



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

MISC. CIVIL APPLICATION NO. 10 OF 2014

NAOMI WANJIKU NDERITU APPLICANT

VERSUS

SIMON MWANGI NJURE RESPONDENT

RULING

1. Naomi Wanjiku Nderitu, hereinafter referred to as the applicant, filed the notice of motion dated 22nd July, 2014 seeking the following orders:-

- 1. Certification of the application as urgent and as such fit for hearing *ex parte* in the first instance;**
- 2. An order of stay of proceedings in Nanyuki Land Case No. 5 of 2012 and or stay of execution of any orders and decree consequential thereto pending the hearing and determination of the application**
- 3. Enlargement of the time within which the applicant ought to have filed an appeal against the award of the Central Division Laikipia East District Land Disputes Tribunal Case Number 38 of 2011 dated 16th February 2012 and admit the appeal out of time.**
- 4. Such further orders as the court may deem fit and expedient to meet the ends of justice;**
- 5. Costs of the application to be in cause.**

2. The application is premised on the grounds that the delay in filing the appeal was not deliberate; the application has been brought without inordinate delay; the appeal has overwhelming chances of success and that the respondent will not suffer any prejudice if the application is allowed.

3. The application is supported by the affidavit of the applicant sworn on 22nd July, 2014 in which the grounds on the face of the application are reiterated. Besides reiterating the grounds on the face of the application, the applicant contends that she was not invited for reading of the award. The applicant alleges that she got to know of the award during the hearing of the respondent's application dated 26th November, 2013 (application for dismissal of her suit to wit, Nanyuki CMCC No.102 of 2013). The applicant accuses the Chairman of the Land Disputes Tribunal for having failed to file the award before court for purpose of being read to the parties.

4. It is pointed out that the applicant has filed an application before the lower court seeking adoption of the award as the judgment of the court.
5. Maintaining that the Tribunal had no jurisdiction to order the cancellation of the title he holds over the suit property, the applicant is apprehensive that if the award is adopted, he risks losing his land.
6. In reply and opposition to the application, the respondent filed the replying affidavit he swore on **12th September, 2014** and the notice of preliminary objection dated **10th September 2014**.
7. Through those pleadings, the respondent contends that this court lacks jurisdiction to hear and determine the application; that the application is fatally defective for violating the provisions of **Order 42** of the Civil Procedure Rules. It is further contended that the application offends **Sections 7 and 8** of the Land Disputes Tribunal Act, No.18 of 1990.
8. The applicant is said to be guilty of laches and to have deliberately suppressed material facts from the court.
9. It is further contended that the registration of the applicant as the proprietor of the suit property was procured fraudulently hence null and void.
10. On his part, the respondent argues that the applicant was aware of the award but deliberately failed or ignored to file an appeal within the time prescribed by law. It is contended that failure by the applicant to appeal or apply for judicial review within the time prescribed by law for challenging the award, renders the current application incompetent, bad in law, a non starter and incurably defective.
11. It is pointed out that the applicant filed a case against the respondent in Nanyuki law courts to wit, Nanyuki CMCCC NO. 103 of 2013, which was dismissed and contended that the current application is meant to deny the respondent the fruits of her judgment.
12. Maintaining that the intended appeal is time barred, the respondent urges the court to disregard the allegations that the Tribunal improperly conducted itself.
13. Contrary to the contention by the applicant that the court has jurisdiction to enlarge time for filing an appeal against the award of the Land Disputes Tribunal, it is contended that the court lacks jurisdiction to do so.
14. Arguing that the applicant will suffer prejudice if the application is allowed (the suit property may be transferred to a third party), the respondent submits that the applicant slept on her rights hence undeserving of an equitable remedy.
15. When the matter came up for hearing, counsels reiterated the cases for the respective parties.
16. Counsel for the applicant, **Mr. Thuku**, urged the court not to shut its eyes on the fact that the Tribunal had no jurisdiction to order cancellation of the title held by the applicant. He cited the following cases in support of the applicant's case:

1. **Meru High Court Civil Application No. 86 of 2010; Ibrahim M' Ikiugu V. Joseph Wambugu Chege & Another** where it was held:-

“...The right of appeal granted under the Land Disputes Tribunals Act cannot be exercised in isolation and applied without reference to the Civil Procedure Act and Rules....I am of the view that by failing to allow this application (application for leave to file appeal out of time), the purposes of the Constitution shall not be protected and promoted.”

2. **Meru High Court Misc. Application No.162 of 2009; M' Arachi M'Mutungi v. Chief Magistrates Court** where it was held:

“There is no power to grant leave sought by M’Arachi. The Constitution of Kenya, however, and in particular Section 65(2) gives the High Court supervisory powers over sub-ordinate courts. By virtue of that supervisory power, this court is well able to grant the leave sought by M’ Arachi.”

3. Esther Wanjiku Kibugu v. Julius Nderitu Macharia Nyeri Misc. Application No. 152 of 2008 where **Kasango J**, granted the applicant leave to file appeal out of time on the ground that there was no evidence that she was notified of the date of the decision.

4. Peterson Nguchi Kaburi v. Joseph Thuku Kaburi; Nyeri Court of Appeal Civil Appeal No.18 of 2015 where the Court of Appeal held that it cannot be right for a court to shut its eyes to glaring illegalities and that the court is duty bound to prevent illegalities; that it would be a dereliction of duty for it to adopt a patent nullity as a judgment of itself. The court further observed that it is a public policy that courts should not aid the perpetration of illegalities.

17. Counsel for the applicant pointed out that the award has not been adopted.

18. Counsel for the respondent, **Mr. Abwour**, maintained that this court lacks jurisdiction to hear and determine the current application on the grounds that it offends **Section 7 and 8** of the Land Disputes Tribunal Act, 1990. According to Mr. Abwour, once the award was filed in court, the duty of the lower court was merely to adopt it.

19. As for the legality or otherwise of the award, he submitted that the time to challenge the award has lapsed.

20. With regard to the authorities cited in support of the application, he submitted that the authorities are distinguishable on the ground that the issues raised are different from the issue raised in the instant application.

22. Maintaining that the orders sought have been overtaken by events, he urged the court to dismiss the application.

23. In a rejoinder, Mr. Thuku submitted that the award does not show that the applicant was present when it was read.

24. On delay in bringing the application, he submitted that it has been accounted for.

Analysis and determination

25. I have considered the rival arguments by counsels for the parties. I have also read and considered the authorities cited by counsel for the applicant. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought.

26. In determining this issue, I will be guided by the decision in the case of Chege Macharia v. Francis Kimani Kirimira, Nyeri Civil Appeal No. 20 of 2015 where the Court of Appeal held:

““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 parties so desire. Such appeals would be to the High Court by dint of clause 13 of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.”

27. Since the award hereto is yet to be adopted as the judgment of the Court, from the above cited decision, adoption of the award will not prevent the applicant from appealing against the judgment or

decree.

28. The upshot of the foregoing is that the application is premised on a misapprehension of the law and to that extent lacking in merit. That being my view of the application, I dismiss it with costs to the respondent.

Dated, signed and delivered at Nyeri this 14th day of October, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

N/A for the applicant

N/A for the respondents

Court assistant - Lydia