REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC MISC APPLICATION NO. 54 OF 2016

MARGARET WANGECHI KAHOYA..................................APPLICANT

VERSUS

WINFRED ESTHER WANGARI MUTUGI....................RESPONDENT

RULING

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".*** Emphasis added

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules on the other hand is worded in the following terms:

> ***6 (1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside".***
>
> ***(2) "No order for stay of execution shall be made under Sub-rule (1) unless –***
>
> ***(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"*** Emphasis added

Citing the above two provisions, the applicant filed this application on 8th December 2016 seeking the following orders:

> ***1. Spent.***
>
> ***2. That the applicant be given leave to appeal out of time against the Land Disputes Tribunal No. 9 of 2007 Baricho and the subsequent decree in BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES TRIBUNAL CASE No. 8 of 2007.***
>
> ***3. That stay of execution be given against the decree in BARICHO RESIDENT MAGISTRATE'S COURT LAND DISPUTES TRIBUNAL CASE No. 8 of 2007 dated 30th July 2008 pending the hearing and determination of this appeal.***
>
> ***4. That status quo be granted that no sub-division and transfer of L.R MWERUA/KAGIO/20141 be carried out until the hearing and determination of the appeal herein.***
>
> ***5. That costs be in the appeal.***

The application is based on the grounds set out therein and is also supported by the affidavit of **MARGARET WANGECHI KAHOY**A the applicant herein.

The gravamen of the application is that land parcel No. MWERUA/KAGIO/2041 was registered in the applicant's names but the respondent had filed a case at the **NDIA DIVISION LAND DISPUTES TRIBUNAL** (the Tribunal) which made an award that was subsequently confirmed by the Resident Magistrate's Court at Baricho in Case No. 8 of 2007.

Aggrieved by that award and the subsequent decree dated 30th July 2008, the applicant filed an appeal at the Central Provincial Land Disputes Appeals Tribunal being Appeal No. 50 of 2008 on 31st July 2008. However, the appeal could not proceed to hearing because the ***Land Disputes Tribunal Act*** was repealed hence this application.

In opposing this application, the respondent **WINFRED ESTHER WANGARI MUTUGI** filed a replying affidavit in which she described it as frivolous, vexatious and grossly incompetent and an abuse of due process as there is no appeal pending before this Court. Further, that the Land Disputes Tribunal Act having been repealed way back in 2011, no explanation has been given for the delay in filing this application in December 2016 some five (5) years down the line. In any case, there is no provision for filing an appeal to this Court from the decision of the Tribunal. Lastly, that the grant of leave is not as of right but is a discretionary power.

In a further supporting affidavit, the applicant deponed that the Tribunal had no jurisdiction to deal with matters concerning registered land and therefore both the award of the Tribunal and the decree issued by the Resident Magistrate's Court at Baricho were a nullity. That the appeal at the Provincial Appeals Committee was filed in time but was over-taken by the repeal of the ***Land Disputes Tribunal Act*** by ***Section 31 of the Environment and Land Court Act of 2011*** and being a lay-person, the applicant thought her appeal was still pending in Nyeri until she saw surveyors demarcating the land pursuant to the decree issued by the Court at Baricho.

The application was canvassed by way of written submissions which have been filed by the firm of **V.E MUGUKU** Advocate for the applicant and **MAINA KAGIO** Advocate for the respondent.

I have considered the application, the rival affidavits and submissions by counsel.

It is not in contention that the dispute between the parties herein involved registered land being L.R No. MWERUA/KAGIO/2041 registered in the names of the applicant. The respondent's claim to a portion of the suit land was based on the pleading that the applicant held it in trust for her. The Tribunal found in her favour and ordered that the land be divided into two equal portions and a decree followed. A Tribunal

established under ***Section 4 of the repealed Land Disputes Tribunal Act*** had no jurisdiction to determine disputes relating to registered land or even make findings based on trust – ***JOTHAM AMUNAVI VS CHAIRMAN SABATIA LAND DISPUTES TRUBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU***). See also the case of ***JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEAL COMMITTEE & OTHERS C.A CIVIL APPEAL No. 82 of 2006 (ELDORET*)** where the Court of Appeal stated as follows citing ***Section 3 (1) of the repealed Land Disputes Tribunal Act:***

> "***Evidently, the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a trust in favour of a party which in essence was the basis of the 3rd respondent's claim".***

It is clear therefore that the Tribunal had no jurisdiction to determine the dispute involving the parties with respect to the land parcel No. MWERUA/KAGIO/2041 and that the subsequent decree ordering the sub-divisions of that land as issued by the Resident Magistrate's Court at Baricho were a nullity. Therefore, an appeal properly lay to the Provincial Appeals Committee in Nyeri and subsequently to the High Court as was the law under

Section 8 (1) and 8 (9) of the repealed Land Disputes Tribunal Act. The applicant did indeed file appeal Case No. 50 of 2008 on 31st July 2008 at the Central Provincial Land Disputes Appeals Committee in Nyeri but appears not to have pursued it. The Appeals Committee was of course later disbanded following the repeal at the ***Land Disputes Tribunal Act*** in 2011 with the coming into force of the ***Environment and Land Court Act No. 19 of 2011.***

It is in view of the above that counsel for the respondent **MR. KAGIO** has submitted that no appeal from the decision of the Tribunal can be preferred directly to this Court. That submission could only be correct for as long as the ***Land Disputes Tribunal Act*** was still in force because ***Sections 8 (1) and (8) (9)*** thereof provided as follows:

> ***8 (1) "Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land in the subject matter of the dispute is situated"***
>
> **8** (***9) "Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of;***
>
> ***Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved".***

MR. KAGIO cannot however be correct when he submits that no appeal lies to this Court in this matter. This is because the applicant's Appeal Case No. 50 of 2008 was still pending at the Provincial Appeals Committee at Nyeri when the ***Land Disputes Tribunal Act*** was repealed in 2011. That appeal ought to have been transferred to this Court for determination. Indeed practice directions were issued to that effect. In the case of ***FRANCIS KIMANI KIRIMIRA VS CHEGE MACHARIA C.A CIVIL APPEAL No. 20 of 2015 (NYERI) (2015 e K.L.R),*** the Court of Appeal held that a decree of the Magistrate's Court following an award of the Tribunal established under ***Section 3 of the repealed Land Disputes Tribunal Act*** would lie to this Court since the Appeals Committee was no longer in existence. The Court of Appeal in the case of ***FRANCIS KIMANI KIRIMARA*** (supra) expressed itself as follows:

> ***"We are of the considered view that where, as in this case, an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the Court to be followed by the usual process of decree and execution and appeal where the parties so desire. Such appeal would be to the High Court by dint of Clause 13 of the practice directions, the Provincial Appeals Committees also having met their quietus with the repeal of the Act".***

Of course the reference to '***High Court'*** in the above decision could only have meant reference to the ***Environment and Land Court*** following its establishment in 2011. It is my finding therefore that following the repeal of the ***Land Disputes Tribunal Act***, any appeals from the decree of the Magistrate's Court confirming any award by the Tribunal could be filed to this Court and at the same time, any undetermined appeals pending at the Provincial Appeals Committees could be transferred to this Court for its determination.

The next issue for my determination is whether I can admit the applicant's appeal out of time, order a stay of execution of the decree issued on 30th July 2008 by the Baricho Resident Magistrate's Court in Case No. 8 of 2007 and also order maintenance of status quo on the land in dispute.

It is clear from the record herein that the applicant filed an appeal at the Appeals Committee in Nyeri in good time. Indeed she filed the appeal within 30 days as required by law. However, having filed that appeal, the applicant went to sleep and did not pursue it. She only woke up in December 2016 when she noticed that the land in dispute was being demarcated following the award of the Tribunal. Having filed the appeal in July 2008, she went into a slumber for eight (8) years before filing this application. She attributes this lack of action on her part on ignorance.In paragraph seven (7) of her further affidavit, she has deponed as follows:

> ***"That I am a layman with no knowledge of operations of the law and expected my appeal at the Provincial Appeals Tribunal in Nyeri was still pending in Court until December 2016 when I noticed the respondent with his surveyor demarcating the land for sub-division as ordered by Baricho Land Disputes Tribunal No. 9/2007 as ratified by Baricho RM Court No. 8/2007 dated 30th July 2008 which I advised (sic) by lawyers that they were null and void with no legal effect and should not be implemented"***

While the applicant may truly have been ignorant, it is a legal principle that ignorance of the law is no defence and while a Court may be sympathetic, it must apply the law to situations before it. In the case of ***NICHOLAS KIPTOO arap KURIA SALAT VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS 2014 e K.L.R***, the Supreme Court laid down the following principles that should guide a Court in exercising its discretion in extending time within which to file an appeal:

> ***1. Extension of time is not a right of a party. It is an equitable remedy only available to a deserving party at the discretion of the Court.***
>
> ***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.***
>
> ***3. Whether the Court should exercise the discretion to extend time is a consideration to be made in a case to case basis.***
>
> ***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.***
>
> ***5. Whether there will be any prejudice suffered by the respondent if the extension is granted.***
>
> ***6. Whether the application has been brought without undue delay; and***
>
> ***7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.***

Guided by the above principles, I do not find this to be a proper case to extend time. The delay herein is inordinate and the explanation for it is not reasonable nor satisfactory. Besides, the respondent who has a decree in her favour dating back to 2008 will be highly prejudiced. Bearing in mind also that the remedy of extension of time is an equitable remedy that is only available to a deserving party and at the discretion

of the Court, I am not persuaded that this is a proper case in which to exercise my discretion in favour of the applicant as no "***good and sufficient cause***" has been shown to the satisfaction of the Court. I must therefore dismiss the prayer for leave to appeal out of time.

Having dismissed the prayer for leave to appeal out of time, there is no appeal upon which to consider an application for stay of execution pending appeal or order for status quo. Nonetheless, the applicant would have had to show what substantial loss she would suffer if stay is not granted, such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given and finally, the application must be made without unreasonable delay. Substantial loss is the cornerstone of an application for stay pending an appeal. In ***KENYA SHELL LIMITED VS KIBIRU 1986 K.L.R 410 PLATT Ag. J.A*** (as he then was) said:

> ***"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone for both jurisdiction for granting stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money***".

I have perused the applicant's two affidavits in support of this application and there is no evidence of what substantial loss she will suffer if stay is not granted. Indeed apart from the reference to "***irreparable damage and prejudice***" in her further supporting affidavit filed on 7th February 2017, there is no mention of what loss she will suffer nor any evidence that such loss will be substantial. It is not even enough simply to claim that one will suffer substantial loss. The applicant must go further and demonstrate how such loss will be substantial to enable the Court exercise its discretion in her favour. The applicant herein has failed that test.

Secondly, the decree herein was issued way back in 2008 and the law is that such an application has to be "***made without un-reasonable delay"***. Even if this Court were to assume, for purposes of argument, that the appeal filed at the Provincial Appeals Committee in Nyeri in 2008 was properly before me, this application for stay would have been defeated by laches.

The up-shot of the above is that the Notice of Motion dated 8th December 2016 is devoid of merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Njiru for Maina Kagio for Respondent present

Applicant present in person.

B.N. OLAO

JUDGE

16TH JUNE, 2017