



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 69 OF 2013**

**MICHAEL GATURA.....1<sup>ST</sup> APPLICANT**

**MARGARET N. KARANJA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JEREMIAH SATIEU.....RESPONDENT**

**RULING**

1. In the Application dated 27<sup>th</sup> March, 2013, the Applicants are seeking for the following reliefs:

***a. That the Applicants be granted leave to file an Appeal out of time.***

***b. That the cost of this Application be in the cause.***

2. The Application is premised on the grounds that the Applicants instructed the firm of Amolo and Kibanya advocates to file an Appeal against the Decree and order of the Senior Resident Magistrate, Machakos; that the Applicants have since learnt that no Appeal was lodged by the said advocate and that the Applicants should not be made to suffer for the mistakes of an advocate.

3. According to the Affidavit of the 1<sup>st</sup> Applicant, they filed a claim at Athi River Land Disputes Tribunal, Claim No. 4 of 2005 in respect of Land parcel number 10029/30 situate in Kajiado; that the Tribunal made its Ruling on 4<sup>th</sup> August, 2005 in their favour and that he was shocked when he received a hearing notice from the Provincial Appeals Committee when he was informed that the Appeals Committee had overturned the decision of the Tribunal.

4. It is the deposition of the 1<sup>st</sup> Applicant that neither himself nor his advocates were notified of the hearing before the Appeals Committee; that although he informed his advocate to lodge an Appeal after discovering about the Award of the Committee in February, 2011, the said advocate never lodged an Appeal in the High Court and that the Respondent filed his Appeal with the Provincial Appeals Committee after five (5) years.

5. The Applicants' advocate swore a Supporting Affidavit, in which he stated that the Tribunal made its Award on 4<sup>th</sup> August, 2005; that the Applicants proceeded to execute the Tribunal's Award and that he was shocked when he was informed that the Appeals Committee had overturned the Award of the Tribunal without involving them or the Applicants.

6. According to counsel, the delay in filing the Appeal was caused when the Resident Judge left the station and that the Applicants are not to blame for the late filing of the Appeal.

7. The Respondent deponed that after the Tribunal's Award was adopted by the Magistrate on 30<sup>th</sup> September, 2005, he appealed against the said decision of the Provincial Appeals Committee on 28<sup>th</sup> October, 2005.

8. It is the Respondent's case that the Appeals Committee summoned the Applicants to appear before the Committee on 11<sup>th</sup> November, 2010; that the 1<sup>st</sup> Applicant attended the proceedings once and that the Appeals Committee made its Award on 11<sup>th</sup> November, 2010; that the Award was read and adopted by the lower court on 18<sup>th</sup> January, 2011 and that the Applicants' Appeal is inordinately out of time.

9. The Respondent finally deponed that he has since acted upon the Award by distributing the suit land to third parties and that the Application should be dismissed.

10. Both the Applicants' and the Respondent's advocate filed their respective submissions which I have considered.

11. It is not in dispute that on 4<sup>th</sup> August, 2005, the Athi River Land Disputes Tribunal made an Award in respect of L.R. No. 10029/30 in which it gave the Applicants herein 10 acres of the said land. However, the Respondent filed an Appeal with the Eastern Provincial Land Disputes Appeal Committee on 28<sup>th</sup> October, 2005.

12. The Respondent has produced a copy of the hearing notice that was served on the 2<sup>nd</sup> Applicant by the Chief of Kitengela Location. The said Hearing Notice was duly received by the 2<sup>nd</sup> Applicant who was supposed to attend to the hearing of the Appeal on 11<sup>th</sup> November, 2010.

13. The Applicants have admitted that they were notified of the date that the Award of the Appeals Committee was to be read and adopted by the lower court, which was on 2<sup>nd</sup> December, 2010. The Applicants were therefore made aware of the decision of the Appeals Committee in November, 2010 when they received a Hearing Notice from the court, and they duly notified their advocate.

14. The Applicants were required to file an Appeal against the decision of the Appeals Committee on points of law alone within sixty (60) days (*See Section 8(9) of the Land Disputes Tribunals Act*). However, they did nothing until March, 2013 when they filed the current Application.

15. The decision whether or not to extend the time for appealing is discretionary. In exercising the said discretion, the court ought to take into account the length of the delay; the reasons for the delay; the chances of the Appeal succeeding if the Application is granted and the degree of prejudice to the Respondent if the Application is granted.

16. As I have stated above, Applicants were notified of the Award of the Appeals Committee in November, 2010, the same month that the Appeals Committee made its decision. Indeed, the record shows that the 1<sup>st</sup> Applicant was present in court when the Award was adopted by the Senior Resident Magistrate in Machakos SRM Case No. 63 of 2005 on 18<sup>th</sup> January, 2011. The delay of two (2) years in filing the current Application is inordinate, and the same can only be mitigated if indeed good reasons exist.

17. The Applicants' advocate has deponed that although he was instructed to file an Appeal, he did not do so because the *"firm's Senior Clerk left the firm in disarray"* and *"the Resident Judge, Justice Kihara Kariuki left station..."*

18. The reasons by the Applicants' advocate for not filing an Appeal or the current Application within a reasonable period are not plausible. Indeed, the issue of a Judge leaving a station can never prevent a litigant from filing any pleading in the registry. In any event, the Applicants should have made a follow-up within the shortest time possible to ascertain if indeed their advocate had filed an Appeal. Considering that a suit always belongs to the litigant, he cannot sit back for more than two (2) years and then claim that his advocate had not effected his instructions. That is an unacceptable practice.

19. In any event, the Respondent has stated that he has since acted on the decision of the Appeals Committee by transferring the suit land to third parties. The Applicants did not adduce evidence to show that this averment is not true. If that is the case, the Respondent will be prejudiced if the decision of the Appeals Committee is re-opened after two (2) years. As has always been held, every litigation has to come to an end.

20. I have perused the Applicants' draft Memorandum of Appeal and have not come across any serious point of law. Indeed, the Applicants seem to be appealing against the decision of the Magistrate who only adopted the Award of the Appeals Committee. The Appeal by the Applicants on purely matters of law should be as against the decision of the Appeals Committee and not the Magistrate who adopted it. Suffice to say that having been notified of the hearing before the Appeals Committee, which hearing the Appellants did not attend, the chances of the Applicants succeeding in the Appeal are very minimal.

21. Consequently, and for the reasons I have given above, I find that the Application dated 27<sup>th</sup> March, 2013 is unmeritorious. The Application is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**