



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: NAMBUYE, MUSINGA & GATEMBU, J.J.A.)**

**CIVIL APPEAL NO. 131 OF 2018**

**BETWEEN**

**ANDREW KIPTANUI SANG as administrator of the estate of**

**THEOPHILUS KIPSANG LELEI.....APPELLANT**

**AND**

**MUGEIYOT FARM DIRECTORS**

**1. JACOB KIBITOK BIRECH**

**2. DANIEL KIMARU MARITIM**

**3. BENJAMIN KIPROP ARAP KOECH**

**4. KIPKASIO ARAP KETER.....RESPONDENTS**

*(Being an appeal against the Ruling of the Environment and Land Court*

*at Kitale (Obaga, J.) delivered on 20<sup>th</sup> January, 2017*

*in*

***ELC. Misc. C. Application No. 8 of 2014)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal arises from a ruling of the Environment and Land Court (ELC) (*E. Obaga, J.*) given on 20<sup>th</sup> January 2017 which allowed the respondents' application (dated 27<sup>th</sup> January 2014) for extension of time within which to appeal a decision of the Rift Valley Provincial Land Disputes Committee.

2. Counsel for both parties dispensed with appearance during the hearing of the appeal and relied entirely on their respective written submissions. For the appellant, represented by the firm of Kiarie & Company Advocates, it was urged that the Judge erred in granting extension of time as the respondents had no right of appeal; that with the repeal of the Land Disputes Tribunal Act which provided for appeals to the High Court under Section 8(9) thereof, the right of appeal was lost; that under Section 30 of the Environment and Land Court Act, it was only a matter that was pending in court by the time of the repeal of the Land Disputes Tribunal Act that could thereafter be heard and determined and no fresh action or appeal could be entertained.

3. It was submitted that in this case, the judgment of the Appeals Committee was read on 3<sup>rd</sup> August 2010; that any party aggrieved by that decision was given 60 days within which to appeal to the High Court, hence, the last day for filing an appeal would have been 2<sup>nd</sup> October 2010; that Environment and Land Court Act which repealed the Land Disputes Tribunal Act became operational on 30<sup>th</sup> August 2011 and by that date, there was no pending application before the High Court seeking extension of time; that under the transitional provision in Section 30 of Environment and Land Court Act, it is only proceedings that were pending before any court or tribunal that could be continued with

pending the establishment of the ELC; that as at 30<sup>th</sup> August 2011, there was also nothing pending before the appeals committee as its decision of 3<sup>rd</sup> August 2010 had not been appealed against by 2<sup>nd</sup> October 2010 when the 60 day window for appealing expired.

4. It was submitted that the fact that the decision of the appeals committee of 3<sup>rd</sup> August 2010 was not read and adopted as a judgment of the court until 9<sup>th</sup> December 2010 was of no consequence as there was no provision in the Land Disputes Tribunal Act for the adoption of the decision of the appeals committee by the subordinate court; that the decision of the appeals committee was supposed to be read by that committee and an appeal to the High Court by any aggrieved party was to be lodged within 60 days.

5. It was submitted further that the respondents filed an appeal before the High Court at Kitale, being HCCC No. 42 of 2010 by a memorandum of appeal dated 14<sup>th</sup> December 2010 challenging the order of the subordinate court of 9<sup>th</sup> December 2010 adopting the decision of the appeals committee but the respondents withdrew that appeal when a preliminary objection was raised that that appeal was out of time; that subsequently, on 27<sup>th</sup> January 2014, the respondents filed the application (on the basis of which the impugned ruling was made) for extension of time within which to appeal the decision of the appeals committee of 3<sup>rd</sup> August 2010.

6. It was submitted that the Judge erred in holding that the repeal of the Land Disputes Tribunal Act did not take away the respondents' right of appeal; that a court cannot have jurisdiction to extend time to appeal where a right of appeal does not exist and the Judge erred in extending time to file an appeal against the decision of the appeals committee of 3<sup>rd</sup> August 2010 as the respondents did not by then have a right of appeal.

7. Opposing the appeal, the respondents, through the firm of Chebii Cherop & Co Advocates submitted that under Section 3A of the Civil Procedure Act on the basis of which their application of 27<sup>th</sup> January 2014 was based, the court is empowered to make orders as may be necessary for the ends of justice to be met.

8. It was submitted that by the time the Land Disputes Tribunal Act was repealed, the Provincial Appeals Committee had finalized its work *"and the issue transferred to the High Court for appeal purposes"*; that the Provincial Appeals Committee advised the parties to wait to be notified by the Kitale Magistrates' court regarding the date for reading and adoption of Committee's decision; that the outcome of the decision of the Committee of 3<sup>rd</sup> August 2010 was not known until 9<sup>th</sup> December 2010 when it was read in open court and any aggrieved party given 60 days to appeal to the High Court; that although there was no provision in the Land Disputes Tribunal Act for adoption of the committee's decision, the parties were nonetheless advised by that committee to await the reading and adoption of the decision by the court.

9. It was submitted further that the present appeal is incompetent because the notice of appeal and the letter bespeaking proceedings were served out of time and because the appellant also failed to include in its record of appeal the submissions and authorities on which the respondents relied in the lower court.

10. We have considered the appeal and the rival submissions. The only issue for consideration is whether the learned Judge erred in allowing the respondents' application for extension of time. In granting the extension of time, the learned Judge was exercising judicial discretion. The circumstances in which we can interfere with such exercise of discretion are limited as enunciated in *Mbogo vs. Shah [1968] E.A. 93* where the Court stated that:

***".....A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."***

11. With that in mind, did the Judge err in extending time within which the respondents could challenge the decision of the appeals committee? The thrust of the appellant's argument is that learned Judge erred in allowing an extension of time because the respondents did not have a right of appeal from the decision of the Committee.

12. The Land Disputes Tribunals Act, repealed by the Environment and Land Court Act, Act No.19 of 2011 which commenced on 30<sup>th</sup> August 2011, provided the statutory framework for the Land Disputes Tribunal, its jurisdiction, appeals to the Appeals Committee, and appeals to the High Court. Under Section 8 of the Land Disputes Tribunals Act, a party aggrieved by the decision of the Tribunal was at liberty to appeal to the Appeals Committee constituted for the Province.

13. Section 8(8) of Land Disputes Tribunals Act provided that the decision of the Appeals Committee, *"shall be final on any issue of fact and no appeal shall lie therefrom to any court."* But under Section 8(9), the decision of the Appeals Committee was appealable to the High Court *"on point of law within sixty days from the date of the decision complained of"* with the proviso that *"no appeal shall be admitted for hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved."*

14. There can be no doubt therefore that the right of appeal to the High Court on points of law was expressly conferred by statute and the contention by the appellants that the respondent had no right of appeal is not correct.

15. The argument by the appellant that the repeal of the Land Disputes Tribunals Act upon commencement of Environment and Land Court Act, Act No.19 of 2011 on 30<sup>th</sup> August 2011 took away the respondents' right of appeal from the decision of the Appeals Committee was adequately, and correctly, addressed by the learned Judge as follows:

***"Mr. Kiarie in his submissions argued that Parliament had taken away the right of appeal from the applicants following the repeal of the Land Disputes Tribunals Act No. 18 of 1990. It is true there were no proceedings pending before the Appeal***

***Committee as at the time the Act was repealed. The transitional provisions under Section 30 of the Environment and Land Court Act provided for the manner in which pending cases were to be heard. The repeal of the Act did not however take away the applicants right to appeal. The applicants were past the committee stage. There remedy lay in the High Court and if they have shown that there was reason why they did not file their appeal in time, they should be afforded the opportunity. It cannot be argued that the repeal of the Act removed their right of appeal.”***

We are unable to fault the reasoning and conclusion reached by the learned Judge in that regard.

16. In allowing the respondents’ application for extension of time and granting them leave to file their appeal within 21 days from the date of filing, it has not been demonstrated that the learned Judge took into consideration matters that he should not have, or that he failed to consider matters that he ought to have considered, or that the decision is plainly wrong. We do not have any basis for interfering with the decision of the Judge.

17. The result is that the appeal fails and is hereby dismissed with costs to the respondents.

***Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.***

**R. NAMBUYE**

.....

**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**