal was dismissed and the District Tribunal's decision was up held.

(9) This clearly shows that at all times the applicant was aware of what he was appealing against and he was aware that the appeal was dismissed and the District Tribunal's decision stood.

(10) The District Land Dispute Tribunal's decision is very clear that I get half share of the portion of land and there is no any vagueness in the decision as alleged.

(11) Its not true as alleged in Para. 7 of the Supporting Affidavit that the appeals committee awarded me a portion to occupy and utilize. In fact the appeals committee did not add or reduce anything from the District Lands Disputes Tribunal's, the appeal committee simply dismissed the appeal and nothing more.

(12) THAT this application is an after thought and brought in bad faith.

(13) THAT all along the applicant has been aware of what was happening in this matter and served with all the court process.

(14) THAT even when the surveyor went to sub divided the land the applicant was present and even instructed the surveyor on how to subdivide the land.

(15) THAT the applicant has not clearly demonstrated why he never filed the appeal in the high court immediately his appeal was dismissed by the appeals committee Embu.

(16) ***THAT*** justice demands that litigation should come to an end and it's for the interest of justice that this application be dismissed.

(17) ***THAT*** the appeal has been over taken by event and the land has been transferred to third parties who are the respondent's daughters.

(18) ***THAT*** this application is not merited as the matter was heard by the elders who know the situation on the ground.

(19) ***THAT*** the application is discriminating me on account of my gender which is against the constitution, that we have planted coffee together on this firm and I am entitled to a share there of.

(20) ***THAT*** I only took 2 acres and he remained with 2 ½ acres.

(21) ***THAT*** the applicant's wants to secure a loan using the said parcel as a security which might render the family landless. In the event he is to repay the loan and there is no urgent emergence for the loan.”

5. In his Submission, the Applicant has captured what is in the grounds in support of the application and in his supporting affidavit. He adds that under **Article 159** of the **Constitution** the Court has residual powers pursuant to the overriding objective in law to do justice and to overlook technicalities which would amount to injustice.

6. Applicant has cited the following authorities in support of the motion.

a) ***MALINDI CIVIL APPEAL NO. 48 OF 2010. MPENZWE NGOBA MTANA & ANOTHER VS. ZUHURA SHABANA (2014) eKLR.***

b) ***NYERI MISC. APPL. NO. 93 of 2012 ,BERNARD NGANGA SOLOMON VS. WAITHIRA GATITU (2013 eKLR).***

7. The Respondent's Submissions are dated 11th August, 2014. Similarly, the Respondent has also repeated what she has averred in her replying affidavit. Respondent has however emphasized the long period the applicant has taken to bring up this matter.

8. **The issues for determination;**

i. ***Whether the decision of the Provincial Lands Dispute Appeals Committee (hereinafter referred to us P.L.D.A.C) was too vague to comprehend.***

ii. ***Whether the delay in filing the appeal is excusable***

iii. ***Whether the court can overlook procedural technicalities as provided for under section 159 (2) (d) of the constitution***

9. Was the decision of P.L.D.A.C too vague to comprehend? The decision in question reads as follows;

“the appellant has two wives. He unfairly allocated his land to one of his wives son leaving the other wife without any land. EACH WIFE IS TO GET TWO ACRES AND THE BALANCE TO REMAIN WITH THE APPELLANT. R/A 60 DAYS.”

The wording is crystal clear. There is nothing vague about the decision. The application cannot succeed on this ground.

10. Is the delay excusable?

It is not clear how long this dispute has been in the litigation arena considering that the proceedings of the initial Lands Dispute Tribunal have not been annexed to the application. The period is however evidently long. Very long. From the proceedings before the CM's court in Meru L.D.T NO.50 OF 2008 the original award was read in court in the presence of both parties on 2/9/2008. The right of appeal was explained. It is apparent that applicant was not satisfied with that decision hence the appeal before the P.L.D.A .C NO. 86 OF 2008. The decision of the PLDAC was read in court on 8/9/2009. The right of appeal was again pronounced.

11. The present application is dated 3/7/2012. It took three years for the applicant to move the court concerning the proposed appeal. That delay is not excusable at all. It is not lost to this court that this is the seventh year from the time the decision of PLDAC was adopted by the court. I am in agreement with the Respondent that the court should not assist the indolent.

12. Can't the court overlook the issue of procedural technicalities and proceed to the application?

13. The spirit of the constitutional provisions on procedural technicalities envisages a situation whereby substantial justice is not sacrificed at the altar of procedures. What has emerged is that the Respondent is a wife of the applicant. She is alleged to be over 85 years old. The applicant has not denied these averments. I would take it that applicant is equally old. If this court was to overlook the issues of procedure and allow the application it would in essence amount to grave injustice in light of the long period the matter has been in the litigation arena, the relationship between the two parties and finally the advanced age of the litigants. This is hence one of those cases whereby the Court will follow procedures.

14. Justice delayed is justice denied, see **article 159 2b of the constitution**. Litigation has to come to an end and the sooner the better.

15. I conclude that the application dated 5/7/2012 has no merits and the same is dismissed with costs to the Respondent.

DELIVERED IN OPEN COURT AT MERU THIS 23RD DAY OF FEBRUARY, 2017 IN THE PRESENCE OF:-

CA: Mungai/Kananu

Mutuma Mwenda h/b for Ondieki for Respondent

Miss Nyaga for Applicant

L.N. MBUGUA

JUDGE