



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISCELLANEOUS APPLICATION NO. 107 OF 2017

YUSUF MUHUMED ABDI.....APPELLANT/APPLICANT

VERSUS

ADAN ABDULLAHI KADIYE.....RESPONDENT

RULING

The application for determination is the Applicant's Notice of Motion dated the 24th May, 2017 brought pursuant to Order 51 rule 1 of the Civil Procedure Rules, Section 3A, 79G and 95 of the Civil Procedure Act and all the other enabling provisions of the law.

The Appellant/Applicant seeks the following orders:

1. That the proposed Appellant be granted leave to appeal out of time against the whole of the said Ruling of the Secretary, County Land Management Board, Kajiado delivered on 25th June, 2015.
2. That the costs of the application be provided for.

The application is based on the following grounds which in summary is that the proposed Applicant is dissatisfied with and wishes to appeal against the Ruling of the Secretary, County Land Management Board. The time prescribed in law for appealing against the said Judgement expired. The proposed Applicant has an arguable and serious appeal with overwhelming prospects of success. Subsequent to the said Ruling, the Applicant immediately filed an application for Judicial Review vide Nairobi High Court Judicial Review Case No. 4 of 2016 (formerly Nairobi High Court Judicial Review No. 314 of 2015) challenging the jurisdiction of the said Board hence the delay in filing his appeal. The Applicant's judicial review application was dismissed. Applicant stands to suffer irreparable loss if orders sought are not granted and no prejudice will befall Respondent if the application is allowed.

The application is supported by the affidavit of YUSUF MUHUMED ABDI who is the proposed Appellant herein where he deposes that following a complaint lodged by the Respondent, the Secretary of the County Land Management Board in Kajiado delivered its Ruling on 25th June, 2015 in favour of the Respondent. He avers that he was dissatisfied with the said Ruling and filed a Judicial Review Application challenging the jurisdiction of the said Board to hear and determine disputes between private citizens, that is between himself and the Respondent, and that was the reason he did not first lodge an appeal against the Board's decision. He confirms that the time for lodging an appeal against the decision of the County Land Management Board lapsed thus necessitating the making of the instant application. He contends that the delay occasioned herein is highly regrettable and is not so inordinate as to be

inexcusable. He insists no prejudice will be suffered by the Respondent if the orders sought are granted as he has an arguable appeal and unless the orders sought are granted, he will suffer irreparable damage.

On 13th December, 2017 the Applicant's Counsel proceeded unopposed as the application was served upon the Respondent vide substituted service in the Daily Nation Newspaper on 2nd November, 2017 but he did not enter appearance nor file a response to oppose it.

Analysis and Determination

The only issue for determination at this juncture is whether the intended Appellant should be granted leave to lodge an appeal out of time.

Section 95 of the Civil Procedure Act provides as follows: **'Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'**

Order 50 Rule 6 of the Civil Procedure Rules stipulates that: **'Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'**

The Applicant admits that he first lodged the Judicial Review instead of an appeal. I note the Judicial Review was dismissed. Further, I find that litigation must come to an end and since the Applicant already lost in the JR proceedings before the High Court, they cannot purport to seek leave to appeal against the same decision that they sought to be quashed in the JR. I find that the window is closed as the applicant cannot have both. Since there are allegations of fraud, I find that this matter is best determined by a trial court where the issues of ownership and determination of the suit land can be canvassed on merit instead of at the appellate stage. Further, the delay in failing to file the appeal is not properly articulated. I note that the Judicial Review application was dismissed on 31st January, 2017 while the application seeking leave to enlarge time to appeal out of time was lodged on 4th July, 2017 which is almost six months thereafter. There seems to have been laxity on the part of the Applicant and the delay was inordinate and inexcusable. It is my humble view that the application seeking leave to appeal out of time is a mere afterthought.

I further note that the decision sought to be appealed against had been canvassed in the Judicial Review proceedings. The issues raised in the annexed Memorandum of Appeal are best heard and determined in a substantive suit.

In the circumstances, I find that the Applicant's application is not merited and I dismiss it with no order as to costs.

Dated signed and delivered in open court at Kajiado this 22nd day of January, 2018.

CHRISTINE OCHIENG

JUDGE