



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND COURT**  
**MISC. CIVIL APPLICATION NO. 228 OF 2014**

**KITOITOI OLE MOOKE.....APPLICANT**

**VERSUS**

**BONIFACE TAANI.....RESPONDENT**

**RULING**

The Application for consideration is the Notice of Motion dated 27th June 2014 brought **under Order 42 Rule 1 of the Civil Procedure Rules, section 1A, 1B, 75, 78, 79G of the Civil Procedure Act, section 3(1), 13(4) (7) & 31 of the Environmental & Land Court Act and sections 3 & 8 of the Land Disputes Tribunal Act 18/1990** seeking for orders that:-

1. Spent.
2. The court be pleased to grant leave to the Applicant to file an appeal out of time with respect to the decision of **Kajiado Lands Dispute Tribunal Case No. 418 of 2007** and the subsequent adoption of its decision in **Kajiado SRMC Case No. 14 of 2008 Boniface Taani –vs- Kitoitoi Ole Mooke** made by the Hon. W.N. Kaberia, Senior Resident Magistrate on 27<sup>th</sup> May 2008.
3. If prayer 2 above is granted, the annexed draft Memorandum of Appeal be admitted as properly filed upon payment of the requisite court filing fees.
4. That the court be pleased to issue temporary injunctive orders restraining the Respondent either by himself, his servants or agents or any other claiming under him from parting with possession and or title and or interest or a portion thereof, charging, letting, alienating or in any other way interfering and or transacting with and or on the title currently registered in the Respondent's name for Kajiado/Kaputiei North/2118 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and the intended appeal.
5. That the costs of this Application be provided for.

This Application is premised on the grounds appearing on the face of the Application and the supporting affidavit of the Applicant, Kitoitoi Ole Mooke, sworn on 27th June 2014 in which he averred that he is a joint administrator of the estate of Mooke Tonou Lila, his late father, together with his brother Jason Ole Mooke. He averred further that his late father was the registered proprietor of the suit property and according to the Confirmation of Grant, both he and his said brother were to share the suit property equally. He further averred that on 5<sup>th</sup> July 2010, his aforementioned brother and he embarked on the process of transferring the suit property to their names by way of transmission when they were informed that the same was transferred to the Respondent. He further averred that upon conducting a search at the Kajiado Land Registry, he found out that the suit property was transferred to the Respondent on 23<sup>rd</sup> September 2010 and a title deed issued to him on the same date. He further stated that it then that he came

to learn about **Kajiado Land Dispute Tribunal Cause No. 418 of 2007** in which he and his late father were indicated as the objectors. He further stated that he came to learn that the tribunal's award dated 13<sup>th</sup> March 2008 was read and adopted in **Kajiado Senior Resident Magistrates Case No. 14 of 2008** on 27<sup>th</sup> May 2008. He added that neither he nor his aforementioned brother was ever given notice of the tribunal case at all. He further indicated that his said brother filed judicial review proceedings against the decision of the tribunal in **Machakos Misc. JR. Application No. 13 of 2011** which were dismissed on 10<sup>th</sup> June 2014 on a technicality because proper parties were not properly before the court. He further stated that the statutory period for filing judicial review proceedings for an order of certiorari lapsed six months after the date of the order of the lower court and further that the time for filing an appeal against the decision of the **Kajiado Senior Resident Magistrate Court Misc. Application No. 8 of 2008** lapsed as well. He stated further that this court has been given jurisdiction to hear and determine appeals from subordinate court and further have unfettered discretion to enlarge the time within which to appeal provided that good and sufficient cause for the delay has been shown. He advanced the reasons for the delay in appealing as being that he came to learn of the award of the tribunal in the year 2010 after the suit property had been transferred to the Respondent, that he was not present when the tribunal's award was adopted by the Resident Magistrate Court at Kajiado, that he was not summoned to the tribunal and court hearings and that upon the stated judicial review proceedings being dismissed he filed this Application immediately.

This application is contested. The Respondent, Boniface Taani, filed his Replying Affidavit sworn on 30<sup>th</sup> October 2014 in which he averred that by way of a Sale Agreement dated 16<sup>th</sup> October 1991, he purchased a parcel of land measuring 30 acres from the Applicant whereby it was agreed that the said parcel would be excised from the Applicant's portion of his father's land. He further averred that the Applicant's father subdivided his parcel of land and upon payment of the deposit of the purchase price, the portion he purchased was excised off and he and his family moved and settled therein. He further stated that the Applicant failed to give him the transfer documents leading him to institute proceedings before the Kajiado Land Disputes Tribunal wherein the Tribunal ordered that the Applicant respect the Sale Agreement and facilitate the transfer of the suit property to him. He confirmed that the Tribunal's decision was adopted by the Kajiado Senior Resident Magistrate Court on 27<sup>th</sup> May 2008. He further stated that the Applicant never appealed or challenged the proceedings notwithstanding the fact that he was present when it was delivered and that it is wrongful for the Applicant to aver that he was not aware of the proceedings. He further stated that pursuant to the order of the court, he prepared transfer forms for execution by the Executive Officer of the court which he lodged for registration and was issued with a title deed over the suit property. He added that this Application has the same grounds and facts the Applicant's brother used in Judicial Review proceedings at the **Machakos High Court being Misc. Application No. 13 of 2011** which were dismissed. He then stated that this Application should be dismissed because the Applicant participated in the ruling of the Tribunal and if he was aggrieved, he knew or ought to have known that the time for filing an appeal was within 60 days of the decision, that there was no plausible reason given by the Applicant as to why they took 2 years to file Judicial Review proceedings and further why they took over 6 years from the decision to file this Application. He stated that the delay was inordinate and manifestly indolent.

Parties canvassed this Application by way of written submissions. The Applicant relied on **section 75G of the Civil Procedure Act** which gives the court unfettered discretion to extend time within which to file an appeal out of time provided that the applicant satisfies the court that he had good and sufficient cause for the delay in filing the appeal. It is true that this court has unfettered discretion to make a determination on whether or not to extend time to appeal. However, in exercising discretion, the court should do so judiciously and in accordance with the principles set out in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997** where the court stated that,

*“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”*

Having considered the material placed before the court, it is apparent that the Applicant is blaming his lack of knowledge of the tribunal decision and the adoption of the award in court at the Kajiado Magistrates Court as his failure to file the appeal within the stipulated time. The dispute that caused the institution of this suit emanated from a sale agreement between the Applicant and the Respondent dated 16<sup>th</sup> October 1991. The Respondent paid the purchase price of Kshs. 150,000/= but the title to the suit property was in the name of the Applicant's father. The applicant's father died on 5<sup>th</sup> June 1994. The Applicant did not transfer the title to the Respondent which forced the Respondent to institute proceedings at the Kajiado Land Dispute Tribunal. The Respondent in his affidavit claimed that the Applicant together with his witnesses were present in the hearing at the tribunal where an award was given in favor of the Respondent on 13<sup>th</sup> March 2008. This award was later adopted at the Chief Magistrate's Court in Kajiado on 27<sup>th</sup> May 2008 after a Notice of the adoption of the award was issued to the Applicant. The Applicant did not appeal against the tribunal's decision or the judgment of the court. The Applicant's brother, one Jason Ole Mooke Tonou, filed Judicial Review Proceedings on 21<sup>st</sup> February 2011 but the same was dismissed on grounds that the parties before the court were not proper. The Applicant then filed this suit. It is important to note that the Applicant did not file any appeal immediately after the award was adopted as an order of the court in 2008 and only came to court in 2011.

Under **section 79G of the Civil Procedure Act**, this court has power to extend time within which to file an appeal from the decisions of the subordinate courts provided good and sufficient cause is shown. The Applicant has sought for extension of time in this Application after the expiry of six (6) years after the decision of the tribunal. The explanation given by the Applicant for this delay is not convincing for he contends that he was not aware that there was a suit at the tribunal and the magistrate's court until 2010 when they learnt of the same from the lands registry in Kajiado. The Respondent has been on the suit property since 1991 and the Applicant knew that the property belonged to his father why then would he leave the Respondent on the suit property for all that while if he knew he had not sold land to him? The prayer sought by the Applicant is discretionary therefore it is my opinion that the Applicant has not convinced the court to exercise its discretion in granting the said prayer. I therefore decline to extend time within which to file an appeal. In the circumstances, I also decline to issue any of the other orders that the Applicant sought.

The upshot of the above is that this Application is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2015.**

**MARY M. GITUMBI**

**JUDGE**