



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 11'A' OF 2012**

**SIMON KARANI GACHOKI (UNSOUND MIND SUING THROUGH NEXT FRIEND)**

**MICHAEL NGONDI KARANI..... PLAINTIFF**

**VERSUS**

**JAMES MUCHIRI NYAGA.....DEFENDANT**

**RULING**

The application before me is the one dated 14<sup>th</sup> May 2012 and filed herein on 15<sup>th</sup> May 2012 brought under the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**. It seeks the following orders:-

1. *Spent*
2. *Spent*
3. *That this Honourable Court do extend the time within which to appeal against the judgment/decree issued on 1<sup>st</sup> December 2009 in KERUGOYA SENIOR PRINCIPAL MAGISTRATE COURT L.D.T Case No. 54 of 2007.*
4. *That this Honourable Court do grant a stay of execution of the judgment/decree issued on 1<sup>st</sup> December 2009 in KERUGOYA SENIOR PRINCIPAL MAGISTRATE' COURT LDT Case No. 54 of 2007 pending the hearing and determination of the intended appeal.*
5. *That costs be provided for.*

The application is based on the grounds set out therein and supported by the applicant's affidavit.

What comes out from the said affidavit is that the dispute involving the parties herein related to a parcel of land No. INOI/KIAGA/588 (suit land) which is registered in the applicant's name and which was heard by the Kirinyaga Central Division Land

Disputes Tribunal (Tribunol). The said Tribunal made an award ordering the applicant to sub-divide the suit land and give a portion to the respondent. That award was subsequently adopted by the KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT IN LDT Case No. 54 of 2007 and the respondent is in the process of executing the said order hence this application. The applicant adds that he only knew about the orders during the proceedings of another case being KERUGOYA CIVIL CASE NO. 4 OF 2010.

The application is opposed and in his replying affidavit, the respondent has deponed as follows:-

1. *That the applicant lodged his claim in the Land Disputes Tribunal in the year 2007.*

2. *The Tribunal made an award and the applicant was dissatisfied and lodged an appeal at the Appeals Committee in Nyeri which delivered its award.*
3. *That instead of appealing against that decision to the*

**High Court the applicant filed KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 4 OF 2010.**

4. *That this application does not meet the requirements set out in the Civil Procedure Rules.*

The application was canvassed before me orally on 27<sup>th</sup> October 2015 with the applicant stating that he was not satisfied with the decision of the Tribunal and therefore seeks leave to appeal out of time.

Mr. Ngigi for respondent submitted that the decree was issued in December 2009 and this application was filed in May 2012 which is over 3 years and so the delay is in-ordinate. Further, there is no appeal pending and the subject matter has been transferred to a third party.

I have considered the application together with the rival affidavits and the oral submissions made.

This application is premised under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** as well as the other provisions cited therein. The two orders sought are:-

- a. *Extension of time within which to file an appeal.*
- b. *Stay of execution.*

It is clear from the record herein that this dispute commenced in the Kirinyaga Central Division Land Disputes Tribunal which made an award that the suit land which had been sub-divided into two portions being INOI/KIAGA/752 and 753 was properly sub-divided and registered with the applicant and two others being registered as owners of INOI/KIAGA/752 and the respondent being registered as the owner of INOI/KIAGA/753. The Tribunal infact refused to make any orders since those sub-divisions were made in 1995 and the suit was time-barred.

Being aggrieved with that decision which was delivered on 24<sup>th</sup> September 2007. the applicant appealed to the Provincial Land Appeals Committee in Nyeri which on 27<sup>th</sup> November 2008 up-held the decision of the Tribunal.

Under the provisions of **Section 8 (9) of the then Land**

**Disputes Tribunal Act** (now repealed) the applicant had sixty days within which to appeal to the High Court against that decision on points of law. That decision was infact confirmed by the Senior Principal Magistrate's Court at Kerugoya in L.D.T Case No. 54 of 2007 on 1<sup>st</sup> December 2009. There is nothing to suggest that the applicant filed any appeal to the High Court. Mr. Ngigi has confirmed that infact no such appeal was filed.

The applicant now seeks an extension of time so that he can file the appeal. Previously, it was generally agreed that the provisions of the **Civil Procedure Act** would not apply to appeals under the then Land Disputes Tribunal Act but the Court of Appeal has now taken a different view – see **MUTHIKE MWANIKI VS GENESIO NJAGI C.A CIVIL APPEAL NO. 82 OF 2009 (NYERI)**. Therefore, the Court will consider this application in the light of the pronouncements in that case. **Section 79G of the Civil Procedure Act** gives the Court the discretion to allow an appeal to be filed out of time so long as the applicant “*satisfies the Court that he had good and sufficient cause for not filing the appeal in time*”.

In the case of **BAGAJO VS CHRISTIAN CHILDREN FUND INC (2004) 2 K.L.R. 273 Ringera Ag. J.A** (as he then was) was considering an application under **Rule 4 of the Court of Appeal Rules** but the same principles would apply in an application under **Section 79G of the Civil Procedure Act**. He laid down those principles as follows:-

- *the length of the delay*
- *the explanation for the delay*
- *is the intended appeal arguable*
- *the prejudice that may be caused to the respondent if the application is allowed*
  
- *the public importance of the matter*
- *the requirements of the interests of justice in the case*

The decree for which leave is sought to appeal against was issued on 1<sup>st</sup> December 2009 and this application was filed on 15<sup>th</sup> May 2012 (some 2 years and 5 months later). The applicant does not explain the reason for that delay which is clearly in-ordinate. In paragraph 9 of his supporting affidavit, he only states that he learnt of the existence of those orders during the proceedings in KERUGOYA P.M CIVIL CASE NO. 4 OF 2010 but he does not give us that date. However, it is clear from the record herein that KERUGOYA P.M CIVIL CASE NO. 4 OF 2010 in which the applicant was the plaintiff was filed on 8<sup>th</sup> January 2010 and a defence was filed on 5<sup>th</sup> May 2010 by the respondent herein in which it was pleaded, inter alia, that this dispute was infact the subject of the Tribunal case No. 54 of 2007. Clearly therefore, the applicant must have been aware about the Tribunal case in 2010. That would still mean that it has taken him two years to file this application which delay is un-reasonable and un-explained. As no sufficient cause has been given, this application must fail.

Even if this Court was to consider the merits of the appeal, it would appear from the record herein that by the time the applicant was approaching the Tribunal in 2007, the suit land had infact already been subdivided to give rise to parcels No. INOI/KIAGA/752 and 753. It is not clear under what orders that subdivision was made but as I have already indicted above, the Tribunal refused to interfere citing limitation of time and ordering that the status quo be maintained. The Provincial Appeals Committee in Nyeri affirmed that decision. Therefore, there can be no orders made by either the Tribunal or the Appeal Committee that can be the subject of any appeal to this Court.

And with regard to the public importance of the matter and the general requirements of the interest of justice, it is true

that this is a land dispute and land is an emotive subject. However, land cases, just like any other cases, must also come to an end and cannot be litigated ad infinitum. The Court has also been informed by Mr. Ngigi that the land has been transferred to a third party namely JACKSON KARIMI. Taking all that into account, it would not be in the interest of justice to grant this application for leave to appeal out of time.

Then there is the application for stay of execution of the judgment/decreed issued on 1<sup>st</sup> December 2009. As the application for leave to appeal out of time has been denied, this application similarly collapses. Even if this Court was to consider it on its merits, it does not meet the threshold set out in **Order 42 Rule 6 (2) of the Civil Procedure Rules** in that there is no evidence of what substantial loss the applicant will suffer if stay is not granted – **KENYA SHELL LTD VS KIBIRU & ANOTHER 1986 K.L.R 410**. An application under **Order 42 Rule 6 (2) Civil Procedure Rules** must also be brought “***without un-reasonable delay***”. I have already found the delay herein to be un-reasonable and un-explained.

In the circumstances, the application dated 14<sup>th</sup> May 2012 and filed herein on 15<sup>th</sup> May 2012 is dismissed with costs.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**

**COURT: Ruling delivered, dated and signed this 4<sup>th</sup> day of December, 2015 in open Court.**

Plaintiff present in person

Mr. Momanyi for Defendant present.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**