



**Eastern Produce Kenya Limited v Chief Land Registrar & another;
County Government of Nandi (Interested Party) (Environment and Land
Appeal 2 of 2023) [2023] KEELC 19191 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 2 OF 2023**

MN MWANYALE, J

JULY 31, 2023

(FORMERLY ELD ELC E008 OF 2023)

BETWEEN

EASTERN PRODUCE KENYA LIMITED APPLICANT

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

KIMASAS FARMERS CO-OPERATIVE SOCIETY 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF NANDI INTERESTED PARTY

RULING

1. This Ruling relates to the Notice of Motion dated 28th April 2023 filed by the Eastern Produce Kenya Limited herein after referred to as the “Applicant.”
2. The application seeks the following orders
 - i. Spent
 - ii. Spent
 - iii. That the Appeal filed herein be deemed as being duly filed pursuant to Section 16 (A)(1) of the *Environment and Land Court Act*.
 - iv. That alternatively, the Honourable Court be pleased to admit the appeal filed herein out of time, in respect of the Gazette Notice dated 1st March 2019, and the National Lands Commissions determination dated 7th February 2019 in respect of NLC/HLI/225/2018.



- v. That, pending the hearing and determination of the appeal, there be a stay of execution of the Gazette Notice dated 1st March 2019 and the National Land Commission determination dated 7th February 2019, under NLC/HLI/225/2018 in respect of the revocation of LR 9285/3.
 - vi. Costs of the application be costs in the cause.
3. The grounds in support of the application are interalia that; -
- i. The National Land Commission had ordered the cancellation LR No 9285/3; the Applicant had filed Judicial Review proceedings under Nairobi ELC JR No 5/2020 Republic v National Land Commission, Chief Land Registrar and others Exparte Eastern Produce Kenya, (herein after referred to as Nairobi ELC No 51 OF 2020), where the Court delivered its judgement on 20th April 2023 demising the Judicial Review proceedings
 - ii. During the pendency of the Nairobi ELC JR 5/2020 there was a stay order staying the implementation of the Gazette Notice and the National Land Commission determination. It was not possible to prosecute the JR proceedings as well as an Appeal at the same time as this would have deemed to be an abuse of the Court process. The Applicant after the dismissal of the JR proceedings had now lodged an Appeal against the National Land Commission determination.
 - iii. In view of the dismissal of the JR proceedings, there was imminent risk that the 1st Respondent, the Chief Land Registrar, would cancel the Applicants title LR No 9285/3 resulting in a breach of the Applicants right to property under Article 40 (1) of *Constitution*.
 - iv. The Appeal raises various arguable issues of law and fact, as it would be an appeal on merits of the National Land Commission determination since the Nairobi JR 5/2020, proceedings were not founded on the merits of the National Land Commission determination.
 - v. The Applicant was the registered proprietor of LR No 9285/3 and its investment on LR No 9285/3 would be jeopardized unless the stay of execution orders were granted.
 - vi. That unless orders of stay of execution were granted, the appeal would be rendered nugatory.
4. The application was further supported by the annexed supporting affidavit of Mr Dennis Gitaka, the Legal Manager who annexed interalia the following annexures thereto, the Nairobi ELC JR 15/2020 application, a copy of the Gazette Notice dated 1st March 2019, copies of parliamentary proceedings of 28th March 2018, annulling the National Land Commission (investigation of historical injustices) Regulations 2017, letter from National Land Commission dated 5th June 2018 to the Applicant, letter dated 21st February 2018, National Land Commission determination in respect of NLC/HLI/255/2018, copy of gazette Notice dated 1st March 2019, judgment Nairobi ELC JR No 5/2020.
5. In opposition to the application the 1st Respondent represented by the Attorney General Chambers filed grounds of opposition dated 13/5/2023 while the 2nd Respondent filed a Replying Affidavit deponed by Daniel Biwott on 15th May 2023; and were represented by Mac Law Advocates LLP.
6. The Interested Party, County Government of Nandi represented by Mr Tororei, filed a Replying Affidavit deponed by Dr Francis Sang on 16th May 2023.
7. The Applicant filed a further affidavit deponed by Mr Denis Gitaka on 23rd May 2023.



8. The Court directed parties to file written submission on the application and allowed the parties to highlight their submissions.
9. Before highlighting of the submissions, the National Land Commission vide an application dated 26th May 2023 for joinder, sought to be joined in the proceedings as an Interested Party.
10. The application for joinder was heard first and ruling reserved for 31st July 2023, but vide ruling dated 12th June 2023, the Court vacated the ruling date of 31/7/2023 and directed that the ruling in respect of the application dated 26/5/2023 would abide by the outcome of this ruling in respect of the application dated 28/4/2023.
11. I have considered the application, taken into consideration, the affidavit in support and in opposition to the application, the rival submissions and the authorities in support of each of the party's position with regards to the application.
12. The Court frames the following as issues for determination: -
 - a. Whether or not Section 16(A)(1) of the *Environment and Land Court Act* grants the Applicant a Right of Appeal against the decision of the National Land Commissions?
 - b. Whether or not time for lodging an appeal should be extended?
 - c. Whether or not a stay of execution of Gazette Notice dated 1/3/2019 and the National Land Commission determination dated 7/9/2019 in respect of NLC/HLI/255/2018 should be granted pending determination of the appeal?

Analysis and Determination: -

13. Before dealing with the issue for determination as framed above, a few non contested issues were settled which the Courts needs to note before reverting the framed issue.
14. It is common ground that the National Land Commission determination sought to be appealed from by the Applicant was delivered on 1/3/2019, and the Applicant took out Judicial Review proceedings in Nairobi ELC JR No 5/2020.
15. It is commons ground that upon filing of Nairobi ELC JR No 5/2020 a stay of implementation of the National Land Commission determination was issued but the said stay order lapsed on 20/4/2023 upon delivery of the Judgment in Nairobi JR No 5/2020.
16. It is also common ground that the Memorandum of Appeal sought to be deemed as properly filed related to the said National Land Commission determination dated 1/3/2019 and is dated 28th April 2023.
17. The Applicant further confirmed that there is a Notice of Appeal lodged in the Court of Appeal against the judgment in Nairobi JR No 5/2020.
18. The above are the uncontested facts that arose from the application and the replies and submissions of the parties.
19. The Application subject of this ruling is expressed to be brought under the provisions of Section 1A, 1B, 3A and 799 of the *Civil Procedure Act*. Order 42 Rule 6, Order 50 Rule 1 of the *Civil Procedure Rules* (2020) Sections 13 (1) (4) and 16 A (1) and (2) of the *Environment and Land Court Act*, Article 50 and 159 (2) (d) of the *Constitution*.



20. On issue number 1 of the issues, the Applicant at paragraph 9.0 of its submission submits that it is not necessary to seek leave before filing of an Appeal under Section 79 (a) of the *Civil Procedure Act* and Section 16 A (1) and (2) of the *Environment and Land Court Act*, hence Appeal could be filed, as it was, and thereafter seek to have an appeal admitted out of the statutory period of time.
21. Section 79(g) upon which this application is founded on provides as follows: -
- “Time for filing appeals from Subordinate Courts. Every appeal from a Subordinate Court to the High Court shall be filed within thirty days from the date of the decree of 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 satisfied the Court that he had good and sufficient cause for not filing the appeal in time.”
22. Section 16 A (1) and (2) of the *Environment and Land Court Act* similarly provides *pari materiae*, as follows;
- “ 16 A: Appeals from Subordinate
1. All Appeals from Subordinate Courts and local Tribunal shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13 (2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or Tribunal may certify as having been requisite for the preparation and delivery to the Appellant on copy of the decree or order.
 2. An appeal may be admitted out of time if the Appellant satisfied the Court that he had a good and sufficient cause for not filing the appeal in time.”
23. From the above provisions it follows thus there is a right of appeal exercisable from decrees and orders of Subordinate Courts or Local Tribunals to be exercised within 30 days, and an appeal therefrom can be admitted on satisfaction to the Court of good and sufficient cause.
24. Aware of this principles of the law, during the highlighting of the submissions the Court posed the question to the parties as to whether the National Land Commission whose determination is being appealed from is a subordinate Court or a Local Tribunal?
25. In answer to this question Dr Ojiambo Learned Counsel for the Applicant answered that the National Land Commission was a Subordinate Court and hence the Applicant could exercise the right of appeal under Section 16A (1) and (2) while Mr Tororei learned Counsel for the interested Party, Mr Motari for the 1st Respondent as well as Mrs. Nderitu for the 2nd Respondent all responded that the National Land Commission was a Tribunal. It was Mr Tororei’s further submission that a right of Appeal existed against the decisions of National Land Commission made under Section 15 of the *National Land Commissions Act* under Regulation 29 of the schedules on the *National Land Commissions (Investigation of Historical Injustices) Regulations*, 2017.



26. With tremendous respect to Dr Ojiambo Learned Counsel, the National Land Commission is this not a Subordinate Court, as the Subordinate Courts are defined under Article 169 of the Constitution, and the National Land Commission is not one of them.
27. With regard to the issue as to whether the National Land Commission is a Tribunal, with utmost respect to Messrs. Tororei, Motari and Mrs. Nderitu, the National Land Commissions is equally not a Tribunal. As the Tribunals envisaged under Section 16A were defined under the Practice Direction on Proceedings relating to the Environment, the use and occupation and title to land and proceedings in others Courts Trite Gazette Notice No 5178/2014 paragraph 13 thereof.
The Tribunal identified therein are interalia, Business Premises Rent Tribunal, Rent Restriction Tribunal and National Environment Tribunal.
28. The above findings find resonance in the decision in *Owinyo & 3 others* (Appealing for and behalf of the communities of Alego and Yimbo v National Land Commission. ELC Misc Case No E019/2022 at Siaya (unreported).
29. Thus , the National Land Commission is a Constitutional body exercising Constitutional and Statutorily duties under the National Land Commission Act.
30. It follows therefor that a Committee of the National Land Commission such as the one set up under Section 15 of the National Land Commission Act is neither a Subordinate Court nor a tribunal but a quasi judicial body.
31. Thus the right of Appeal under Section 79 (a) of the Civil Procedure Act and 16A (1) and (2) of the Environment and Land Court Act would not be available against a decision of the Committee of National Land Commissions as the said right of Appeal applies to Subordinates Courts and Tribunals. Thus in answer to issue number I find that there is no right of appeal under Section 16 A (1) available against the decision of a committee of National and Land Commission.
32. The principles of good and sufficient cause for extension of time for an appeal filed out of time provided under Section 79(a) of the Civil Procedure Act and 16A (1) and (2) of the Environment and Land Court Act would equally not be available to the Applicant and are not applicable in the present application.
33. Having held that, I find that the Applicant had a Right of Appeal under Regulation 29 of the Historical Land Injustices Regulations 2017.
34. Regulation 29, grant a right of Appeal to be exercised within 28 days of publication of the decision/ determination.
35. In our present application, the National Land Commission determination was dated 1/3/2019 and the Memorandum of Appeal was dated on 28/4/2023, 4 years later, and the Court thus has to determine an extension of time. The Applicants vide paragraph 9 of their submissions submit that it is not necessary to seek leave to file an appeal out time.
36. However, as has been held the provisions of Section 79 (a) of the Civil Procedure Act and Section 16 A (2) is not applicable, it follows that extension of time has to be granted nonetheless, for an Appeal to be deemed to be proper.
37. The principles for the exercise of the judicial discretion in extension of time were set out in the Court of Appeal decision in *Leo Silla Mutiso v Rose Hellen Wangari Mwangi* Nai Civil Application No 255/1997; Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, equally empower Courts to extended time.



38. In the Leo silla Mutiso case, the Court of Appeal stated as follows; -

“it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the Court takes into account in deciding whether to grant an extension of time are; - first, the length of the delay, secondly, the reason for the delay, thirdly, the chances (possibly) of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

39. The above principle shall guide the Court in determining the application. The principles of good and sufficient cause as submitted by Dr Ojiambo Senior Counsel having their foundation on Section 79 (a) of the *Civil Procedure Act* and Section 16A (1) of the *Environment and Land Court Act*, have been found not to be applicable in the present application.

40. On length of the delay, it is common ground that the Application herein has been filed 4 years after the decision.

41. In the submissions before Court the Applicant submit placing reliance on the Court of Appeal decision. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR, that the “law does not set out any minimum or maximum period of delay.” All it states is that “any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour, there has to be a valid and clear reasons upon which discretion can be favorably exercised.”

42. The Appellant further submitted that the Appeal was filed immediately upon the delivery of Judgment in Nairobi ELC JR 5/2020 thus there was no delay.

43. In response Mr Motari for the 1st Respondent submits that the Appeal was filed 4 years after the decision and places reliance in the decision in *Alma Farm Limited v National Land Commission and 2 others* (2021) eKLR.

44. Mrs. Nderitu for the 2nd Respondent argues the Court to find 4 years delay inordinate and has cited the decision in the case of *Moses Mureithi Nyaga v Juliet Wanjaa ireri* (2018) eKLR, where the Court found 1-year delay not inexcusable.

45. On behalf of the Interested Party Mr Totorei submits that 4-year delay is inordinate.

46. On the reasons for the delay, the Applicant submits that the delay was caused by the fact that it had pursued Judicial Review proceedings through Nairobi ELC JR No 5/2020.

47. In response the 1st Respondent and Interested Party submit that the reason advanced for the delay is not satisfactory.

The Applicants were aware of their right of Appeal which was time bound and chose not to exercise it.

48. The Courts finds that the 4-year delay is an inordinate delay but would have allowed the extension of time, if the reasons for the delay herein that the Applicant pursued Judicial Review proceedings were satisfactory.

49. I find the reasons unsatisfactory because the Applicant was aware of the time bound nature of an appeal but consciously chose to pursue Judicial Review proceedings and not an appeal against the merits of a determination.



50. Accordingly, the reason advanced being unsatisfactory and taking into consideration the length of the delay, the Court declines to extend time to file an Appeal.
51. The upshot is that there is no appeal before Court and hence the issue of stay of execution shall not be considered. The Court had earlier alluded to a ruling in respect of an application by the National Land Commission for joinder, and having declined to extend time for the Appeal and there being no Appeal, the application dated 26/5/2023 is deemed to have been overtaken by events and the Court shall not pronounce itself on that application.
52. For the reasons advanced in this Ruling, the application dated 28/4/2023 is hereby dismissed with costs to the Respondents.

DELIVERED AND DATED AT KAPSABET THIS 31ST DAY OF JULY, 2023.

HON. M. N. MWANYALE

JUDGE.

In the presence of; -

1. Mrs. B. K. Opiyo for the Applicant
2. Mr Tororei for Interested Party
3. Mrs. Nderitu for 2nd Respondent
4. Mrs. Kwame holding brief for Mr Motari for 1st Respondent.

