



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC MISC. APP. NO. 9 OF 2014**

**SOMOE FAKII.....APPLICANT**

**=VERSUS=**

**SHIDA KARISA GONA.....RESPONDENT**

**R U L I N G**

**Introduction:**

1. The Application before me is the one dated 22<sup>nd</sup> April 2014 seeking for the following orders:

**(a) That the learned members of the Land Disputes Tribunal and the magistrate who adopted their decision erred in law and fact by failing to note that they had no jurisdiction to hear and or determine the case filed by the respondent given that the issue arose at Kilifi which is within the jurisdiction of a different Land Disputes Tribunal and any award made thereafter by the said Tribunal was therefore void ab initio and a nullity in law.**

**(b) That the learned magistrate who adopted the order of the tribunal erred in law and fact in doing so because the new Environment and Land Act repealed the Land Disputes Tribunal Act No. 18 of 1990 and any orders made after that date by the court were a nullity.**

**The Applicant's case:**

2. According to the grounds in support of the Application, the Applicant is a widow and wife of the late Said Sharrif Famau who was the owner of plot number MBU43 Mabirikani.
3. It is the Applicant's case that the Respondent grabbed the said parcel of land and the matter ended up in the Land Disputes Tribunal case number 8 of 2011 which after adoption became land case Number 22 of 2011 which was decided in favour of the Respondent.
4. The Applicant has averred that he was unable to file her appeal owing to the changes in the law after the repeal of the the Land Disputes Tribunal Act; that the award by the Tribunal was entertained by a court without jurisdiction and that owing to his indigence and illiteracy, he was unable to file the appeal in good time.

**The Respondent's case:**

5. In his Replying Affidavit, the Respondent deponed that the Applicant has not given sufficient

- reasons to explain the delay in filing an appeal within the prescribed time and that the issue of which court the Applicant should have filed his appeal after the decision of the Tribunal does not arise because he was informed by the magistrate vide a letter dated 19<sup>th</sup> January 2012.
6. On the issue of jurisdiction of the Tribunal, the Respondent has deponed that he had filed the dispute at the Kilifi Land Disputes Tribunal before the same was transferred to Malindi Land Disputes Tribunal upon his complain of bias; that pursuant to the Practice Directions, all matters that were pending before the Land Disputes Tribunals after the repeal of the Land Disputes Tribunal Act were to continue in the said court and that the magistrate had jurisdiction to enter judgment in accordance with the decision of the Tribunal.
  7. The Respondent deponed that he sold the land after he realised that the Applicant does not intend to appeal; that the new owner has commenced construction of a house on the land and that when the construction commenced, the Applicant did not object.

#### **Submissions:**

8. The Applicant's advocate submitted that the draft Memorandum of Appeal has raised the issue as to whether the Tribunal that dealt with the dispute had jurisdiction; that the delay in filing an appeal was occasioned by the confusion that arose after the repeal of the Land Disputes Tribunal Act and that the fact that the Applicant is illiterate compounded the situation.
9. On the other hand, the Respondent's advocate submitted that the delay of 2 ½ years is inordinate and no sufficient reasons have been given for the said delay; that the Applicant did not file an appeal even after being advised by the Magistrate to do so vide a letter dated 19<sup>th</sup> January 2012 and that the Respondent has explained why he filed the dispute in Malindi and not Kilifi.
10. Counsel finally submitted that the Respondent will be prejudiced if the Application is allowed because a third party is now in possession of the suit property.

#### **Analysis and findings:**

11. The Application before me is for an order to file an appeal out of time. The main reason given by the Applicant as to why he did not file his appeal within time is that there was confusion as to which court the appeal was to be filed after the repeal of the Land Disputes Tribunal Act.
12. It is the Applicant's case that by the time the Magistrate was adopting the Tribunal's decision, the Land Disputes Tribunal Act had been repealed.
13. In his letter dated 19<sup>th</sup> January 2012, the Magistrate who adopted the award by the Tribunal appreciated the confusion that had arisen, after the repeal of the Land Disputes Tribunal Act. He advised the Applicant to file an appeal because the court had become *factus officio*.
14. I agree with the Magistrate's appreciation of the confusion that arose on what should have happened after the Land Disputes Act was repealed by the Environment and Land Court Act with effect from 30<sup>th</sup> August 2011. Could the Magistrate adopt the award of the Tribunal after the repeal of the law that donated the powers to the subordinate court to adopt such an award? That in my view, is a substantial question of law that this court should address on appeal.
15. Although the Chief Justice subsequently issued Practice Directions to the effect that all appeals from the Tribunal should be filed in this court, the court was not operational until November 2012 when the Judges in the said Court were appointed and sworn in. Indeed, most people were not aware exactly when the court became fully operational.
16. It is therefore understandable that most parties delayed in filing appeals from the decisions of the Tribunal in this court due to the said confusion.
17. The question as to whether the Tribunal that dealt with the dispute had jurisdiction or not is a weighty legal issue that needs to be determined on appeal.
18. Although the Respondent has stated that the dispute was procedurally moved from Kilifi to Malindi, this court can only address that issue once the appeal has been lodged.
19. In the circumstances, I find that the Applicant has given plausible reasons as to why he did not file his appeal within the prescribed time. The interests of justice require that the Applicant should be granted leave to file his appeal out of time.
20. For those reasons, I allow the Application dated 22<sup>nd</sup> April 2014 with no orders as to costs.

Dated and delivered in Malindi this **13<sup>th</sup>** day of **February**, 2015.

**O. A. Angote**

**Judge**