



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO.67 OF 2010

SIMON MULAVAI LENGETA.....APPELLANT

VERSUS

MUNYALO MAKAU.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Snr. Resident

Magistrate's Court at Kitui in Civil Case No. 318 of 2005

delivered on 21st October, 2009 by Hon. T.M. Mwangi,

Resident Magistrate)

JUDGMENT

1. The Appellant in this matter was the Defendant in the lower court. The Appellant is challenging the Judgment of the lower court on the following grounds: that the learned Magistrate erred when he conducted the trial when he had no jurisdiction to do so; that the Magistrate erred when he failed to give him an opportunity to be heard and that the Magistrate erred when he held that the Respondent was the absolute proprietor of the suit land.
2. The Respondent filed a Notice of Preliminary Objection in which he averred that the Appeal should be struck out for having been filed out of time.
3. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the suit land was within an Adjudication Section as at the time of trial and that the court having admitted the Appeal, the Preliminary Objection should be dismissed.
4. The Appellant's counsel submitted that the suit land being in an Adjudication Section, the court did not have jurisdiction to handle the dispute pursuant to the provision of Section 30 of the Land Adjudication Act and that the consent the Respondent had from the Land Adjudication Office was limited to an injunction.
5. The Appellant's advocate submitted that the Defence was not notified of the date of 17th June, 2009; that the Defendant was condemned unheard and that there was mistrial.
6. In his submissions, the Respondent's advocate submitted that the Appeal was filed out of time; that there is no certificate of delay that was issued to the Appellant or leave granted by the court and that execution of the Judgment of the lower court had already been carried out.
7. The Respondent's counsel submitted that in any event, the Appellant did not adduce any evidence to prove his Counter-claim and that the lower court had jurisdiction to hear the Appeal. The Respondent's counsel submitted that the Land Adjudication Officer produced the adjudication record which confirmed that the Respondent was the owner of the land and that the court was right to declare the Respondent the bona fide owner of the suit land.
8. Before delving into the merits of the Appeal, I will determine the Preliminary Objection raised by the Respondent. It is not in dispute that the impugned Judgment of the lower court was delivered on 21st October, 2009. In the said Judgment, the court declared the Respondent (*Plaintiff*) the absolute proprietor of Land parcel number 398 Miambani Adjudication Section.
9. After the delivery of the Judgment on 21st October, 2009, it was not until 19th May, 2010 that the Appellant filed the Memorandum of Appeal challenging the decision of the court. The Memorandum of Appeal was filed after six (6) months from the date of the Judgment. The Appeal was admitted by the court on 8th October, 2010.

10. Section 79G of the Civil Procedure Act provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. The Appellant in this matter did not file an Application for leave to have his Appeal admitted out of time. Although the Appellant’s advocate submitted that the court having admitted the Appeal, it had validated the filing of the Appeal, he did not show to this court any law which stipulates that.

12. The admission of an Appeal by the court is only meant to give the court an opportunity to be satisfied that the documents stipulated under Order 42 Rule 13(4) of the Civil Procedure Rules are on record. The court need not interrogate whether the Appeal was filed within time or not at that particular point, although it can still do so and summarily dismiss the Appeal under the provisions of Section 79B of the Act.

13. Having not obtained the leave of the court to file the Appeal out of time, the Appeal before the court was filed contra-statute and cannot stand. For those reasons, the Preliminary Objection by the Respondent is allowed and the Appeal is struck out with costs to the Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE