



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 10 OF 2013

GEITWA MIANO NDEGWA.....APPELLANT

VERSUS

LYDIA WANGECHI1ST RESPONDENT

CECILIA WANJIRU 2ND RESPONDENT

RULING

The parties herein are a man (applicant) and his two wives (respondents). They have been litigating over a parcel of land known as MWERUA/KIANDAI/979 since 2004 and as was the practice then, their dispute was heard by the Baricho Land Disputes Tribunal in Case No. 17 of 2004. The said Tribunal delivered a judgment on 20th July 2004 ordering that the said parcel of land should be divided into two equal portions and thereafter one portion should be registered in the names of the applicant and the first wife and the other portion in the names of the applicant and the second wife. That decision, pursuant to the provisions of **Section 7 (2) of the then Land Disputes Tribunal Act** (now repealed) was read to the parties on 21st July 2004 by J.M. Githaiga Resident Magistrate Baricho and was adopted and judgment entered in terms of the said award. The parties were then notified of their right of appeal within 30 days to the Provincial Appeals Tribunal at Nyeri as was the law then.

The applicant was dissatisfied by that decision and so he filed an appeal at the Provincial Land Appeal Tribunal at Nyeri being appeal No. 10 of 2004. That appeal was heard and on 27th November 2008 the said Tribunal confirmed the award of the Baricho Land Disputes Tribunal as confirmed by the Baricho Court. The record shows that the decision of the Provincial Land Appeal Tribunal was again sent to the Resident Magistrate's Court at Baricho where on 18th February 2009, J.N. Mwaniki - Resident Magistrate proceeded to adopt the said decision as a judgment of the Court. It is not clear under what provision of the law the decision of the Provincial Land Appeal Tribunal was again sent to the Court for adoption. From what I gather in the provisions of the Land Dispute Act, it is only provided for under **Section 7 (2)** that the award of the Land Dispute Tribunal shall be entered as a judgment of the Court and a decree shall follow. **Section 8 of Land Disputes Tribunal Act** which provides for appeals to the Provincial Appeals Committee does not have a provision for adoption of its decision by the Court. **Sections 8 (8) and (9) of the Land Disputes Tribunal** states that the decision of the Appeals Committee shall be final but an appeal may lie to the High Court on points of law within sixty days of the date of the decision complained of.

The applicant being dissatisfied with the decision of J.N. Mwaniki Resident Magistrate dated 18th February 2009 filed an appeal at the High Court Embu dated 17th March 2009 although the Court stamp reads 17th March 2006 which must have been an error because the decision appealed against was delivered on 18th February 2009. The Court date stamp must have been meant to read 17th March 2009

because the appeal itself is signed by the appellant then acting in person on 17th March 2009.

The said appeal was placed before Wanjiru J. (as she then was) on 24th September 2010 and the Judge made the following order:-

“No appeal can lie to this Court from a decision of the Land Disputes Tribunal”.

Aggrieved by that decision of Wanjiru Karanja J. (as she then was) dated 24th September 2010, the applicant filed this Notice of Motion on 2nd November 2012 under **Order 45 Rule 1 of the Civil Procedure Rules** seeking the orders:-

1. That the Honourable Court be pleased to review its order of 24th September 2010

2. That the Honourable Court do reinstate the appeal herein

3. That costs be provided for.

That application was canvassed before me orally with Mr. Ngigi appearing for the applicant while the respondents were in person. The said application is the subject of this ruling.

I have considered the application. In his submissions, Mr. Ngigi for the applicant submitted that after the applicant filed his memorandum of appeal on 17th March 2009, he kept waiting for a letter from the Court to confirm if the same had been admitted or not and it was not until the applicant instructed him that he perused the file and found the order of Wanjiru Karanja J. (as she then was) dated 24th September 2010. It is his submission therefore that the said order was made in error because the applicant's appeal was not against the award of the Land Dispute Tribunal but rather the decision of the Appeals Committee at Nyeri. Therefore, Wanjiru Karanja J. (as she then was) made an error in treating the appeal as if it was an appeal against the decision of the Land Disputes Tribunal. Accordingly, it is the view of Mr. Ngigi that, that was an error on the part the Judge which calls for a review from this Court.

The respondent's acting in person submitted that both the Land Dispute Tribunal and the Provincial Appeals Committee in Nyeri ordered the applicant to sub-divide the land subject matter of this dispute between them. They urged me not to disturb that decision because that is where they live.

This application is founded under the provisions of **Order 45 Rule 1 of the Civil Procedure Rules** which provides as follows:-

“Any person considering himself aggrieved –

a. by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the Court which passed the decree or made the order without unreasonable delay” emphasis added.

The issue raised herein is that Wanjiru Karanja J. (as she then was) ***“inadvertently rejected the appeal from the Appeals Committee, Nyeri”***. There is therefore an error on the face of the record in the order of Wanjiru Karanja J. (as she then was) dated 24th September 2010. I think that complaint is well merited. From the record, the appeal that was placed before Wanjiru Karanja J. (as she then was) was the

one dated 17th March 2009 which was really an appeal from the decision of the Appeals Committee at Nyeri and not the appeal from the Baricho Land Disputes Tribunal. I think the confusion was caused by the applicant himself in the manner in which he drew his memorandum of appeal which is headed as follows:-

“AN APPEAL FROM THE JUDGMENT AND ORDERS OF THE LEARNED RESIDENT MAGISTRATE HONOURABLE J.N. MWANIKI IN THE RESIDENT MAGISTRATE’S COURT AT BARICHO IN LAND DISPUTE TRIBUNAL CASE NUMBER 9 OF 2004 DELIVERED ON 18TH FEBRUARY 2009”

It is highly possible that Justice Wanjiru Karanja (as she then was) only looked at that heading which created the impression that the appeal before her was from the decision of the Land Disputes Tribunal. Had the learned Judge gone further and read the next paragraph that followed the above heading, she would have noted that it read as follows:-

“The appellant being dissatisfied with the award of the Appeals Committee Nyeri and -----“

Therefore, when the Judge made the order subject of this application, she must have assumed that the appeal before her was from the decision of the Baricho Land Disputes Tribunal. I am satisfied that, that was an error which, unfortunately, was contributed to by the imprecise manner in which the memorandum of appeal was drafted. This must have been due to the fact that the appellant was then acting in person.

The applicant has therefore demonstrated that there was indeed an error on the face of the record. However, **Order 45 Rule 1 of the Civil Procedure Rules** also mandates him to move and rectify that error **“without un-reasonable delay”**. The order complained of was made on 24th September 2010 and the application before me was filed on 2nd November 2012. The application was therefore filed two years later. His explanation for that is that he was waiting for a letter from the Court to inform him whether his appeal had been admitted (see paragraph 2 of his supporting affidavit) and that it was not until he instructed an advocate that the said advocate proceeded to High Court of Embu and upon perusal of the Court file discovered the order subject of this application. The Court is not told when this discovery was made. I have however perused the file and found that on 28th September 2010 (four days after Wanjiru Karanja J. (as she then was) made the order complained of) letters were dispatched by the Deputy Registrar to both the appellant and respondents at their address “P.O. BOX 53 BARICHO” informing them that the appeal had been rejected and that **“the file is available for perusal during office hours”**. There is nothing to suggest that this letter did not reach the applicant and he has not said so. From what I heard the 2nd respondent say, the parties must have received the letter dated 28th September 2010 because the 2nd respondent was aware that the High Court at Embu dealt with the matter. It is instructive to note that the parties are a man and wife and share the same address above. Further, the applicant has not been candid as to when exactly he came to learn that his appeal had been rejected. However, from the material before me, I am satisfied that he was notified by a letter dated 28th September 2010 that his appeal has been rejected. He has offered no reason for the delay of two years.

Is that delay **“un-reasonable”**? In **KENFREIGHT E.A LTD VS STAR E.A CO. LTD (2002) 2 K.L.R. 783**, the Court found that a delay of three months was un-reasonable. In **ABDULRAHMAN HASSAN VS NATIONAL BANK OF KENYA KISUMU H.C.C.C NO. 446 OF 2001 (KSM)**, the Court observed also that an un-explained delay of three months was unreasonable. Lastly, in **JOHN AGINA VS ABDULSWAMAD SHARIF ALWI C.A CIVIL APPEAL NO. 83 of 1992; (1992) L.L.R 5734**, the Court of Appeal ruled that an un-explained delay of two years in making an application for review was not sufficient reason to earn a party the sympathy from the Court.

In the application before me, the delay is two years. It has not been satisfactorily explained and it is clearly unreasonable. I would therefore dismiss this application with no order as to cost since the parties are family.

It is so ordered. JUDGE B.N.OLAO

DATED & DELIVERED ON 7th November 2014

7/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Abubakar for Mr. Ngige for Appellant – present

Respondent – absent

COURT; Ruling delivered this 7th day of November, 2014 in open Court.

Mr. Abubakar for Mr. Ngige for Appellant- present

Respondent absent.