



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

MISC. APPLICATION NO. 45 OF 2015

NJERU M'CHANGARA.....APPLICANT

VERSUS

BEATRICE NDUKU MUTUA.....RESPONDENT

RULING

This is in respect to the applicant's Notice of Motion dated 10th November 2015 in which he seeks the following substantive orders:-

- 1. That this Honourable Court be pleased to grant leave to the applicant to file appeal out of time.***
- 2. That the costs of this application be provided for.***

The application is based on the grounds set out therein and based on the applicant's supporting affidavit.

Basically, the applicant's case is that he was not satisfied with the decision of the Land Adjudication officer delivered on 13th May 2011 and wishes to file an appeal against the same. His argument is that he was not informed when the decision was being delivered and only came to learn about it in August 2015 when the respondent showed intention of selling the land. Annexed to his supporting affidavit is a copy of the objection proceedings before the Land Adjudication officer dated 13th May 2011 in Objection Case No. 779 in relation to plot No. 793.

I have considered the application. This being an application for leave to appeal out of time, the Court has the discretion to grant such leave. However, that remedy is not a right but is an equitable remedy which is only available to a deserving party. In exercising such discretion, the Court will consider the following:-

- 1. The nature of the delay.***
- 2. The reasons for the delay.***
- 3. Whether any prejudice will be caused to the other party.***
- 4. Whether public interest militate for or against such extension etc.***

See **SALAT VS I.E.B.C and 7 OTHERS 2014 e K.L.R** and also **BAGAJO VS CHRISTIAN**

CHILDREN FUND INC (2004) 2 K.L.R 273.

The applicant herein says that he was not aware when the decision the subject of the appeal was being delivered and only came to know about it in August 2015. That cannot be correct because attached to his own application are the proceedings before the Land Adjudication officer dated 13th May 2011 (annexture **NM 1**) which show that he was present during the hearing and even cross-examined the objector who was represented by his wife **BEATRICE NDUKU MUTUA**. Indeed at the end of the hearing, the applicant addressed the Land Adjudication officer in the following terms in response to a question put to him:-

“I have no problem with this woman. I can stay with her”

The proceedings are even signed by the applicant who thumb-printed the same. The Land Adjudication officer then made the following decision:-

“I allow this objection partly and P/NO 773 to be sub-divided into two equal parts and each party to get half of the shares. Right of appeal to the Minister within sixty (60) days from to-day is explained to them. Objector issued with a new number 2489”

L.A.O

13.5.2011”

It is clear therefore that the decision sought to be appealed from was delivered in the presence of the applicant on 13th May 2011 and the right of appeal explained to him. He cannot now claim that he only came to learn about the decision in August 2015. This remedy is a discretionary remedy which will not be granted to one who has come to Court with dirty hands. The applicant has clearly not come to Court with clean hands and has infact deliberately tried to mislead the Court. He is not deserving of that equitable remedy.

Secondly, it has taken the applicant four (4) years to move the Court. That is clearly undue delay which he has not even attempted to explain. Leave to appeal out of time is not granted as a matter of course.

In the circumstances therefore, the applicant’s Notice of Motion dated 10th November 2015 is wholly un-meritorious. It is accordingly dismissed.

B.N. OLAO

JUDGE

12TH MAY, 2016

Ruling dated, delivered and signed this 12th day of May, 2016 in open Court

Mr. Macharia for Mr. Kagio for the Applicant present.

B.N. OLAO

JUDGE

12TH MAY, 2016