



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 186 OF 2010

GEOFFREY GAKINYA KAMAU also known as

GEOFFREY GAKINYA.....PLAINTIFF

- VERSUS -

JOSEPH MURORI MBOCHI..... DEFENDANT

RULING

1. This is the applicant's notice of motion dated 29th April 2010. The applicant craves leave to appeal out of time the ruling of the Resident Magistrate dated 18th January 2007 in the Senior Resident Magistrates Court Tribunal case Number 3 of 2006 *Geoffrey Gakinya Kamau Vs Joseph Murori Mbochi*. That ruling entered an award by elders dated 2nd December 2005 under the Land Disputes Tribunal Act. From the annexed record, that ruling was read in open court in the presence of the claimant and the objector but in the absence of the objector's advocate. The objector in those proceedings is the applicant here. One of the grounds to appeal out of time is that the applicant's counsel was not served with the ruling date and only became aware after perusal of the court record on 1st March 2010. The ruling is also sought to be impeached for being delivered outside the 42 days allowed by the then order XX rule 1 of the repealed civil procedure rules.

2. The motion is contested. The pith of the objection is that under the applicable Land Disputes Tribunal Act, the aggrieved applicant should have filed an appeal under section 8 on the tribunal's decision. It is thus mistaken to seek to appeal the decision of the Resident Magistrate who was only required to read the award under section 7 of the Act. My attention was also drawn to the record of the magistrate showing that the impugned ruling was read in open court in the presence of both parties. The application is also attacked for laches and lacking in merit. The respondent thus prays that the motion be dismissed with costs.

3. I have heard the rival arguments. The impugned ruling was read on 18th January 2007. From the record of the lower court, it is clear that it was read in open court in the presence of both the claimant and objector. The objector's counsel was absent. The objector is the applicant in the present motion. Whether or not his counsel was present or served with the ruling date does not alter the fact that the objector was present on the ruling date. I also note from the respondent's replying affidavit sworn on 8th November 2010 at paragraphs 7, 17, 18 and 19 clear and uncontroverted averments that the applicant was present during the ruling. On the basis of that evidence, I also find that there has been lengthy and inexcusable delay in bringing the present motion. The words of Salmon L J in *Allen Vs Mc Alpine & Sons* [1968] ALL ER 56) are instructive:

“as a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied”

4. The excuse put forward is that the applicant only became aware of the ruling on 1st March 2010 upon perusal of the court record. Parties had argued the application before the honourable magistrate on 21st September 2006. A ruling had been reserved for 15th October 2006. I would have thought that the applicant would have then followed up on the matter to find out the status of the ruling. To claim to have perused the record over 3 years later on 1st March 2010 does not reflect well on the diligence of the applicant or his legal advisors. It does not answer well the inordinate and lengthy delay in bringing the present motion. I note in passing that even after that discovery, the applicant did not present this motion until 29th April 2010, nearly two months later. It is all consistent with a litigant who is indolent. Having slept on his rights, this court is reluctant to grant him the discretionary remedy sought.

5. The legal basis upon which the impugned ruling was delivered is doubtful. Under the relevant section 7 of the Act, all that the learned magistrate was required to do was to read and enter the award. He seems, on the application of the parties, to have interrogated the merits of the award. For example, he was concerned that it was read by a clerk. He was also considering when time started running in the award. But with respect, he conceded at the end of his ruling that under section 8 of the then Land Disputes Tribunal Act, he was only required to enter the award.

6. As a corollary, the remedy for an aggrieved party to such an award is to appeal that award. Not the decision of the magistrate reading or entering the award. The motion before me now seeks leave to file an appeal out of time against the decision of the learned magistrate at Githunguri in Tribunal case No 3 of 2006 dated 18th January 2007. The applicant is barking up the wrong tree. I have said that the inordinate delay prejudices the application for leave to appeal out of time. Even if the motion had been made timeously, it would still be incompetent for being misdirected at the wrong target of appeal. The complaint that the ruling was delivered outside the 42 days provided by the repealed order XX rule 1 of the Civil Procedure Rules is then neither here nor there.

7. I have thus come to the conclusion that the applicant’s notice of motion dated 29th April 2010 lacks merit. I order that the same be dismissed with costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 5th day of July 2012.

**G.K. KIMONDO
JUDGE**

Ruling read in open court in the presence of

No appearance for the Applicants.
Mr. Chege for the Respondent.