



**Mwihandi & another (Legal representative of Estate of Baingentu (alias) Jose Mwihandi) v Murianki (Environment & Land Miscellaneous Case E007 of 2023) [2023] KEELC 19035 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E007 OF 2023**

**CK YANO, J**

**JULY 26, 2023**

**BETWEEN**

**KARANI JOSE ..... 1<sup>ST</sup> APPLICANT**

**KELLEN KAARI NJUE ..... 2<sup>ND</sup> APPLICANT**

**LEGAL REPRESENTATIVE OF ESTATE OF BAINGENTU (ALIAS) JOSES  
MWIHANDI**

**AND**

**MBAE MURIANKI ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion application dated March 17, 2023 brought pursuant to section 1A, (1), (2), (3), 3A, 79G and 63(e) of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The applicants seek for orders;
  1. Spent
  2. Spent
  3. That the Honourable court be pleased to issue a temporary order of stay of execution and/or further implementation of the decision of Eastern province Committee Land Dispute Tribunal Appeals Committee, Appeal No. 28 of 2009 which was adopted as judgment of the court in Chuka SPMC LDT No. 34 of 2008 pending the hearing and determination of this application and thereafter pending the hearing and determination of the intended appeal.
  4. Spent



5. That the Honourable court be pleased to issue an order of inhibition against Land Parcel No. Mwimbi/s. Mugumango/519 pending the hearing and determination of this application and thereafter pending the hearing of the intended appeal.
  6. That the Honourable court be pleased to grant the applicants herein leave to file appeal out of time from the decision of Eastern Province Land Dispute Appeal Committee Appeal No. 28 of 2009 which was adopted as judgment of court on 18<sup>th</sup> August 2010 in Chuka SPMC LDT No. 34 of 2008.
  7. That the costs of this application be in the cause.
2. The application is premised on the grounds set out therein. Briefly, it is stated that one Mwiandi Baingentu Alias Joses Mwiandi Baingentu - deceased- who was the appellant in Eastern Province Land Dispute Appeals Committee Appeal No. 28 of 2010 died on September 1, 2014 and the respondent herein who was the respondent in the said appeal, has commenced implementation and/or execution of the said decision in the said appeal which was adopted as judgment of the court on August 18, 2010 in Chuka SPMC LDT No. 34 of 2008 while fully aware that the appellant is deceased. That the appellant in said Eastern Province Land Dispute Appeals Committee had filed Meru High Court Civil Appeal No. 13 OF 2010 challenging the decision of the said Eastern Province Land Dispute Appeals Committee but the same was dismissed for want of prosecution on July 13, 2015 when he was already dead. Further that the applicants herein were not aware of the existence of the said appeals until after they filed Chuka CMCC Succession Cause No. 127 of 2018 and commenced the distribution of the deceased's land parcel No. Mwimbi/s. Mugumango/519 which they later learnt was a subject matter in the said Eastern Province Land Dispute Appeals Committee when the respondent herein started executing and or commenced implementation of the said appeal. That the applicants, their siblings and the whole family of the late Mwiandi Baingentu (deceased) were born, brought up live and eke out their living from the said land and that if the respondent proceeds with execution and or further implementation of the said decision which was adopted as a judgment of the court in Chuka SPMC LDT No. 34 of 2008, it will lead to the alienation of the said land and subsequent eviction of the applicants and their siblings which will also lead to great loss to the estate of the deceased.
3. Kellen Kaari Njue, one of the applicants explains in the supporting affidavit sworn on March 17, 2023 and a further affidavit sworn on April 13, 2023 *inter alia* that they filed Chuka CMCC Succession cause No. 127 of 2018 which was finalized on July 21, 2021 and a certificate of confirmed grant issued. That pursuant to the said certificate of grant, they successfully applied for registration of LR 19 to the register for land parcel No. Mwimbi/s. Mugumango/519, obtained a certificate of search and subsequently applied for consent of the Chuka Land Control Board, but when they went to obtain the consent, they were surprised that the copy of the search certificate was missing and they could not therefore be given the consent. That upon making inquiries from the chairman of Chuka Land Control Board why the copy of search which was attached to the application for consent was missing, they were advised to consult the Land Registrar's Office at Chuka where they proceeded and were informed that there was a court decree from Chuka SPMC Ldt No. 34 of 2008 which was already registered on the register of the suit land to reverse the registration of the deceased as owner of the said land. The applicants have exhibited copies of the Grant of Administration, Death certificate, certificate of confirmed Grant, application for registration and copy of the register as well as certificate of search.
4. The deponent deposes that they were able to apply to Chuka Principal Magistrate court and obtained the decree in the said case and has annexed copies of the proceedings, decision, decree and orders in Chuka SPMC Ldt No. 34 of 2008, Mwimbi Land Dispute Tribunal Case No. 11 of 2006, Eastern Province Land Dispute Appeals Committee appeal No. 28 of 2009 and letter forwarding the



- proceedings, findings and ruling. That upon obtaining the said documents, the applicants realized that in the proceedings of Mwimbi Land Dispute Tribunal case No. 11 of 2006 which was referring to Chuka Civil case no. 60 of 2006 and which they obtained the plaint and defence also annexed together with an application and order in the said case.
5. The applicants aver that whereas the deceased had sued the respondent and 3 others seeking orders of eviction from the suit land, and applied for Chuka PMCC No. 60 of 2006 to be referred for hearing by Mwimbi Division Land Dispute Tribunal, they were surprised that instead it is the respondent herein who became the plaintiff while the deceased became the defendant. That in the proceedings of Mwimbi Ldt No. 11 of 2006 the respondent filed claim on behalf of his late father Murianki Murugu who was already deceased against the applicant's late father (now deceased). That they also learnt of Meru High Civil appeal No. 134 of 2010 copies of the pleadings which have also been annexed.
  6. The applicants aver that they were not aware of all these cases until October 30, 2022 and that even after the demise of their father on September 1, 2014, the respondent never brought the existence of the said cases to their attention and also never took any action by applying for substitution. The applicants further aver that on 31<sup>st</sup> January, 2023 they instructed their advocates on record to file an application in Chuka SPMC Ldt No. 34 of 2008 seeking for the applicants to be enjoined in the said case as legal representatives which was granted and the order has been annexed. That they also learnt that their late father filed Meru HCCA No. 134 OF 2010 which was filed out of time and without leave and which was dismissed on July 13, 2015, almost one year after the death of the applicant's late father, hence the filing of this application. It is the applicants' contention that the respondent will not suffer prejudice if the application herein is allowed.
  7. The application is opposed through a replying affidavit sworn by the respondent on March 28, 2023 and another sworn by Ileri Charles Mugo advocate for the respondent on March 24, 2023. It is the respondent's contention *inter alia* that the prayers sought by the applicants in the application herein are not available courtesy of operation of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed). Relying on advise, the respondent avers that the said Act did not provide for extension of time and consequently taking into account that the primary suit in this matter was predicated on the said Act, this court cannot extend time to the applicants to appeal out of time. The respondent admits that the decision in the Province Appeal Committee Appeal No. 28 of 2009 was decided in his favour on August 18, 2010 and a decree therefrom was extracted in Chuka SPMC Ldt case No. 34 of 2008, a copy of which has been annexed.
  8. The respondent further states that the matter was heard and determined by the tribunal and the appeals Committee where the parties subjected themselves to their jurisdictions and being dissatisfied with the award of the appeals committee, the deceased filed Meru Appeal No. 134 of 2010 albeit out of time whereupon the said appeal was dismissed for want of prosecution, adding that even then, the suit had abated upon the expiry of one year after the death of the applicant's deceased father. The respondent avers that he had no obligation to inform the applicants about the existence of the cases since they had not been issued with grant of letters of administration. The respondent argues that the application is bad in law, incompetent and has been brought after inordinate delay.
  9. The application was canvassed by way of written submissions which were duly filed by the parties through their respective advocates on record and which I have read and need not reproduce herein.

### **Analysis And Determination**

10. I have considered the application, the response and rival submissions made by the parties. The issues for my determination in my opinion are;



- i. Whether this court has jurisdiction to grant the prayers sought.
  - ii. Whether the orders sought in the application should issue as prayed,
  - iii. Who should pay the costs of this application?
11. In the application herein, the applicants are seeking leave to file appeal out of time from the decision of the Eastern Province Land Dispute Appeals Committee Appeal No. 28 of 2009 which was adopted as judgment of the court on August 18, 2010 in Chuka SPMC LDT No. 34 of 2008 as well as orders of stay of execution and or implementation of the said decision and an order of inhibition against the suit property pending the hearing and determination of this application and the intended appeal. It is not in dispute that the proceedings herein emanate from a decision made pursuant to the provisions of the *Land Disputes Tribunal Act* No. 18 of 1990 (now repealed).
12. Section 8 of the *Land Disputes Tribunal Act* (repealed) provided as follows-;
- 8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may within thirty days of the decision, appeal to the appeals committee constituted for the province in which the land which is the subject matter of the dispute is situated.
  - (2) ....
  - (3) .....
  - (4) ....
  - (5) ....
  - (6) ....
  - (7) .....
  - (8) The decision of the appeal committee shall be final on any issue of fact and no appeal shall lie therefrom to any court
  - (9) Either party to the appeal may appeal from the decisions of the appeals committee to the High Court on a point of law within sixty days from the date of the decision complained of; provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court certified that an issue of law (other than customary law) is involved. A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”
13. The provisions of Section 8 of the *Land Disputes Tribunal Act* (repealed) is that the decision of the appeal committee was final in regard to issues of facts and no party was allowed to appeal to court. On questions of law, the dissatisfied party was to appeal to the High Court within 60 days from the date of the judgment of the appeals committee.
14. In this case, it is admitted by the applicants that there was an appeal filed, albeit out of time, and which was subsequently dismissed for lack of prosecution.
15. In the case of *Albert Chinge Wabule Vs Festo Maniuli Njiule* [2005] eKLR, it was held that-;
- “...this court has no jurisdiction or discretion to extend time to appeal under section 8 (1) of the Land Disputes Tribunal Act. The legislature had in its mind the view that Land Disputes should be heard and determined expeditiously without involving courts.”



16. Further, in the case of *John Mungai Tama Vs Angelica Muthoni Tama* [2005] eKLR, it was held that-;
- “The Land Disputes Tribunal Act and its rules make no provisions for extension of time by a Land Disputes Tribunal or a Provincial Land Disputes Appeal Committee or by a court of law or anybody else to appeal...”
17. It is trite law that jurisdiction is donated by the constitution or statute and as such a court cannot exercise its discretionary powers to donate jurisdiction where it does not exist and where it has not been donated by the constitution or statute. Jurisdiction as succinctly stated in the classic case of *Owners of Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Limited* ( 1989) KLR 1 is everything. Nyarangi JA held;
- “...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction”.
18. This position has been eruditely restated with finality by the Supreme Court of Kenya in the case of *Samuel Kamau & another Versus Kenya Commercial Bank and 2 others* Sup Ct Civil Application No. 2 of 2011. The court opined as follows-;
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submission that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.”
19. To that end the court cannot allow the appeal out of time and therefore the other orders the applicants are seeking cannot be issued in a vacuum. Therefore on whether the applicants have made up a case for being granted the orders sought, having found that the court cannot extend time to file an appeal out of time, it means that the other orders sought will also not be granted. Moreover, the application herein has been brought after inordinate delay and after a previous appeal had been dismissed, albeit for lack of prosecution.
20. The upshot of this is that the notice of motion dated March 17, 2023 is devoid of merits and the same is dismissed with costs.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 26<sup>TH</sup> DAY OF JULY, 2023**

**C. K. YANO**

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**JUDGE**

In the presence of

Court Assistant – Martha

Nyamu Nyaga for Applicant



I.C. Mugo for Respondent

